UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC — Docket No. MPRSA-04-2019-7500

Respondent.

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

_____/

Respondent Great Lakes Dredge & Dock Co., LLC's Opposition to EPA's Motion for Partial Accelerated Decision

Respondent Great Lakes Dredge & Dock Co., LLC ("Great Lakes") opposes EPA Region 4's Motion for Partial Accelerated Decision as to Liability dated October 16, 2002 (the "Motion"). Summary adjudication of the claims in this case would be procedurally improper, since Great Lakes has not had the opportunity to cross-examine Region 4's witness. The Motion does not identify facts or present evidence sufficient to carry Region 4's burden of proof that Great Lakes committed the violations, and is based in part on a legal theory that the agency has disclaimed earlier in this proceeding. Even if the Motion did present sufficient evidence, there are disputed issues of material fact that preclude summary adjudication. Great Lakes respectfully requests that the Motion be denied and that it be given the opportunity to defend itself at the merits hearing.

I. PROCEDURAL BACKGROUND

This is a civil penalty action brought pursuant to the Marine Protection Research and Sanctuaries Act ("MPRSA") related to the deepening of the Port of Miami. In its Complaint, Region 4 claims that Great Lakes violated the Site Management and Monitoring Plan ("SMMP") for the Miami Ocean Dredged Material Disposal Site ("ODMDS") on 95 vessel trips over the course of the project. Compl. ¶ 30. In particular, the complaint alleges 37 trips of excessive

leakage, *id.* ¶ 30(a); 36 trips where scow hulls were open when the vessels exited the ODMDS, *id.* ¶ 30(b); two trips where there were mis-dumps, *id.* ¶ 30(c); eleven trips where there were alleged failures to report violations, *id.* ¶ 30(d); and nine trips where vessels transited a restricted area, *id.* ¶ 30(e).

Great Lakes filed a Motion to Dismiss, which argued that the MPRSA's civil penalty statute, 33 U.S.C. § 1415(a), does not allow EPA to assess civil penalties based on a violation of the company's contract with the U.S. Army Corps of Engineers ("Corps") or the SMMP. Region 4 generally opposed the motion, but clarified that it was only seeking to assess civil penalties based on alleged violations of the SMMP. *See* EPA Resp. to Mot. to Dismiss, at 5. The Tribunal denied Great Lakes' motion, and ruled that the requirements of the SMMP are enforceable, but noted that "EPA clarifies that while it cited the contract between the COE and Respondent in the Complaint, it did so 'simply to illustrate the parallel nature of the contract requirement and the SMMP requirement' and that it is not seeking penalties for violations of the contract terms themselves in this proceeding." Order Denying Respondent's Mot. to Dismiss ("Order"), at 13.

The parties have conducted their pre-hearing exchange pursuant to the rules. While the parties provided each other with documents that they may use as exhibits at the merits hearing and lists of potential witnesses, there have been no depositions. Great Lakes therefore has had no opportunity to cross-examine the Region 4 witness whose declaration is the basis of the instant Motion.

Region 4's Motion now asks the Tribunal to find Great Lakes liable on 36 claims without a hearing. The Motion claims that Great Lakes is liable on those claims based on alleged violations of the SMMP and also based on alleged violations of the Contract. *See, e.g.,* Motion, at 20. The Motion asserts that if Great Lakes is found liable, then there need only be a "hearing and briefing schedule regarding the amount of civil penalty." *Id.* at 1. The Motion is silent as to the other 59 claims alleged in the Complaint. Based on the fact that the Motion suggests that

the only remaining issue for the hearing would be the penalty amount, it suggests that Region 4 is dismissing the claims not addressed in the Motion.[1]

II. THE TRIBUNAL SHOULD DENY THE MOTION AND ALLOW GREAT LAKES TO PRESENT A DEFENSE AT THE HEARING

A. Summary Adjudication is Procedurally Improper in this Proceeding

The liability issues in this proceeding are best adjudicated at the merits hearing. The Motion would take away procedural protections for respondents provided in the EPA's Consolidated Rules, 40 CFR Part 22, and would deny Great Lakes the opportunity to confront Region 4's witnesses.

EPA civil penalty proceedings are structured so that a respondent has the opportunity to confront EPA's witnesses at the hearing on the merits. Unlike in a typical civil proceeding, Great Lakes has no right to take the deposition of government witnesses prior to the hearing. This means that one of the essential procedural protections in judicial civil litigation that allows for summary judgment – discovery – is missing in this proceeding. Summary adjudication of the liability issue would deprive Great Lakes of the opportunity to probe the basis of witnesses' testimony, and would subvert the civil penalty procedure.

There are substantial questions regarding the weight that should be given to the testimony of Christopher McArthur, whose declaration is the key to the Motion. To Great Lakes' knowledge, Mr. McArthur lacks personal knowledge of the assertions in his affidavit, other than to state that certain documents are authentic. He was not present during the actual dredging activities, and he only sporadically participated in conference calls during the course of the Project. *See* Attachment A (Declaration of Christopher Pomfret). It is not clear that Mr. McArthur has more than a superficial understanding of how dredge scows operate – what

[1] Great Lakes asks that Region 4 expressly dismiss the remaining 59 claims if it is not pursuing them at the merits hearing. Dismissal of those claims would simplify the merits hearing even if the Tribunal denies the Motion. If Region 4 is not dismissing those claims, then the Motion is incorrect that granting the Motion will mean that the only remaining issue is the penalty amount.

causes leakage (draft loss), how rapidly dredged material is disposed from scows, and how scow hulls close – which is important for him to reach some of the conclusions stated in his declaration. Mr. McArthur also appears to have had no involvement in the drafting or negotiation of Great Lakes' Contract with the Corps, which means that he has no special insight into how its provisions should be interpreted. Summary adjudication is inappropriate where there are reasons to doubt the credibility of the movant's witnesses. *TypeRight Keyboard Corp. v. Microsoft Corp.,* 374 F.3d 1151, 1158-59 (Fed. Cir. 2004) ("summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of movant's witnesses").

The documents cited by Mr. McArthur do not make his personal testimony irrelevant. The documents may show sensor readings on individual scow trips, but they do not indicate who operated the scows or what specifically caused events to occur. Both of those facts are important for determining whether it was Great Lakes or another person who violated applicable standards. Where a party fails to present evidence regarding an essential element of its claim, a tribunal cannot enter summary judgment for that party. *See Hotel 71 Mezz Lender LLC v. National Retirement Fund,* 778 F.3d 595, 601 (7th Cir. 2015) ("Where, as here, the movant is seeking summary judgment on a claim as to which it bears the burden of proof, it must lay out the elements of the claim, cite the facts which it believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the nonmovant on the claim."); *United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, Ala.,* 941 F.2d 1428, 1438 (11th Cir. 1991) ("[T]he moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party."); *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986) ("[i]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must

establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor.").

In addition, genuine factual disputes remain about whether EPA has presented sufficient evidence to prove Great Lakes caused the alleged violations. Evidence shows that third-party tug captains and even the Corps may have caused the alleged violations. Where causation is disputed, summary adjudication is inappropriate. *See Kubicki on behalf of Kubicki v. Medtronic, Inc.*, 293 F. Supp. 3d 129 (D.D.C. 2018) (denying summary judgment where there were factual disputes over causation); *Hartford Cas. Ins. Co. v. Intrastate Constr. Corp.*, 2015 WL 13402421, *4 (S.D. Fla. 2015) (denying summary judgment where there were factual disputes regarding causation); *In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 70 (D.D.C. 2012) (noting that "proximate causation is ordinarily a question of fact for the jury . . . [and] that it is only the '*exceptional case*' in which questions of proximate cause 'pass from the realm of fact to one of law'") (emphasis in original) (quoting *Majeska v. Dist. of Columbia*, 812 A.2d 948, 950 (D.C. 2002)).

Great Lakes has prepared its case on the expectation that there will be a hearing where it can examine EPA witnesses and hold the government to its proof. Entry of summary adjudication now in this proceeding would allow Region 4 to avoid proving essential elements of its prima face case, and would deny Great Lakes the opportunity to fully defend against the government's claims.

B. Region 4 Is Not Entitled to Summary Adjudication Based on Alleged Violations of the Contract

The Tribunal should deny the Motion to the extent that it seeks to assess civil penalties based on alleged violations of Great Lakes' Contract with the Corps. The Complaint does not bring claims based on alleged violations of the contract, and Region 4 affirmatively told the Tribunal that its claims are solely based on violations of the SMMP. Region 4 cannot now

change its theory and attempt to seek summary adjudication based on a theory it has not presented.

The Motion asks the Tribunal to find Great Lakes liable in part based on violations of the Contract with the Corps. The Motion generally asserts that Great Lakes "committed 36 violations of MPRSA and/or its implementing regulations by: (1) deviating from standards and conditions in its contract with the Corps ..., and/or (2) by failing to comply with conditions in the SMMP for the Miami ODMDS..." Motion, at 20. For each of the alleged types of violation, the Motion cites both provisions of the SMMP and also provisions of the Contract, and argues that Great Lakes violated the specific terms of each. *See id.* at 21-24.

This is a flip-flop from Region 4's earlier statements regarding its claims. The Complaint asserted claims on the individual vessel trips to the ODMDS based solely on alleged violations of the SMMP and related planning documents. *See* Compl. ¶ 30 ("Respondent transported dredge material ... ninety-five times (95) in a manner inconsistent with the Miami ODMDS SMMP and in violation of the Dredged Material Permit, 40 CFR § 228.15(h)(19), and Section 101(a) of the MPRSA, 33 U.S.C. § 1411(a)"); *see also id.* ¶ 25 ("The terms and conditions of the Phase 3 Dredged Material Permit are contained in the 103 Evaluation Report, EPA's 103 Concurrence Letters, and the Miami ODMDS SMMP."). Contract 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.

In response to Great Lakes' Motion to Dismiss, Region 4 affirmatively stated that it was not bringing claims based on alleged violations of the Contract. EPA Resp. to Mot. to Dismiss, at 5 ("Contrary to Great Lakes' assertions, EPA seeks to enforce the requirements of the SMMP as required by the Federal project. EPA cited contract language in Appendix A of the Complaint simply to illustrate the parallel nature of the contract requirements and the SMMP requirements."). The Tribunal accepted this clarification in its Order Denying Respondent's Motion to Dismiss. Order, at 13 ("EPA clarifies that while it cited the contract between the COE

and Respondent in the Complaint, it did so 'simply to illustrate the parallel nature of the contract requirement and the SMMP requirement' and that it is not seeking penalties for violations of the contract terms themselves in this proceeding.") (emphasis added). For that reason, the Order focused its analysis on whether violations of provisions of the SMMP can provide the basis to assess civil penalties.[2]

Nowhere does the Motion acknowledge that Region 4 is changing its position. Just as the Motion silently drops two-thirds of the specific claims in the Complaint, the Motion simply relies on the Contract provisions and says nothing about the prior representations to the Tribunal.

Region 4 cannot now seek summary adjudication against Great Lakes based on alleged violations of the Contract. A party can only seek summary judgment based on claims set forth in the Complaint. *Anderson v. Donahoe,* 669 F.3d 989, 997 (7th Cir. 2012) (holding that plaintiff cannot seek adjudication of claims not found in the amended complaint, and "may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment") (quoting *Grayson v. O'Neill,* 308 F.3d 808, 817 (7th Cir. 2002) and *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir. 1996)). Great Lakes has prepared for the hearing, and provided a prehearing exchange, based on Region 4's representations that it is not seeking civil penalties based on alleged Contract violations. It would be inequitable and unfair for the Tribunal to now adjudicate liability based on that discarded legal theory. *Harris v. Reston Hosp. Ctr., LLC,* 523 F. App'x 938, 946 (4th Cir. 2013) (refusing to consider new theory at summary judgment because "constructive amendment of the complaint at summary judgment undermines the complaint's purpose and can thus unfairly prejudice the defendant").

[2] Great Lakes respectfully disagrees with the Tribunal's ruling on the Motion to Dismiss, and preserves its position that EPA cannot assess civil penalties against it for violation of the Contract or SMMP.

C. The Motion Fails to Present Evidence Supporting a Prima Facie Case for Civil Penalties

Region 4 has the burden of proving each element of its claims by a preponderance of evidence. 40 CFR § 22.24; *see also id.* § 22.20 (presiding officer may dismiss a proceeding "on the basis of failure to establish a prima facie case"). In order to obtain summary adjudication, it must identify undisputed facts that establish each element of its claims. *Hotel 71 Mezz Lender LLC,* 778 F.3d at 601. To the extent there is any dispute as to the material facts, then the Tribunal must resolve those disputes at the merits hearing.

The MPRSA allows EPA to assess civil penalties against "[a]ny person who violates" applicable requirements of the statute. 33 U.S.C. § 1415(a). Although the civil penalty section does not require proof of intent or fault (i.e., it is a strict liability stature), it does require that EPA demonstrate that the respondent committed the violation.

Basic principles of federal law provide that one person is not generally liable for the acts of another. If a different person committed the violation, then the respondent is not liable. *Cf. In re Berjac of Or.*, 538 B.R. 67, 82 (D. Or. 2015) (dismissing aiding and abetting claim as insufficiently plead because "one is not liable for the acts of another if each is acting independently") (internal quotation omitted); *Parnell v. C & N Bowl Corp.*, 954 F. Supp. 1326, 1329 (W.D. Ark. 1997) (holding that bowling alley was not liable for abduction and murder of customer in parking lot as "one is ordinarily not liable for the acts of another unless a special relationship exists between" them); *Temple v. WISAP USA in Tex.*, 152 F.R.D. 591, 622 (D. Neb. 1993) (sanctioning lawyer who thought two corporation were "the same" as "[g]enerally speaking, corporations are distinct legal entities and one corporation is not liable for the acts of another corporation even if the two corporations have the same name."); *see also Louie v. United States*, 776 F.2d 819, 827 (9th Cir. 1985) (holding government was not liable for off-duty soldier who drove drunk and struck motorist, explaining "the general rule [is] that there is no duty to control the conduct of a third person to prevent him from causing physical harm to

another"). In the context of this proceeding, that means that Region 4 must demonstrate that Great Lakes committed the violations, or that Great Lakes is legally responsible for violations committed by a third party.

Nowhere does the Motion demonstrate that Great Lakes committed the violations. The Motion simply assumes that Great Lakes is the "person who violate[d]" applicable requirements, ignoring the fact that legally the Corps itself conducted the Project and that other companies in addition to Great Lakes also worked on it. The Motion fails because it simply cites no facts linking the violations to Great Lakes' actions (other than a single trip through the Sensitive Sea Area discussed below).

This failure of proof is important in light of facts ignored in the Motion. Dredge scows are unmanned vessels that are towed by tug boats. The tug boats on the Port of Miami Project were owned and operated by companies other than Great Lakes, who employed the tug captains and crews. Attachment B (Declaration of Timothy Burke). The tug captains decide the route by which they navigate the scows between the point of dredging and the ODMDS, and they also decide when to initiate the disposal of dredged material by pressing a remote control button that activate the opening of the scow hulls. *Id.* Many of the alleged violations are based on decisions by tug captains to initiate disposal prematurely (i.e., the "mis-dump" violations), to tow the scows through a restricted sea area (i.e., the violations related to the "Florida Keys Particularly Sensitive Sea Area"), and to exit the ODMDS after disposal before the scow hulls have pressurized shut (i.e., the "open hull" violations). These acts were not committed by Great Lakes, but by employees of other companies.

It is well established that the owner of a towed vessel is not liable for the acts of a tug. *Boston Metals Co. v. The Winding Gulf,* 349 U.S. 122, 123 (1955) (holding that "it was error to hold [the owner of the tow] liable for the negligence of the towing company's employees," because "the persons who conducted the towing operations were in fact acting as employees of the towing company, not as employees of the owner of the tow"); *People of the State of*

California v. The Jules Fribourg, 140 F. Supp. 333, 349 (N.D. Cal. 1956) (holding that the owner of a towed vessel was "not liable for the negligence of the tug company on principles of agency" because there is "a substantial line of authorities uniformly holding that when a tug company is hired to dock a vessel, it does so, not as an agent for the vessel owner, but as an independent contractor"); *Walker v. The Tug Diane,* 350 F. Supp. 1388, 1389 (D.V.I. 1972) (holding that owner of a towed barge was not liable for the negligence of a tow boat: "As a matter of law, when a time charter agreement is entered into with the vessel chartered being operated by personnel under the direct control, supervision and employment of the owners, and the same tows an unmanned barge, whatever damages that may be caused by their negligent operation are for the account of the tug and her owner."). Consistent with this principle, EPA has assessed civil penalties directly against tug companies in past MPRSA civil penalty actions. *In re Dann Marine Towing,* Docket No. MPRSA 04-2009-7500 (EPA 2009) (Consent Agreement and Final Order).

The Motion does not present any facts about the relationship between Great Lakes and the tug companies that would establish that Great Lakes is vicariously liable for the tug captains' decisions. The Motion makes a conclusory statement that the scows and tugs were operated by "GLDD's agents and/or subcontractors," Motion, at 5, but presents no specific facts that would establish that an agency relationship existed. To the contrary, the tug purchase orders cited in the Motion incorporate terms and conditions that provide that the tug companies are independent contractors. The declaration of Timothy Burke (Attach. B) confirms that Great Lakes did not control the tug companies' work such that they were Great Lakes' agents.

The provision of Great Lakes' Contract with the Corps cited by EPA does not make the company liable for civil penalties based on actions of subcontractors. That section of the contract states the following: "Assurance of compliance with this section by subcontractors shall be the responsibility of the Contractor." CX7, at 653 (Contract Specifications, Section 01 57 20, Section 1.6). This provision simply assigns to Great Lakes, and not the Corps, the contractual

responsibility for supervising subcontractors. The sentence says nothing about the subcontractors all becoming Great Lakes' agents, and it does not even speak to the issue of vicarious liability. Even if the Corps could withhold payment from Great Lakes under the Contract based on a mistake by a subcontractor, there is nothing in that language indicating that Great Lakes would be liable to a third party such as the EPA in a civil penalty proceeding. EPA's interpretation of a contract to which it was not a party deserves no weight. *Cf. Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 981 (11th Cir. 2005) (plaintiff lacked standing "to enforce a contract to which he is not a party" between developer and town). Even if EPA is deemed to stand in the shoes of the Corps, the Contract must interpreted in favor of Great Lakes since the Contract was written by the Corps. *Turner Constr. Co., Inc. v. United States,* 367 F.3d 1319, 1321 (Fed. Cir. 2004) ("When a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, we apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document.").

Lastly, if Region 4's reading of the Corps' Contract were correct, and this provision makes Great Lakes the liable party for errors by the tug companies, then it would raise questions about the validity of the Contract. *Cf. Boston Metals Co.,* 349 U.S. at 123 (invalidating contract that shifted liability for a tug's negligence to the owner of the towed vessel); *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 90 (1955) (holding that owner of towed vessel was not liable for negligence of tug boat owned by a separate company, despite a contract that purported to shift liability; stating "a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence").

Region 4 has no special insight into the meaning of the Contract, because EPA is not a party to it. The Tribunal should decline to interpret the Contract as suggested in the Motion, as doing so would be inconsistent with the well-established principles that tug companies are responsible for their own actions.

C. Region 4 Is Not Entitled to Summary Adjudication of the Specific Claims Set Forth in the Motion

1. Missed Dumps

The Motion seeks summary adjudication for two claims based on so-called "mis-dumps," which occurred when the tug captains opened the scow hulls a few moments before the scows entered the Release Zone at the Miami ODMDS. These claims are based on alleged violations of Section 2.8 of the SMMP, which provides that "disposal shall be initiated within the disposal release zone," and Contract Section 35 02 23, Part 3.4.2.2 that prohibits release of scow loads "outside the boundaries of the release zone as shown on the plans." Motion, at 7-8, 21.

The Tribunal should deny the Motion as it relates to these two trips. First, the Motion should be denied to the extent that it is based on alleged violations of the Contract. Those claims are not set forth in the Complaint, and Region 4 explicitly told the Tribunal that it was not seeking civil penalties for violations of Contract provisions.

Second, the Motion does not demonstrate that Great Lakes committed these violations. The decision as to when to initiate disposal is made by tug captains, who have to push buttons on their tugs that remotely open the scow hulls. Attach. B (Burke Decl.). That is a judgment call that they make based on whether they think the scow is located inside the release zone of the ODMDS. The tug captains are not Great Lakes employees, but are employees of independent contractors. As discussed above, the owner of a towed vessel is generally not liable for negligent acts by a towing vessel. EPA therefore has failed to present evidence in support of an essential element of its claims, and even if it had, there is a factual and legal dispute as to whether Great Lakes is vicariously liable for the acts of the third-party tug companies.

2. Transit Through the Restricted Area

The Motion next seeks summary adjudication of nine claims based on disposal vessel trips through a designated "Particularly Sensitive Sea Area" on their way to or from the Miami ODMDS. These claims are based on alleged violation of Section 2.7 of the SMMP, which

provides that "disposal vessels are also not allowed to transit the Particularly Sensitive Sea Area south of the channel," and Contract Section 01 57 20, Part 3.1.5.8 which provides that the "Contractor shall also avoid the area labeled 'Particularly Sensitive Area" on NOAA Chart 11466." Motion, at 9, 22.

The Tribunal should deny the Motion with respect to the eight claims involving dredge scows, for two reasons. First, Region 4 cannot seek to impose civil penalties based on alleged violations of the Contract given that such claims are not set forth in the Complaint and EPA affirmatively told the Tribunal that this was not the basis of its claims. Region 4 can only seek civil penalties based on alleged violations of the SMMP.

Second, similar to the missed dump violations, the Motion does not establish that Great Lakes violated requirements of the MPRSA when tugs towing dredged scows traveled through the restricted area. The decision regarding where to navigate the scows on their way to and from the Miami ODMDS was made by the tug captains, who worked for separate companies. Attach. B (Burke Decl.). The Motion presents no evidence demonstrating that Great Lakes had anything to with the decision of where to navigate the scows. EPA therefore has failed to present evidence in support of an essential element of its eight claims involving scows, and even if it had, there is a factual and legal dispute as to whether Great Lakes is vicariously liable for the acts of the third party tug companies.[3]

3. Open Hull

Next, the Motion seeks summary adjudication of three claims based on trips involving so-called "open hull" violations, where hull sensors did not read that the hulls were closed when the scows left the ODMDS. The Motion bases these claims based on alleged violations both of the SMMP and the Contract. Section 2.8 of the SMMP provides that "disposal . . . shall be

[3] Great Lakes acknowledges that one of the trips in question, DQM Load 112, involved the Terrapin Island, which is a hopper dredge owned and operated by Great Lakes.

completed (doors closed) prior to departing the ODMDS." Contract Section 35 20 23, Part 3.4.2.3 states that "all hopper doors, dump scow doors, or split hull dumping mechanisms shall be closed and sealed prior to exiting the ODMDS," and Part 3.1.5 states that "open/closed status of the bin, corresponding to the split/nonsplit condition of a split hull scow shall be monitored. . . . For this contract, hull status shall register closed prior to leaving the disposal area." Motion, at 12, 22-23.

The Tribunal should deny Region 4's request for summary adjudication of these claims, for several reasons. First, as discussed above, Region 4 cannot seek summary adjudication based on alleged violations of the Contract. It failed to state those claims in the Complaint and it affirmatively represented to the Tribunal that it was not seeking to asses civil penalties based on violation of Contract provisions. This point is especially significant with respect to these "open hull" claims, because there are differences between the language in the SMMP and the Contract. Section 2.8 of the SMMP states that "disposal . . . shall be completed (doors closed) prior to departing the ODMDS." There is no language in the SMMP about sensor readings on the scow hulls; that is entirely a requirement of the Contract. The nature of Region 4's required proof therefore is different if the claims are based solely on the SMMP. For 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 ODMDS.

Second, EPA has not presented evidence supporting its claim that there was a violation of the SMMP on these scow trips. The Motion only shows that on three trips, scow hull sensors did not read "closed" when the scows left the ODMDS. There 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. In fact, the hull open/close sensor data does not show whether or not disposal was complete or the scow hulls were closed. As indicated in the attached declaration of Andrew Larkin, essentially all of the dredged material drops out of a scow within a minute when the hulls are open due to

the weight of the material. Attachment C. This is consistent with some of the very documents cited in the Motion, which indicate that all of the dredged material was properly disposed in the Release Zone. *See* RX 3(A), RX 37(A). In addition, Mr. Larkin explains in his declaration that the open/closed sensors on scow hulls only read "closed" when the hulls are pressurized shut, but the hulls will naturally close by gravity due to their weight regardless of whether the hulls are pressurized shut. Great Lakes therefore disputes whether the disposal was completed and the hulls were closed on these scow trips.

Third, the Motion presents no evidence as to who or what caused the scow hull sensor to read "open" on those trips. There is no evidence that the hull sensor read "open" due to some failure by the tug captain to wait to leave the ODMDS until the hulls were closed, whether there was some failure of the scows' hydraulic system so that the hulls were not pressurized shut, or whether there was some fault with the sensor. Email notifications from Great Lakes to the Corps at the time indicate that at least one of these "open hull" trips was the result of a faulty sensor. *See* RX 37(A) (Load DQM429 / GLDD 1791). Region 4 bears the burden of proof on each element of a prima facie case, which includes proof that Great Lakes committed the violation.

To the extent that there was a failure of the hydraulic system on these scow trips that prevented the pressurization of the hulls after disposal, EPA has not demonstrated that it could have been fixed within the ODMDS without endangering lives. When scow pressure systems do not function, they need to be re-set or repaired by putting a person on the scow. Attach. C (Larkin Decl.). Scows can be very dangerous to board at sea, especially if the hulls are not pressurized shut – people have been killed in past projects trying to board scows (see Larkin declaration) -- and Great Lakes will not put personnel on scows in the open ocean unless it is absolutely safe. The MPRSA provides 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). The Motion asserts that this statute is "not relevant in

determining whether a violation occurred," Motion, at 4, but that position is belied by the language of the statute and the Motion cites no authority in support of its argument. The Motion presents no evidence that these scows could have been boarded safely prior to exiting the ODMDS to re-set the hydraulic system, and Great Lakes believes that it was not safe. Without a showing that it was safe to board the scows, and in light of the factual dispute on this matter, summary adjudication of these claims would be improper.

4. Draft Loss

The Motion next seeks summary adjudication for eleven claims based on trips where there was excessive "draft loss," which is linked to leakage of water and/or dredged material from the scows when traveling from the point of dredging to the disposal location. These claims are based entirely on Contract Section 35 20 23, Part 3.4.2.1, which 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 en route to the ODMDS Release Zone." The Contract defines "excessive leakage" as "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." Motion, at 14, 23.

The Tribunal should deny the Motion as relates to these eleven "draft loss" trips. First, the Motion is based entirely on a provision of the Contract – there is no equivalent provision of the SMMP. However, the Complaint indicates that Region 4 is not seeking to assess civil penalties based on violations of provisions in the Contract. Region 4 also affirmatively told Great Lakes and the Tribunal that it was only seeking penalties for violations of the SMMP, and not for violations of the Contract. Order at 13 ("EPA clarifies that while it cited the contract between the COE and Respondent in the Complaint, it did so 'simply to illustrate the parallel nature of the contract requirement and the SMMP requirement' and that it is not seeking penalties for violations of the contract terms themselves in this proceeding.") (emphasis added).

It is entirely improper for Region 4 now to change its position in a motion for accelerated decision.

Second, the Motion incorrectly applies the Contract. The Motion recites the Contract's general prohibition of leakage and the language about excessive leakage (the one-foot "draft loss" language), and suggests that any leakage is a violation of the Contract. Motion, at 14, 23-24. However, the Motion fails to inform the Tribunal that the Corps is on record that some leakage is inevitable on any scow trip, and that it told Mr. McArthur in Region 4 that the Contract only prohibits draft loss of more than one foot measured from the end of the channel to the disposal area, and does not prohibit draft loss in the dredging area (which includes the channel). Attach. A (Pomfret declaration); *see also* RX 91-92. Region 4 cannot enforce the Contract inconsistent with its application by the agency that wrote it.

Third, 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. The MPRSA only allows EPA to assess civil penalties against "[a]ny person who violates" an applicable requirement. 33 U.S.C. § 1415(a). This means that Region 4 must show that either somebody from Great Lakes engaged in an act or omission that directly violated the statute, or that it took some action that caused a violation to occur. The Motion simply asserts that more than one foot of draft loss occurred on these trips, and assumes that Great Lakes caused it to occur. *See* Motion, at 14-17, 23-24.

In fact, there is a substantial factual question as to the cause of draft loss exceedances on the Project. During the Port of Miami Project, the Corps asked Great Lakes to change the way it loaded its scows to reduce turbidity at the point of dredging, in order to protect corals immediately adjacent to where the channel was being dredged. *See* RX 81(A), at 7 (Corps Response to Motion for Preliminary Injunction, filed as Docket Entry 18 in *Miami-Dade Reef Guard Ass'n v. U.S. Army Corps of Eng'rs,* Case No. 1:14-cv-23632 (S.D. Fla. 2016)) ("The Corps has instituted a series of adaptive management measures, including four voluntary

changes in the dredging process, designed to further mitigate any possible environmental harm stemming from increased turbidity."); RX 81(D), ¶ 19 (Corps Statement of Material Facts filed as Docket Entry 138 in *Miami-Dade Reef Guard* litigation). Great Lakes did so, even though its loading procedures had been fully compliant with the Contract and are the typical way that dredge scows are loaded on any project.

The effect of the change in loading procedures, however, was that the scows carried more water than actual dredged material, and water is more prone to leakage. In correspondence with Region 4 during the Project, the Corps stated that this change in procedures made draft loss exceedances more likely. In November 2014, the Corps stated the following in its MRPSA Section 103 Evaluation Report (RX 92, at 8-9; emphasis added):

> USACE held a meeting with the contractor on 30 October 2014, regarding ODMDS disposal operations non-compliance. Additional discussions took place on 06 November 2014. In order to adhere to the contract and minimize environmental effects the contractor has significantly reduced scow overflow and is currently not overflowing at all. Due to the overflow minimization, there is less material (from 2,000cy/load down to 600cy/load) and more water in the scows. Although this adaptive management technique has yielded less sedimentation input into the environment, it has increased the water to sediment ratio causing greater leakage potential. Having less material in the scows means there is less pressure to help close the seals because the seals only close from within. The lack of pressure on the seals increases the chance of water loss which results in draft loss. According to the 1992 ARCS Remediation Guidance Document from EPA, the Buffalo District studied the leakage from hopper barges and concluded that all hopper barges leak to some degree. http://www.epa.gov/greatlakes/arcs/EPA-905-B94-003/B94-003.ch5.html#RTFToC11 In addition to the aforementioned pressure impacts from less material in the scows, excess water has also been splashing over the weirs due to rough seas in the early winter months. The contractor indicated that they are working to minimize issues and has conducted numerous water tests to check scow pressures and seals. The contractor plans to bring newer scows onto the project that have new seals. These are scows 500, 501, and 502. They may also bring a brand new scow onto the project.

This calls into question whether Great Lakes caused the draft loss exceedances, and makes the issue of causation complex even on individual scow trips where draft loss exceeded one foot. The Tribunal cannot summarily find Great Lakes liable on these claims without proof

of causation by Region 4 and determining whether Great Lakes was responsible. Given the various circumstances of these trips, this is best done at the merits hearing.

Finally, the Motion contains a number of factual statements that are either unsupported or subject to dispute. The Motion indicates that excessive leakage harmed corals between the dredging site and the Miami ODMDS, Motion, at 14, but the attached declaration of Christopher McArthur provides no factual support for that assertion and Great Lakes questions whether he has personal knowledge. In fact, the record shows that the coral reefs only extend as far east as the end of the channel (because the purpose of the channel is to provide a safe route through the coral reefs), and are not located between the end of the channel and the Miami ODMDS. Attach. A (Pomfret Declaration). As stated above, the Contract does not prohibit draft loss within the channel near to where the coral reefs are located. Moreover, the documentary record indicates that the "draft loss" incidents occurred nowhere near sensitive resources such as coral reefs. *See, e.g.,* RX 21 (A) (email for DQM 8 / GLDD 1012: "No impacts to resources are anticipated as the tug and scow transit route from the end of the Channel to the ODMDS Release Zone does not cover any known resources.").

The Motion also provides Mr. McArthur's calculation of the amount of material that allegedly leaked from the scows on those trips, but there is no indication that Mr. McArthur has sufficient expertise to make such a calculation. The Motion fails to acknowledge that the Corps and Great Lakes calculated the amount of dredged material lost as a result of all scow trips where there was draft loss over 1.0 feet, and they determined that approximately 963 cubic yards of material <u>total</u> leaked from the scows on all such trips (not just those that are the subject of the Motion), as almost all of the leakage was seawater. *See* Attach. A, ¶ 8; RX 86. The Tribunal should decline the Motion's request to summarily adjudicate the draft loss claims based on an incomplete and incorrect record.

5. Reporting

The Motion lastly seeks summary adjudication of eleven claims based on Great Lakes' alleged failure to report violations to the Corps. These claims are based on Section 3.6.1 of the SMMP, which states that the "user is also required to notify the USACE and the EPA within 24 hours if a violation of the permit and/or contract conditions related to MPRSA Section 103 or SMMP requirements occurs during disposal operations." Motion, at 18, 24. The Motion makes clear that it seeks civil penalties solely based on Great Lakes' alleged failure to report the violations to the Corps, not to EPA. *See id.*

The Tribunal should deny the Motion for two reasons. First, the Motion does not present evidence that Great Lakes in fact failed to report the violations to the Corps. The evidence for these claims is the statement in paragraph 32 of Mr. McArthur's declaration that "I have re-reviewed my emails and files related to this case, and I have no record of GLDD ever notifying the Corps or EPA of these violations" related to scow transits through the Sensitive Sea Area. *See* McArthur Decl., ¶ 32. Mr. McArthur worked at EPA, not the Corps, so he would not even have had all of the communications between Great Lakes and the Corps. The absence of an email from Mr. McArthur's files at EPA does not establish anything related to the Corps' files. Even if it did, nothing in the SMMP states that a report needs to be in a written email, and a phone call would not suffice, and Mr. McArthur has no personal knowledge of oral communications between Great Lakes and the Corps. In addition, Mr. McArthur's declaration only addresses the nine reporting claims based on scow transits over the Sensitive Sea Area, but does not even address whether there was communication with the Corps regarding the other two reporting violations, one of which involved a "draft loss" trip and another of which was an "open hull" incident.

Second, the evidence presented with the Motion shows that Great Lakes did notify the Corps of the alleged violations. The Motion is based almost entirely on sensor data, which it asserts shows that violations occurred. Mr. McArthur states in his declaration that this data

"was transmitted from the scows to a Dredge Quality Management ('DQM') system managed by the U.S. Army Corps of Engineers," that "[u]nder this DQM system, the Corps monitors the data for compliance and quality assurance review and management," and that "after the data went through quality assurance procedures, the data was sent to EPA and ADISS [a contractor]." McArthur Decl., ¶¶ 14-19. This means that Great Lakes provided notice to the Corps of any and all violations on the project, because the Corps received the data showing the alleged violations almost immediately. If this data was enough to alert Great Lakes of a violation, then it was enough to alert the Corps.

III. CONCLUSION

The Motion fails to establish that Region 4 is entitled to summary adjudication on its claims regarding the 36 disposal trips. For the foregoing reasons, Great Lakes respectfully requests that the Tribunal deny the Motion.

Dated: November 12, 2020

Respectfully Submitted,

/s/ Neal McAliley

T. Neal McAliley (Florida Bar No. 172091)
Email: nmcaliley@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 overnight delivery on this date to Tyler Sniff, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 4, 61 Forsyth St., SW, Atlanta, Georgia 30303.

/s/ Neal McAliley

ATTACHMENT A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC — Docket No. MPRSA-04-2019-7500

Respondent.

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

/

DECLARATION OF CHRISTOPHER POMFRET

Pursuant to 28 U.S.C. § 1746, I, Christopher Pomfret, state the following:

1. Since 1991, I have been an employee of Great Lakes Dredge & Dock Co. LLC ("Great Lakes"). I have served in various capacities in the domestic and international divisions of Great Lakes, including as a Project Engineer, Quality Control Manager, Estimator, and Contracts Manager. I was the Project Manager for Great Lakes on the Miami Harbor Phase 3 Project (the "Port of Miami Project" or "Project"). In that role, I was familiar with the documentary record and was involved in most discussions and communications regarding environmental compliance issues between the U.S. Army Corps of Engineers ("Corps") and Great Lakes. I have personal knowledge of the facts stated in this declaration.

2. The Port of Miami Project was a Congressionally-authorized, federal project conducted by the Corps. The Corps was the named permittee on the State of Florida Environmental Resource Permit for the Project. The Corps hired Great Lakes as a contractor to perform the dredging work. A number of other companies also worked on the Project. Great Lakes dredged the Port of Miami on this Project from November 2013 to September 2015.

3. Corps employees were closely involved in the supervision of Great Lakes' dredging work on the Project. Corps employees were present onsite; there were regular in-person meetings between employees of the Corps, Great Lakes, and other contractors; and Great Lakes

and Corps employees communicated on a daily basis via telephone and email. Great Lakes also provided the Corps all of the sensor data collected from project equipment, including dredge scows, as soon as the data was collected and subjected to quality assurance review. The Corps therefore had access to all sensor data from Project equipment on a near-real-time basis.

3. There were regular interagency meetings regarding the status of the Project. In particular, the Corps hosted monthly interagency teleconferences at which environmental compliance issues were addressed. Representatives of other agencies, including the U.S. Environmental Protection Agency Region 4 ("EPA"), were invited to attend these meetings. Great Lakes employees always attended those meetings. I personally attended most of those meetings, and reviewed minutes from the meetings that I missed.

4. Christopher McArthur was one of the EPA employees who had a role for his agency on the Project. To the best of my recollection, he was not physically present in Miami during the project other than perhaps one or two visits. Mr. McArthur also did not participate in all of the regularly-scheduled interagency telephone conferences. I am unaware that he conducted any physical investigations related to the Project, or that he even observed dredged scows operating on the Port of Miami Project.

5. Great Lakes' Contract with the Corps generally provided that there should be no leakage from scows transporting dredged material to the Miami Ocean Dredged Material Disposal Site ("ODMDS"). The Corps acknowledged during the Project that some amount of leakage is inevitable from dredge scows, based on the nature of the technology. RX 92 is a copy of the Corps' 2014 submittal to EPA entitled, "MPRSA Section 103 Evaluation Miami Harbor," in which the Corps indicated on pages 8-9 that all hopper barges (scows) leak to some degree. For that reason, Corps employees took the position during the Project that only "excessive leakage" would constitute a violation. Excessive leakage is defined in the Contract as an "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." Since leakage is measured by loss of vessel draft (i.e., the vessel rides higher in the water), this was commonly referred to as the "draft loss" requirement.

6. In the early stages of the Project, I recall discussions between the Corps, EPA and Great Lakes regarding the precise requirements of the Contract regarding draft loss. Mr. McArthur expressed the opinion that the Contract measured draft loss starting from the point dredge scows are loaded, while the Corps and Great Lakes interpreted the Contract to measure draft loss starting from the point the scow leaves the dredging area (which includes the channel). RX 91 is a copy of a December 2013 email in which the Corps informed Mr. McArthur that draft loss is measured from the point a scow leaves the end of the ship channel to the point that the scow enters the Release Zone inside of the ODMDS.

7. During the Project, there were extensive efforts to reduce sedimentation on corals adjacent to the ship channel caused by the operation of dredges and loading of scows. In 2014, in coordination with the Corps, Great Lakes implemented adaptive management measures to reduce the amount of water that overflows from the scows when they are loaded. This reduced the turbidity of the water at the point of loading, which reduced the amount of potential sedimentation on corals near the point of loading, but it also meant that the scows carried more water out to the Miami ODMDS. In RX 92, which is the Corps' 2014 MPRSA Section 103 Evaluation Miami Harbor, the Corps acknowledged that the adaptive management measures "caused greater leakage potential" by increasing the water-to-sediment ratio in the scows. It is my understanding that the Corps saw this as an acceptable trade-off, because the corals are located adjacent to the channel, not between the end of the channel and the Miami ODMDS.

8. During the Project, the Corps and Great Lakes worked to calculate the amount of dredged material that leaked from scows on trips where there had been excessive leakage (i.e., draft loss of more than 1 foot). The draft loss exceedances were caused almost entirely by the leakage of turbid water, not solid dredged material. Great Lakes conducted tests to determine how much dredged sediment was suspended in the water carried by the scows, and Great Lakes

and the Corps used that information to calculate the total volume of dredged material that leaked out with the water. RX 86 is the final calculation issued by the Corps, which indicated that a total of approximately 963 cubic yards of dredged material leaked from all scow trips where draft loss exceeded one foot. This includes trips that are not the subject of EPA's Motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 11th, 2020.

Christopher Pomfret

Digitally signed by Christopher Pomfret
Date: 2020.11.11 11:18:38 -05'00'

Christopher Pomfret

ATTACHMENT B

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC — Docket No. MPRSA-04-2019-7500

Respondent.

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

/

DECLARATION OF TIMOTHY BURKE

Pursuant to 28 U.S.C. § 1746, I, Timothy Burke, state the following:

1. I am the Marine Logistics Manager and Purchasing Agent at Great Lakes Dredge & Dock Co. LLC ("Great Lakes"). In that role, I am responsible for engaging the services of other companies in connection with dredging projects. I have held my position as Marine Logistics Manager and Purchasing Agent for approximately 25 years, and I was responsible for engaging the services of tug companies on the Port of Miami Project that took place from 2013 to 2015.

2. Dredge scows are unmanned vessels that carry dredged material. They have no independent means of propulsion, and therefore must be towed by tug boats from the point of dredging (where the scows are loaded) to the disposal location. Personnel on tug boats steer the scows and remotely operate the scows' hull mechanisms through pressing buttons on a signaling device when the scows are in operation.

3. For the Port of Miami Project, Great Lakes engaged the services of third-party companies to provide tug boats and crews to tow dredge scows between the point of dredging and the Miami Ocean Dredged Material Disposal Site ("ODMDS"). None of the tug boats on the Port of Miami Project that towed scows to the Miami ODMDS were owned by Great Lakes, and none of the tug captains or crew members were employees of Great Lakes.

4. Great Lakes hires tug companies through purchase orders. Those purchase orders incorporate by reference standard terms and conditions. Respondent Exhibits 78(A)-(M) are true and correct copies of the tug company purchase orders on the Port of Miami Project, which include the purchase orders for the tugs that towed the dredge scows to the Miami ODMDS. Respondent Exhibits 82(A)-(B) are true and correct copies of the Great Lakes documents showing the terms and conditions in effect during the Port of Miami Project.

5. General Term and Condition 11 states that, "In the rendering of all services hereunder, Vendor shall be an independent contractor, and Vendor shall not have any 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, Buyer or to bind Buyer in any manner whatsoever." In the terms and conditions, the tug companies are referred to as the "Vendor" and Great Lakes is referred to as the "Buyer."

6. Great Lakes did not employ the tug boat crews that towed dredge scows on the Port of Miami Project. The tug boat companies were responsible for paying the crews' wages, paying workers compensation and unemployment insurance premiums, and withholding social security taxes. Great Lakes had no right to terminate individual crew members' employment with the tug companies.

7. Great Lakes provided the tug companies with the U.S. Army Corps of Engineers' general requirements for the Port of Miami Project, and required tug companies to follow certain procedures to maximize compliance. However, on any individual trip, tug boat crews made independent decisions regarding the navigation of the dredge scows, the route to follow between the point of loading and point of disposal, and when to open and close the scow hulls. A typical scow trip to an offshore disposal area takes several hours, and for most of that time the tug boat and scow are located on the open ocean away from land and other vessels. Great Lakes employees do not, as a general matter, ride on tug boats when they are towing scows, and

therefore were in no position to control the tug crews' moment-to-moment decisions when they are at sea towing dredged scows.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2020.

Timothy Burke

ATTACHMENT C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC — Docket No. MPRSA-04-2019-7500

Respondent.

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

/

DECLARATION OF ANDREW F. LARKIN

I, Andrew Larkin, state the following pursuant to 28 U.S.C. § 1746:

1. I am the Mechanical Dredge Fleet Manager at Great Lakes Dredge & Dock Co. LLC ("Great Lakes"). In that role, I am responsible for overseeing the operations, repairs and maintenance of Great Lakes' dredge scows. Prior to taking that position, I served as Dredge Manager – Mechanical Division, where I was responsible for the management and maintenance of dredge scows on various projects, including part of the Port of Miami deepening project. I have personal knowledge of how Great Lakes' dredge scows are designed and operate, and have extensive experience reviewing and interpreting sensor information regarding scow operations. I have been an employee of Great Lakes since 2009. A copy of my resume is attached to this declaration.

2. Dredge scows are vessels with two hulls that are specially designed to carry dredged material. The two hulls are hinged together on the ends of the vessel, and open from the bottom. The hulls are opened and closed with a hydraulic system that is powered by an engine located on the scows and controlled remotely from another vessel.

3. Under normal operations, the hulls are opened and closed through operation of the hydraulic system. If a scow's hydraulic system is not responding to remote commands to open, dredged material can be released from the scow by depressurizing the system, which

causes the hulls to open by the weight of the material in the bin. Once the dredged material drops out of the bottom of the scow, the scow hulls come back together by their own weight.

4. Dredged material is released from scows very quickly when the two hulls open. The internal shape of the hulls is such that the sides are almost vertical when the hulls open, which means there is very little friction that impedes the release of dredged material. Based on years of working with Great Lakes' scow fleet, I believe that substantially all of the dredged material is released from the scows within 1 minute from when the scow hulls open.

5. There are multiple sensors located on Great Lakes' scows, including sensors that show the vessel location, speed, draft, and bin level. Sensor data can be used to determine where a scow released its dredged material, and how long it took to dispose of the material once the scow hulls open. I have reviewed sensor data for the three "open hull" trips that are the subject of EPA's Motion for Partial Accelerated Decision, GLDD trips 117, 1677, and 1791. The data indicates that the dredged material was fully released from the scows on those three trips within approximately 1 minute. During that time when the material was being released, those scows were located within the Release Zone of the Miami Ocean Dredged Material Disposal Site.

6. Great Lakes' scows have a sensor which indicates whether the hulls are "open" or "closed." That sensor is 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.

7. When there are problems with the hydraulic system or their engines on the scows, they can only be corrected by a person physically on the scow. This work can only be done when a scow is in port or in protected waters. For safety reasons, no crew ride onboard Great Lakes' scows when they are transporting dredged material. Boarding a scow in the open ocean also can be very dangerous in typical sea conditions. There have been incidents in the dredging industry where individuals have been killed or seriously injured when trying to board a scow. It

is Great Lakes' policy not to attempt to board a person onto a scow until the vessel is in a safe location where the person will not be endangered.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2020.

Andrew F Larkin

Digitally signed by Andrew F Larkin
DN: cn=Andrew F Larkin, o=Great Lakes Dredge and Dock Company, LLC, ou=Mechanical Division, email=alarkin@gldd.com, c=US
Date: 2020.11.10 12:42:26 -05'00'

Andrew F. Larkin