UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S REPLY IN SUPPORT OF COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

Complainant properly supported its motion for partial accelerated decision as to liability with electronic tracking system ("ETS") data and admissions by Respondent Great Lakes Dredge and Dock Co. ("GLDD"). In its Response, GLDD failed to provide any evidence that raises a genuine dispute as to whether the 36 violations of the Marine Protection, Research, and Sanctuaries Act ("MPRSA") occurred. In fact, GLDD largely concedes that the violations occurred. Instead of providing evidence, GLDD argues that it is not liable for the violations because it used subcontractors to tow the scows, and that the violations are allegedly inconsistent with the Complaint and improperly based on violations of GLDD's contract with the Corps.

GLDD's first argument fails because under the strict liability scheme of MPRSA both parties who perform the work and parties with responsibility for or control over performance of the work are liable. As discussed below, there is no genuine dispute that, in addition to performing much of the work, GLDD had extensive control over and responsibility for the ocean disposal operations and thus is strictly liable for the MPRSA violations. GLDD's second argument fails because the conduct and violations at issue are consistent with the Complaint, and, as the Tribunal already decided, it is the fact that the conduct violates § 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19)—not that the conduct was, simultaneously, a breach of the contract—that are the bases for the violations. Therefore, the Tribunal should grant the motion.

I. The Tribunal Should Grant The Motion Because It Is Properly Supported, And GLDD Fails To Provide Substantial Evidence Of A Disputed Factual Issue.

As discussed in the motion, a party opposing a properly supported motion for accelerated decision as to liability must provide "substantial and probative" evidence of a disputed factual issue to obtain an evidentiary hearing. Mot. at 19 (quoting *In re Taotao USA Inc.*, No. CAA-HQ-2015-8065, at *3 (2017)). Contrary to GLDD's argument, there is no automatic right to depose witnesses or have a full evidentiary hearing under the applicable Rules of Practice. Generally, there is no formal discovery (depositions or interrogatories) in administrative practice.

Complainant properly supported its motion with a wealth of electronic tracking system ("ETS") data, admissions by GLDD from the Parties' prehearing exchanges, and other evidence, including a declaration. The ETS data and admissions provide strong evidence of 36 violations for unauthorized mis-dumps, unauthorized transiting the Particularly Sensitive Sea Area ("PSSA"), unauthorized open hull doors, unauthorized excessive leakage, and failure to timely report violations. In stark contrast, GLDD presents no evidence—let alone the requisite substantial or probative evidence—that these violations and unauthorized conduct did not occur. In fact, as discussed in detail below, GLDD largely concedes that these violations occurred. Because Complainant properly supported the motion with unrebutted ETS data and admissions by GLDD—not eyewitness testimony or observations as GLDD contends—depositions and an evidentiary hearing on liability are not necessary or justifiable.

Instead of providing any substantial and probative evidence on a disputed factual issue, GLDD makes two primary arguments in its response: (1) that GLDD is not liable for the violations because it subcontracted with tug companies to do some of the work on the project (towing scows that GLDD loaded with material dredged by GLDD), and (2) that the violations proven in the motion are allegedly improperly based on violations of GLDD's contract with the

Corps and inconsistent with the Complaint. For reasons discussed below, these arguments are meritless, and the limited evidence presented by GLDD, while it *may* be relevant to the amount of the civil penalty, is not relevant to whether GLDD is liable for a violation.

A. GLDD is liable for the 36 violations because MPRSA is a strict liability statute, and there is no genuine dispute that GLDD performed much of the work and had extensive control over and responsibility for the project.

As noted above (and detailed below in Part I.C), GLDD largely concedes that the unauthorized mis-dumps, unauthorized transiting the PSSA, unauthorized open hull doors, unauthorized excessive leakage, and failure to timely report violations occurred. GLDD argues that the Tribunal cannot hold GLDD liable for these violations because it used subcontractors (tug companies) to perform some of the work (towing scows that GLDD loaded with material dredged by GLDD).

This argument is contrary to basic and fundamental principles of federal environmental law, and the decisions of several federal courts and the Environmental Appeals Board ("EAB") (in a case against GLDD[1]), which hold that strict liability statutes like MPRSA impose liability both on the party who performed the work and on the party with responsibility for or control over performance of the work. Because, based on evidence discussed below, there is no genuine dispute of material fact that GLDD performed much of the work, GLDD had extensive responsibility for and control over performance of the Phase 3 Project, and GLDD knew about the violations at issue via ETS data and other evidence, GLDD is strictly liable for these violations (regardless of whether the tug operators could also be held liable).

As an initial matter, GLDD concedes that MPRSA, like the Clean Water Act ("CWA") and other federal environmental laws, is a strict liability statute that "does not require proof of

[1] *See Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 200-03 (1992).

intent or fault" or negligence or vicarious liability. GLDD's Resp. at 8. As this Tribunal recognized in its order denying GLDD's motion to dismiss, MPRSA "expansively authorizes EPA to sanction literally 'any person,' defined as including any entity, private or public . . . for violation of 'any provision' of the Act, its regulations, or a permit issued under it." Order at 20 (citing 33 U.S.C. § 1415(a)).

Several federal courts, and the EAB (in a case against GLDD), have held that federal environmental laws such as the CWA and MPRSA with strict liability schemes "impose liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work."[2] *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D.W.V. 1996); *United States v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056, 1063 (S.D. Miss. 1997) ("The ability to control the [operation], coupled with knowledge of the violation, is also sufficient to impose liability under" such statutes). As such, the "towed vessel" and other cases cited in Part II.C. of GLDD's response are not applicable because those cases all involve negligence or breaches of duties of care under mostly state law and not strict liability under MPRSA and similar federal environmental laws.

For example, in *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*, 216 F. Supp. 3d 1198, 1223-24 (W.D. Wash. 2015), the court, in granting a motion for partial summary judgment on liability, found that there was no genuine issue of material fact that a cruise terminal operator—who, like GLDD, claimed that it "did not directly cause" some of the alleged unpermitted discharges from polluting ships—had sufficient control over and responsibility for the ship terminal and knowledge of the unauthorized discharges to be held

[2] Like § 1415(a) of MPRSA quoted above, § 1311(a) of the CWA imposes strict liability on "any person" that discharges "any pollutant" into a water of the United States without the requisite permit. 33 U.S.C. § 1311(a).

liable under the CWA. The court based its finding on evidence that the cruise terminal company managed and coordinated polluting vessel activities, it was responsible for vessel scheduling and invoicing, its contract with the port required it to ensure that third parties complied with environmental laws, it had the ability to monitor and issue stop work orders on vessel activities, and it knew about the different kinds of polluting vessel activities. *Id*. at 1224.

Likewise, in *Lambert*, the court, in granting a motion for partial summary judgment on liability, found that the fact that an independent contractor hired by a defendant caused the actual discharges of fill material into a river was "no defense to liability" for the defendant and that the defendant was strictly liable for the unauthorized discharges under the CWA. 915 F. Supp. at 802. The court based its decision on evidence that the defendant was responsible for performance of the work, the defendant paid for the materials and equipment used by the independent contractor, and the independent contractor could not accomplish the work without the defendant's approval. *See id*.

Consistent with these cases, and directly contrary to GLDD's arguments, the EAB has upheld a decision imposing strictly liability under MPRSA on GLDD for mis-dumps by tug companies. In *Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170 (1992), the EAB affirmed a decision of this Tribunal finding GLDD liable for multiple instances of unauthorized "off-center dumping" of scow loads even though the scows were towed by tug companies. 4 E.A.D. at 200–03. The EAB also found that GLDD was responsible for stopping tugs from dumping scows carrying unpermitted sediments. *Id*. at 197-98. Contrary to GLDD's suggestion, most published

MPRSA cases have, like in *Great Lakes*, been brought against dredging companies like GLDD that are responsible for the projects and not the subcontractors such as tug companies.[3]

Imposing strict liability on the dredging company with responsibility for or control over the federal project "is consistent with the Congressional interest in preventing the destruction of natural resources which may be difficult or impossible to restore, and of eliminating pollution from the nation's waters." *United States v. Bd. of Trustees of Fla. Keys Cmty. Coll.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981); *see also* 33 U.S.C. § 1401 (Congress intended MPRSA to "prevent or strictly limit" the transport and dumping of materials into the ocean).[4]

In the present case, GLDD, as the contractor for the Corps, performed much of the work on the Phase 3 Miami Harbor Deepening Project. Specifically, GLDD owned the scows and the dredging equipment. Larkin Decl. ¶¶ 1, 5 ("Great Lakes' scows"); Respondent GLDD's Prehearing Exchange Exhibit ("RX") 81(C) ¶ 5 (GLDD's Project Manager stating "GLDD fleet at the project site consists of a spider barge and seven scows"). GLDD loaded the scows with dredged material and admits that it used a loading procedure with "greater leakage potential." Pomfret Decl. ¶ 7. GLDD also decided how and when loaded scows were towed/shipped to the ODMDS for disposal of the dredged material. Complainant's Prehearing Exchange Exhibit ("CX") 17 at 23, 35, 52 (discussing instances where GLDD admitted that its own employees

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[3] *See In re Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170 (1992); *Dutra Dredging Co.*, MPRSA-09-2006-0001, 2006 WL 4472581 (EPA Aug. 10, 2006); *Great Lakes Dredge And Dock Co.*, MPRSA-04-2016-7500, 2019 WL 6533977 (EPA Sept. 29, 2016); *Northeast Dredging Equipment Co.*, MPRSA-02-2015-6001, 2017 WL 11462439 (EPA Apr. 23, 2017).

[4] If accepted, GLDD's arguments would seriously weaken MPRSA because it would reduce the incentive of dredging companies to ensure that its contractors comply with MPRSA and require EPA to bring cases against numerous tug operators instead of the dredging companies responsible for the federal dredging and ocean disposal projects. Indeed, GLDD hired numerous tug companies on the Phase 3 Project. *See* RX78(A)-(M) (purchase orders by GLDD for numerous tug companies "to work as directed" by GLDD).

loaded and shipped scows that "weren't properly decanted [by the barge operators] before leaving the [GLDD] spider barge.").

In addition to performing much of the work at issue, there is no genuine dispute that GLDD had ultimate responsibility for performance of the ocean disposal work under the plain language of GLDD's contract with and disposal authorization from the Corps. EPA's Statement of Material Facts ("SOF") at ¶ 16; *see also* CX7 at 177 ("The Contractor shall also be responsible for all . . . work performed until completion and acceptance of the entire work"), 654 (contract condition stating that GLDD personnel were responsible for "careful installation and monitoring of the project to ensure adequate and continuous environmental pollution control"), 657-58 (contract condition stating that the "Contractor shall keep construction activities *under surveillance, management, and control* to avoid pollution of . . . ocean waters.").

Just like the cruise terminal operator in *Puget Soundkeeper* whose contract with the port required it to comply with the CWA, the plain language of GLDD's contract with the Corps required GLDD to ensure that third parties, including the tug captains/operators, complied with MPRSA. *See* Complainant's Statement of Material Facts Concerning Liability that Cannot Be Genuinely Disputed ("EPA SOF") at ¶ 16; see also CX7 at 177 ("The Contractor shall . . . be responsible . . . for complying with any Federal . . . laws, codes, and regulations applicable to the performance of the work."), 682 (requiring GLDD to employ a "full time, dedicated Environmental Manager" to manage environmental compliance and reporting issues). The Corps always interpreted the contract this way including when it withheld payments from GLDD for the mis-dumps and excessive leakage from scows. RX86 at 1-2 (contract performance document signed by the Corps and GLDD deducting a payment for "mis-dumped material" and "several

incidents in which scows have experienced draft losses in excess of . . . the 1 foot allowed per contract and prior to disposal at the ODMDS").

There is also no genuine dispute that GLDD extensively managed and coordinated all the dredging and ocean disposal activities, including the activities of the tug companies that GLDD hired. Burke Decl. at ¶ 7; RX95 at 2 (letter from GLDD to the Corps stating that "GLDD has transited 2,659 scow loads to the Miami ODMDS" during the project); RX78(A)-(M) (GLDD purchase orders requiring tug companies "to work as directed [by GLDD] towing dump barges for [GLDD's] dredge") (emphasis added). GLDD admits that it directed the operations of tug companies and controlled the procedures that the tug companies used to transit and dispose of material at the ODMDS and that were related to compliance with MPRSA. RX95 at 4 (GLDD letter stating that tug captains were required to attend an environmental training session "conducted by GLDD"), 5 (stating that GLDD required tug captains to circle the ODMDS under certain circumstances); CX16 at 166, 275 (emails from GLDD noting that tug companies were required to follow GLDD's "disposal procedures"). In fact, GLDD removed tug operators from the project that did not follow these procedures. RX3(A); RX95 (GLDD letter stating that "GLDD directed Dawn Services (Rental tug services) to remove a Captain from the vessel for the duration of the project due to two disposals outside the ODMDS 'Release Zone'").

Likewise, several of GLDD's emails to the Corps show GLDD's extensive direction and instruction of the tug captains. *See, e.g.*, RX11(A) (GLDD email stating that "the [tug] crew has been instructed to utilize the DQM hull status indicator instead of the scow's hydraulic pressure from now on."); RX65(A) (GLDD email stating that "[t]he Tug Captains have been instructed to only use the Leidos/DQM computer as an indication that the scow hull status sensor is reading 'CLOSED'"); RX64(A) (GLDD email discussing GLDD's instruction to tug captain to "keep all

disposal vessels inside of the ODMDS until the hull sensor displays 'CLOSED'"); (RX65(A) (GLDD email discussing GLDD's instructions to a tug captain about disposal procedures). Further, GLDD required tug operators to report MPRSA violations to GLDD. *See, e.g.*, RX54(F) (example of GLDD "towing tug log"). And like the cruise terminal operator in *Puget Soundkeeper*, GLDD monitored the tug operations using an ETS system, as required by the contract and the Site Management and Monitoring Plan ("SMMP"). EPA's SOF ¶¶ 30-33.

Given GLDD's actual and extensive control, coordination, and monitoring of the tug towing and disposal operations discussed above, there is no genuine dispute that the tug companies were GLDD's servants and not independent contractors.[5] Even if the tug companies were independent contractors, like the defendant in *Lambert* that was held strictly liable for the illegal discharges by its independent contractor, GLDD was ultimately responsible for compliance with MPRSA and performance of the ocean disposal work under its contract with and disposal authorization from the Corps discussed above (i.e., GLDD had a non-delegable duty to ensure that subcontractors complied with MPRSA). Thus, like in *Great Lakes* where the EAB affirmed that GLDD was strictly liable for off-center dumps of scow loads by tug captains, in the present case GLDD is again strictly liable for mis-dumps and transiting the sensitive sea area by the tug captains that GLDD hired, managed, and coordinated.

That said, as noted above and discussed in further detail below in Part I.C, many of the violations—including the unauthorized excessive leakage and failure to report violations—do not involve any work by subcontractors. Finally, in addition to performing much of the work and

[5] *See* Restatement (Second) of Agency §§ 219-20 (stating that a master is liable for the torts of his servants committed while acting in the scope of their employment and that an entity is generally a servant and not an independent contractor where the entity is subject to the other entity's control or right to control). A contract referring to an entity as an independent contractor is not controlling. *See, e.g.*, *Spirides v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979).

having actual and extensive control over and responsibility for all aspects of the project, there is no genuine dispute that GLDD, like the cruise terminal operator in *Puget Soundkeeper*, knew about the violations, as evidenced by several emails from GLDD to the Corps that are cited in the tables in the motion and EPA's SOF. *See also* CX16 (additional emails).

Therefore, based on all the foregoing unrebutted evidence, and even accepting GLDD's incorrect assertion that the tug operators were independent contractors, there is no genuine dispute of material fact that GLDD performed a sufficient amount of the work, had sufficient control over and responsibility for the ocean disposal operations, and had sufficient knowledge of the violations, to hold GLDD liable for the violations under the strict liability scheme of MPRSA.[6]

B. The violations at issue are consistent with the Complaint and the Tribunal's Order because they are for conduct that was not authorized by the Corps and thus violated § 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19).

The second main argument that GLDD focuses on is an argument that the violations proven in the motion are allegedly inconsistent with the Complaint and are improperly based on violations of GLDD's contract with the Corps. For reasons discussed below, this argument is a meritless effort to relitigate the issues decided in the motion to dismiss.

In the Order, the Tribunal held that "a contractor whose work on a federal project was authorized by COE regulation, rather than a permit . . . can be held liable for a civil penalty if it violated a MPRSA statutory provision or regulation." Order at 25. Regarding violations of MPRSA statutory provisions, the Tribunal held that a contractor engages in unauthorized

[6] The question of whether EPA could also bring an enforcement action against the tug companies is not before the Tribunal, and whether the tug companies could also be liable under MPRSA for the violations is not relevant to the present motion. *United States v. Whitehill*, No. 14-CV-188-RJA-MJR, 2018 WL 459300, at *4 n.7 (W.D.N.Y. Jan. 18, 2018).

transport of dredged material for disposal and thus violates Section 1411(a) of MPRSA when its conduct deviates from standards and conditions in its contract with the Corps that relate to transporting and dumping dredged material. *Id*. Regarding violations of MPRSA regulations, the Tribunal held that a contractor violates 40 C.F.R. § 228.15(h)(19) when it fails to "comply with conditions set forth in the most recent approved Site Management and Monitoring Plan." *Id*. at 26.

All the violations proven in the motion are based on and consistent with these holdings by the Tribunal. *See* Mot. at 3 (quoting above holdings). This is true for: (1) the unauthorized mis-dumps, *see* Mot. at 21 ("GLDD violated § 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19) by deviating from Contract Section 35 20 23 Part 3.4.2.2 ('Mis-Dumps') and by failing to comply with Section 2.8 of the SMMP"); (2) the unauthorized transiting of the particularly sensitive sea area, *see* Mot. at 22 ("GLDD violated § 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19) by deviating from Contract Section 01 57 20, Part 3.1.5.8 ('Hardground/Reef Protection') and by failing to comply with Section 2.7 of the SMMP"); (3) the unauthorized open hull doors, *see* Mot. at 23 ("GLDD violated § 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19) by deviating from Contract Section 35 20 23 Part 3.4.2.3 ('Vessel Doors') and Contract Section 35 20 23 Part 3.1.5 ("Hull Status"), and by failing to comply with Section 2.8 of the SMMP"); (4) the unauthorized excessive leakage, *see* Mot. at 24 ("GLDD violated § 1411(a) of MPRSA by deviating from Contract Section 35 20 23 Part 3.4.2.1 ('Spillage/Leakage')"); and (5) failure to timely report violations, *see* Mot. at 25 ("GLDD violated 40 C.F.R. § 228.15(h)(19) by failing to comply with Section 3.6.1 of the SMMP").

The references to provisions of the contract does not, as GLDD argues, make the motion is based on violations of the contract. As the Tribunal explained in its Order, "it is the fact that

this conduct [GLDD's deviations from these standards and conditions in the contract] was not authorized—***not that the conduct was, simultaneously, a breach of Respondent's contractual obligations to the COE***—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 COE." Order at 25 (emphasis added).

Contrary to GLDD's arguments, these violations proven in the motion also are consistent with the claims in the Complaint and EPA's position and representations to this Tribunal throughout this case. Appendix A to the Complaint detailed all the deviations from the conditions in the contract raised in the motion.[7] *See* Compl. at 16. Contrary to GLDD's argument, this is adequate under the Federal Rules of Civil Procedure 10(c) to raise these claims because Appendix A is an exhibit to the Complaint and the paragraphs of the Complaint that allege violations of § 1411(a) of MPRSA adopt Appendix A by reference. Compl. ¶ 30; Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading [and] *a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.*") (emphasis added). Appendix A also repeatedly and specifically states that GLDD violated § 1411(a) of MPRSA by deviating from specific conditions in both the SMMP and the contract. *See* Compl. App'x A at Table 1.

GLDD incorrectly argues that EPA renounced these claims or legal theory based on a statement in one of Complainant's briefs that Complainant cited the contract conditions in Appendix A "to illustrate the parallel nature of the contract requirements and the SMMP requirements." GLDD distorts and takes this statement out of context. As the Tribunal

[7] Due to concerns about confidential business information, Appendix A is redacted from the copy of the Complaint on the public docket, but Complainant filed an unredacted copy of the Complaint containing Appendix A with the Regional Hearing Clerk.

recognized in its Order, prior counsel for Complainant explained that the agency "is not seeking penalties for violations of the contract terms themselves." Order at 13. GLDD ignores that in the same brief Complainant stated that the contract "defined the scope of the Respondent's authority to transport dredged material for the purpose of dumping in ocean water under MPRSA," which is fully consistent with the Complaint, the Tribunal's Order and the violations proven in the motion. EPA's Resp. at 9.

The statements in the brief do not and cannot trump the language of Appendix A of the Complaint, which, as discussed above, is part of the Complaint for all purposes and specifically states that GLDD violated § 1411(a) of MPRSA by deviating from specific conditions in not only the SMMP but also the contract. *See* Compl. App'x A at Table 1. Indeed, these statements in the Complaint and Appendix A more than plausibly give rise to the violations of § 1411(a) of MPRSA raised in the motion, as the Tribunal recognized in its Order. Order at 25. GLDD's arguments are a meritless effort to relitigate its motion to dismiss. *See* GLDD's Resp. at 7 n.2.

Finally, even if GLDD's arguments are correct (which they are not), as GLDD recognizes, most of the violations (except the unauthorized excessive leakage violations) are independently supported by deviations from the conditions of the SMMP. Therefore, the violations proven in the motion (§ 1411(a) of MPRSA and 40 C.F.R. § 228.15(h)(19)) are consistent with the Complaint and the Tribunal's Order.

C. GLDD failed to provide any evidence, let alone substantial and probative evidence, of a disputed factual issue on any of the five types of violations.

GLDD's focus on the two arguments addressed above are a distraction from the fact that GLDD fails to provide any evidence—let alone substantial and probative evidence—that the unauthorized mis-dumps, transiting the particularly sensitive sea area, open hull doors, excessive leakage, and failure to timely report violations did not occur. As discussed below, GLDD largely

concedes that these violations occurred, and the limited evidence presented by GLDD is not relevant to whether GLDD is liable for the violations.

1. Unauthorized mis-dumps (2 violations)

GLDD does not contest that the evidence discussed in the motion (ETS data and admissions by GLDD) prove that two mis-dumps occurred. Instead, GLDD argues that these violations are for violations of the contract and suggests that only the tug companies or tug captains can be held liable for these violations.

For reasons discussed above, this violation is based on GLDD's unauthorized conduct in violation of § 1411(a) of MPRSA and § 40 C.F.R. § 228.15(h)(19), not GLDD breaching its contract with the Corps. These two violations are also based on GLDD's deviations from not just condition 3.4.2.2 of the contract but also Section 2.8 of the SMMP. Mot. at 7.

Further, as discussed above, there is no genuine dispute of material fact that GLDD had sufficient control over and responsibility for the ocean disposal operations and knowledge of the violations to hold GLDD strictly liable for MPRSA violations during the project including the unauthorized mis-dumps. *See Great Lakes*, 4 E.A.D. at 200-03 (affirming that GLDD was liable for "off-center dumping" of scow loads even though the scows were towed by tug companies).

2. Unauthorized transiting particularly sensitive sea area (9 violations)

Like with the mis-dumps, GLDD does not contest that the evidence discussed in the motion (ETS data and admissions by GLDD) prove that scows transited the PSSA on nine occasions. Instead, GLDD argues that these violations are for violations of the contract and suggests that only the tug companies or captains can be held liable for these violations.

For reasons discussed above, this violation is based on GLDD's unauthorized conduct in violation of § 1411(a) of MPRSA and § 40 C.F.R. § 228.15(h)(19), not GLDD breaching its

contract with the Corps. As GLDD admits, these two violations are also based on GLDD's deviations from not just condition 3.1.5.8 of the contract but also Section 2.7 of the SMMP. GLDD's Resp. at 12.

Further, as discussed above, there is no genuine dispute of material fact that GLDD had sufficient control over and responsibility for the ocean disposal operations and knowledge of the violations to hold GLDD liable for MPRSA violations during the project, including the unauthorized transiting of the PSSA. Moreover, GLDD admits that during one of the nine trips in question GLDD piloted the hopper dredge/scow in question. GLDD's Resp. at 13 n.3.

3. Unauthorized hull status "OPEN"/open hull doors (3 violations)

There are two independent bases for the open hull door violations. The first basis is deviations from condition 3.1.5 of the contract, which GLDD acknowledges required the hull status sensors to register closed prior to leaving the disposal area. GLDD's Resp. at 14. The second basis is deviations from Section 2.8 of the SMMP, which required the hull doors to be closed prior to departing the ODMDS. Mot. at 12.

Contrary to GLDD's argument, the plain language of these conditions indicates that proving deviations from these conditions does not require proof that disposal was not actually completed before departing the ODMDS. The condition of the hull status sensor is important because it makes determining MPRSA compliance clear and promotes the use of functioning and properly maintained equipment. *See* CX7 at 18 (noting that the agencies developed this sensor-based system as "a low cost, repeatable, impartial system for automated dredge/scow monitoring"). Both requirements are consistent with the intent of Congress to "prevent or strictly limit" the transport and dumping of materials into the ocean. 33 U.S.C. § 1401.

GLDD concedes that the evidence discussed in the motion (ETS data and admissions by GLDD) prove that on three occasions scows exited the ODMDS with an 'OPEN' value for the hull status sensors. GLDD's Resp. at 14 (admitting that the evidence "shows that on three trips, scow hull sensors did not read 'closed' when the scows left the ODMDS"). In addition, as discussed above, there is no genuine dispute of material fact that GLDD had sufficient control over and responsibility for the ocean disposal operations and knowledge of the violations to hold GLDD strictly liable for MPRSA violations during the project, including the unauthorized hull sensor status and open hull doors. Thus, there is no genuine dispute of material fact that GLDD violated § 1411(a) of MPRSA by deviating from condition 3.1.5 of the contract on these three occasions.

What caused the scow hull sensor to read "OPEN" on these three trips *may* be relevant to the amount of a civil penalty, but, contrary to GLDD's argument, it is not relevant to the present motion and whether a violation occurred. Even if it were relevant at this stage of the case, GLDD fails to provide any evidence on what caused the scow hull sensor to register "OPEN" during two of the three trips (March 13, 2014 (DQM49/GLDD117) and November 8, 2014 (DQM41/GLDD1677)).[8] GLDD's Resp. at 15. GLDD simply speculates that it was caused by "some fault with the sensor" or "some failure of the scows' hydraulic system." *Id.*

Regarding deviations from Section 2.8 of the SMMP—an independent basis for these violations which required the hull doors to actually be closed prior to departing the ODMDS—in the absence of countervailing evidence, the hull status registering "OPEN" is sufficient evidence

[8] For the third trip (November 16, 2014 (DQM429/GLDD1791)), GLDD cites an email that indicates that the reason for the violation was that the scow was broken and needed repairs. Broken equipment is not a defense to this violation particularly since one of the purposes of the hull sensor status condition is to ensure that GLDD uses functioning and properly maintained equipment.

that the hull doors were not closed before departing the ODMDS for trips DQM49/GLDD117 and DQM41/GLDD1677. In addition, GLDD's own records show that one of the reasons why the scow doors did not close is that it was using older scows with older seals. GLDD's Resp. at 18 (citing RX92 at 8-9). While GLDD presents evidence that the hull status sensor registered "OPEN" on trip DQM429/GLDD1791 due to a broken switch, GLDD presents no such evidence for the other two trips (DQM49/GLDD117 and DQM41/GLDD1677).

Instead, GLDD speculates that during these two trips the tug company used a procedure that would have caused the scow doors to open and then close by their own weight but the hull status sensor to continue to register "OPEN."[9] However, GLDD provides no evidence that this procedure was used during these two trips. In fact, GLDD's own records show that the procedure discussed above was not used on trip GLDD117. RX954 at 11. In addition, for trip DQM49/GLDD117, GLDD's project engineer admitted to the Corps that "during the departure of the ODMDS limits the haul was not completely closed." RX3(A). Thus, there is also no genuine dispute of material fact that GLDD violated 40 C.F.R. § 228.15(h)(19) by failing to comply with Section 2.8 of the SMMP.

Finally, GLDD argues that it cannot be held liable for hull door/status violations under § 1415(h) of MPRSA, 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." 33 U.S.C. § 1415(h). This provision is does not apply because, as explained above, the

[9] This procedure can be used if there is some failure in the scow's hydraulic system that prevents it from responding to commands to open. The procedure depressurizes the scow, which causes the doors to open by the weight of the material in the bin. *See* RX17 at 30. The scows then allegedly come back together by their own weight but may not be pressurized enough for the hull status sensor to register "CLOSED." *Id*.

violations are for hull status sensors registering "OPEN" and failing to close hull doors before departing the ODMDS, not illegally dumping material from the scows.

Even if this provision does apply, GLDD bears the burden of proving such a defense, and, as discussed above, GLDD's declarant (Mr. Larkin) only speculates and does not provide any evidence that the violations were caused by a failure of the scows' hydraulic system. In addition, as noted above, GLDD's own records prove that the procedure discussed above was not used on trip GLDD117. RX954 at 11. GLDD did not produce, as it did for other scow trips, any tug logs documenting the use of the procedure discussed above on the three scow trips at issue in the motion, which is evidence that the violations were not caused by a failure of the scows' hydraulic system and that the procedure was not used. *Compare* RX54(F) at 3 (tug log showing use of procedure on trip no. GLDD2561), *with* RX3(A) (no tug log for trip no. GLDD117), RX34 (no tug log for trip no. GLDD1677) & RX37(A) (no tug log for trip no. GLDD1791).

Further, GLDD bases its argument on the incorrect premise that it is necessary to board the scows at sea to reset the system before departing the ODMDS. If the system fails at the ODMDS and there is no way to safely reset it before departing the ODMDS thereby resulting in a violation, that is consistent with the strict liability scheme of MPRSA and the intent of the condition to promote the use of functioning and properly maintained scows/equipment on all disposal trips.

4. Unauthorized excessive leakage (11 violations)

On the excessive leakage violations, Complainant does not, as GLDD falsely claims, suggest that "any leakage is a violation." In fact, the motion *only* focuses on draft loss in excess of one foot, which GLDD agrees is a deviation from condition 3.4.2.1 of the contract. GLDD's Resp. at 17 (acknowledging that the Contract "prohibits draft loss of more than one foot"). As

explained above, such deviations are not just violations of the contract but also violations of § 1411(a) of MPRSA.

Like with the other types of violations, GLDD concedes that draft loss in excess of one foot occurred on the 11 trips/dates discussed in the motion. *See* Pomfret Decl. ¶ 8; GLDD's Resp. at 19 (citing RX86). Unable to provide any evidence that these violations did not occur, GLDD argues that it cannot be held liable for the violations. As discussed above, however, there is no genuine dispute of material fact that GLDD loaded the scows with dredged material, GLDD had extensive control over how and when loaded scows were shipped to the ODMDS, and GLDD had knowledge of the excessive leakage violations to hold GLDD liable for these violations under MPRSA. *See also* Larkin Decl. ¶¶ 1, 5; Pomfret Decl. ¶ 7.

GLDD also argues that it should not be held liable for these excessive leakage violations because during the project GLDD changed its loading procedure to one intended to reduce environmental damage at the dredging site but with "greater leakage potential" during transport. GLDD's Resp. at 18. While this argument *may* be relevant to the appropriate amount of a civil penalty, it is not relevant to whether GLDD is liable for the 11 excessive leakage violations that GLDD concedes occurred. GLDD concedes, and the Corps agreed, that leakage of "water and excavated material" in excess of one foot of draft loss was a deviation from the excessive leakage condition regardless of the type of loading procedure. Pomfret Decl. at ¶ 5; CX17 (Corps' Post Disposal Summary Report stating "non-compliant loads included those with . . . draft losses of 1 foot or more").

Even if the loading procedure that GLDD used is relevant to whether a violation occurred, GLDD fails to provide substantial and probative evidence showing that the procedure caused excessive leakage during the 11 trips at issue in the motion. For several of these 11 scow

trips, GLDD found that its own employees rushed to ship the scows and "the scows weren't properly decanted [by the barge operators] before leaving the spider barge." CX17 at 23 (trip no. GLDD1570), 35 (trip no. GLDD 2098) (scow shipped "before the ponded water [in the scow] was completely drained"), 52 (trip no. GLDD4060). For other trips, GLDD determined that the scows had failed or leaking seals or valves. CX17 at 18 (trip no. GLDD852), 27 (trip no. GLDD 1696).[10] For other trips, GLDD found that debris was stuck in the seal of the scow or provided the Corps with no explanation for the violation. CX17 at 19 (trip no. GLDD1012), 21 (trip nos. GLDD1334 and GLDD1441), 23 (trip no. GLDD1549), 25 (trip no. GLDD1569). In summary, the only evidence is that none of these violations were authorized or necessitated by virtue of GLDD's compliance with Corp's authorization.[11]

The remainder of GLDD's argument challenge facts in the motion that were provided for context or background and do not create any genuine dispute regarding liability. For example, GLDD asserts that the material leaked was mostly "turbid water," but ignores that the intent of EPA, the Corps, and MPRSA is to strictly limit the leakage of turbid water because it can harm sensitive coral and hardground habitats. McArthur Decl. ¶ 34; CX7 at 658 ("The Contractor shall conduct his operations in a manner to minimize turbidity"). GLDD provides no evidence for its assertion that there are no reef habitats between the end of the navigation channel and the ODMDS, and GLDD ignores the fact that there are also sensitive hardground habitats in this area. *Id*. Finally, GLDD challenges the total volume of leaked material calculated by the agency's engineer, but GLDD fails to show its own calculations and methodology. *See* GLDD's

[10] GLDD acknowledges that scows at issue in these violations were older and had older seals. GLDD's Resp. at 18.

[11] In fact, because of these violations, the agencies required GLDD to follow specific protocols to prevent excessive leakage violations during late stages of the Phase 3 Project. CX15 at 5-9.

Resp. at 19 (citing RX86 (Corps document where the Corps used an "estimated volume [of total leakage] based on engineering judgment" with no calculations). These issues may be relevant at the civil penalty stage of this case but are not controlling at the liability stage.

For these reasons (and those discussed in the motion), there is no genuine dispute of material fact that GLDD is liable for 11 violations of § 1411(a) of MPRSA related to the 11 excessive leakage events.

5. Failure to Timely Report Violations (11 violations)

Lastly, on the reporting violations, GLDD concedes that Section 3.6.1 of the SMMP required GLDD to report all violations to both the Corps and EPA within 24 hours of the violation. GLDD's Resp. at 20. As discussed below, GLDD's response ignores very strong evidence of reporting violations cited in the motion, and GLDD fails to provide substantial and probative evidence that GLDD timely reported the violations.

Contrary to GLDD's argument, the motion proves that GLDD failed to timely report the 2014-10-06 excessive leakage violation, and the 2014-11-16 hull status "OPEN" violation, not based on the McArthur Declaration, as GLDD incorrectly argues, but rather properly authenticated emails from GLDD to the Corps. Mot. at 18. Specifically, one email shows that GLDD did not report the excessive leakage violation until 2 days after the violation, CX16 at 117, and the second email shows that GLDD did not report the hull status "OPEN" violation until 76 days after the violation. CX16 at 161-63. In addition, while GLDD produced these emails for these trips as part of its prehearing exchange, none of the emails produced by GLDD show that it reported these violations any earlier to the Corps. Taken together, this is strong evidence that GLDD failed to timely report these violations to the Corps.

For the other nine violations of Section 3.6.1 of the SMMP (failure to report unauthorized transiting of the PSSA), contrary to GLDD's assertions, EPA makes a strong showing based on the McArthur Declaration and other evidence that GLDD never reported to the Corps the nine instances of unauthorized transiting of the PSSA. Contrary to GLDD's assertion that Mr. McArthur has only "superficial" knowledge of ocean disposal operations, Mr. McArthur is a Professional Engineer that has managed and worked on EPA's ocean disposal program for more than 20 years. McArthur Decl. ¶ 7. In fact, he helped write the contract language for implementing the conditions of the SMMP for the Miami ODMDS. *Id*. at ¶ 12; CX3 at 12 (contract language in SMMP). In addition, contrary to GLDD's argument, Mr. McArthur has personal knowledge of GLDD's noncompliance during the Phase 3 Project. Mr. McArthur "was responsible for EPA's oversight of [the] Phase 3 [Project] under [MPRSA]." McArthur Decl. ¶ 10. During the Project, he "regularly reviewed data from the Corps and ADISS plot reports to monitor GLDD's compliance with MPRSA and the SMMP." *Id*. at ¶ 21.

The record shows that GLDD reported violations to the Corps via emails to the Corps, and the Corps then forwarded these emails/reports to Mr. McArthur at EPA. CX16. Neither these emails nor any other files that Mr. McArthur has related to this case show that GLDD reported these nine violations. *See id*.; *see also* McArthur Decl. ¶ 32. In addition, GLDD sent the Corps emails for some of these nine trips in which it reported other types of violations but not the transiting the PSSA violations. RX76(A) (load DQM112); RX57(A) (load DQM624). Taken together, the McArthur Declaration, the McArthur emails, and the emails from GLDD, are strong, credible, and affirmative evidence of absence—evidence that GLDD never reported these nine violations.

Because EPA presents strong and affirmative evidence of absence, the burden shifted to GLDD to produce substantial and probative evidence showing that GLDD did in fact report these violations to the Corps. *In re Taotao USA Inc.*, No. CAA-HQ-2015-8065, at *6-7 (2017); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (holding that when a moving party supports its motion for summary judgment with "credible evidence," the nonmoving party must generally "produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial"). However, GLDD failed to provide any evidence that it properly notified the Corps of the nine transiting the PSSA violations. As such, the Tribunal should enter summary judgment on these reporting violations.

To avoid liability for these reporting violations, GLDD incorrectly argues that the mere transmission of raw ETS data from the scows to the Corps' Dredge Quality Management ("DQM") system was equivalent to reporting actual violations to the Corps. GLDD's Resp. at 21. This argument fails for several reasons. First, the contract required GLDD to report violations by email. *See* CX7 at 672. Second, GLDD does not notify the agencies which of the data constitutes violations when it transmits the raw data. Third, both the SMMP and contract contain separate provisions for reporting violations and providing sensor data. CX2 at 24; CX7 at 1069, 1075. A ruling that transmission of raw ETS data is equivalent to reporting violations would make the Corps, not GLDD, responsible for sifting through the data and identifying violations, contrary to the intent of the condition. Such a ruling would also improperly render superfluous and not give purpose to the provisions in the SMMP on reporting violations. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (cautioning "against reading a text in a way that makes part of it redundant"). Further, GLDD's argument is contrary to the practice of both GLDD and the agencies during the Phase 3 Project of GLDD reporting

violations via emails to the Corps. *See generally* CX16; RX95 at 4 (letter from GLDD to the Corps stating that practice was to notify the Corps of violations via email).

Therefore, GLDD failed to provide any substantial and probative evidence of a disputed factual issue on any of the five types of violations. As such, depositions and an evidentiary hearing are neither necessary or authorized by law and would be a waste of judicial resources.

CONCLUSION

For the foregoing reasons, the Tribunal should grant the motion, and enter an order finding GLDD liable for the 36 violations discussed in the motion.[12]

Respectfully submitted this 8th day of December 2020.

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[12] Complainant has not yet determined whether to pursue an evidentiary hearing on other violations alleged in the Complaint and reserves the right to so at this time.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4
BEFORE THE ADMINISTRATOR

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANT'S REPLY IN SUPPORT OF COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY** was served on the following parties on the date and in the manner indicated below.

Via OALJ E-Filing System

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

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

Via Consented to Service by Email

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SO CERTIFIED this 8th day of December, 2020.

/s/ Tyler J. Sniff
Tyler J. Sniff

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