UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

I. PROCEDURAL HISTORY

This action was instituted on September 27, 2019, by Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 4 ("EPA"), filing an Administrative Complaint against Respondent, Great Lakes Dredge and Dock, LLC.[1] The Complaint alleges that Respondent committed 95 violations of Section 101(a) of the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), codified as amended at 33 U.S.C. § 1411(a), and its implementing regulation at 40 C.F.R. § 228.15(h)(19), during the performance of a U.S. Army Corps of Engineers dredging contract.[2]

Respondent filed an Answer to the Complaint on November 5, 2019, denying the violations, raising various defenses, and requesting a hearing. On November 8, 2019, I issued a Prehearing Order setting forth various filing deadlines and procedures. Thereafter, on December 2, 2019, Respondent filed a Motion to Dismiss ("Motion"), and Complainant filed a response on December 11, 2019 ("Response").[3] The Respondent filed a Reply in support of its Motion on December 23, 2019 ("Reply"). Additionally, on March 30, 2020, the Respondent filed a Notice

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[1] The Complaint was filed with an attachment ("Appendix A") containing a series of five tables detailing the alleged violations. EPA initially identified Appendix A as including confidential business information (CBI) pursuant to 40 C.F.R. § 2.203. Therefore, it filed a redacted copy of the Complaint, omitting Appendix A, for inclusion in the public record and a CBI-designated unredacted copy with the Tribunal. Subsequently, EPA notified the Tribunal that the parties had agreed that the CBI designation of the Appendix was not required. *See* Complainant's Status Report (Nov. 25, 2019).

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

[3] On December 11, 2019, Complainant also filed an unopposed Motion for Extension of Time to File Prehearing Exchange, which was granted by Order dated December 17, 2019, staying all further filing deadlines.

of Supplemental Authority Relevant to its Motion to Dismiss, to which Complainant filed a response on April 14, 2020.

II. APPLICABLE RULES

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules"), 40 C.F.R. Part 22. The Rules address motions to dismiss as follows:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss under Section 22.20(a) are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Asbestos Specialists, Inc.*, TSC Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993). Rule 12(b)(6) of the Federal Rules provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the complaint does not set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *see also McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff.[4] *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Accordingly, to prevail in its Motion, Respondent must show that the EPA's allegations, assumed to be true, could not prove an MPRSA violation as charged. In short, Respondent must demonstrate that Complainant has failed to properly plead a *prima facie* case.

III. THE MPRSA

The MPRSA, also known as the "Ocean Dumping Act" ("Act"), was enacted in 1972. Pub. L. No. 92-532, 86 Stat. 1052 (Oct. 23, 1972), codified at 33 U.S.C. § 1401 *et seq.* Its stated purpose is to "prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment,

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[4] The Federal Rules of Civil Procedure are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n.3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n.10 (EAB, Feb. 24, 1993).

ecological systems, or economic potentialities."[5] 33 U.S.C. § 1401(b); *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 121 (D.C. Cir. 1980) ("Concerned over the related ecological, health, and economic implications of continued unregulated dumping of waste materials into the oceans, Congress enacted the Ocean Dumping Act in 1972.").

The Act's main provision provides in pertinent part that –

> (a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,
>
> (1) no person shall transport from the United States,[6] . . .
>
> * * *
>
> any material for the purpose of dumping it into ocean waters.[7]

33 U.S.C. § 1411(a).

The MPRSA bifurcates authority for implementing its permit scheme between the EPA Administrator and the Secretary of the Army. EPA is given exclusive authority for permitting the dumping of all substances "[e]xcept in relation to dredged material."[8] 33 U.S.C. § 1412(a). Authority over dredged material is assigned to the Secretary, who oversees the Corps of Engineers (COE).[9] 33 U.S.C. § 1413(a) ("the Secretary may issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it into ocean waters"). *See also Nat'l Wildlife Fed'n*, 629 F.2d at 121 ("The [COE] is authorized to issue permits with respect to dredged wastes only, and the EPA Administrator has permit authority for all other wastes."); 33 C.F.R. § 320.2(g) (The Act "authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, . . . for the transportation of dredged material for the purpose of disposal in the ocean . . .").

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[5] After its enactment in 1972, various provisions of the MPRSA were intermittently amended. *See, e.g.*, Pub. L. No. 93-254, 88 Stat. 50 (Mar. 22, 1974); Pub. L. No. 100-688, 102 Stat. 4153 (Nov. 18, 1988) (Title III, § 3201(a)). The statutory language quoted in this Order is that currently in effect, unless otherwise indicated.

[6] Under the MPRSA, "person" means "any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government;" "transport" "refers to the carriage and related handling of any material by a vessel;" and "United States" includes "the several States." 33 U.S.C. § 1402(d), (e), (l).

[7] The Act defines "material" as "matter of any kind or description, including, but not limited to, dredged material;" "dumping" as the "disposition of material;" and "ocean waters" as "those waters of the open seas lying seaward of the base line from which the territorial sea is measured." 33 U.S.C. § 1402(b), (c), (f).

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

[9] The Secretary of the Army has delegated his authority to issue permits under the MPRSA to the "Chief of Engineers and his authorized representatives." 33 C.F.R. § 325.8(a).

Additionally, when undertaking its own construction activities, the Act authorizes the COE to bypass the permit requirement:

> In connection with Federal projects[10] involving dredged material, the Secretary may, *in lieu of the permit procedure*, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under subsections (a), (b), (c), and (d) of this section [1413] and section 1414(a) and (d) of this title.[11]

33 U.S.C. § 1413(e) (emphasis added). *See also* 33 C.F.R. § 335.2 (noting the COE's authority to issue regulations in lieu of permits for Federal projects and that the COE does not issue permits to itself). *Cf. Nat'l Wildlife Fed'n*, 629 F.2d at 121 (noting EPA promulgates the criteria that both it and COE use to evaluate MPRSA permit applications).

Despite the bifurcation, the Act mandates that the COE seek EPA's concurrence before it issues a permit, allows EPA to decline or "concur (with or without conditions)" to the proposed permit, and provides that EPA's "determination shall prevail." 33 U.S.C. § 1413(c); 33 C.F.R. § 320.2(g) ("[T]he Administrator can prevent the issuance of a permit under this authority if he finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas."). If EPA concurs with conditions, the COE is obliged to require compliance with such conditions in the permit it issues. 33 U.S.C. § 1413(c)(3), (5).

The Act also grants EPA exclusive authority to designate ocean dump sites and time periods for dumping. 33 U.S.C. § 1412(c). In the case of each dredged material disposal site specifically, "the Administrator, in conjunction with the Secretary," is directed to "develop a site management plan." 33 U.S.C. § 1412(c)(3). These plans are required to provide, among other things, a program for site monitoring and "special management conditions or practices to be

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[10] A " 'Federal project' means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to section 404 of the Clean Water Act, or section 103 of the MPRSA." 33 C.F.R. § 327.3(c). *See also* 33 C.F.R. § 203.15 (defining a Federal project as a "project constructed by the Corps, and subsequently turned over to a local sponsor for operations and maintenance responsibility. This definition also includes any project specifically designated as a Federal project by an Act of Congress.").

[11] Subsections (a)-(d) of section 1413 relate to the Secretary's authority to issue permits for the transport and dumping into the ocean of dredged material. They require that the Secretary provide notice and an opportunity for a public hearing and make certain determinations before issuing such a permit (§1413(a)); that in making such determination, the Secretary use the same criteria EPA uses for its permits as well as make certain independent evaluations such as the effect of permit denial on navigation, development, and commerce, and consider other possible methods of disposal (§1413(b)); that the Secretary seek the EPA Administrator's concurrence, and if granted with conditions, the issued "permit shall include such conditions" (§1413(c)); and that the Secretary seek a waiver from EPA if the dredged material cannot be dumped consistent with EPA's criteria relating to its own permits (§1413(d)). Section 1414(a) and (b) establish the technical information to be designated in an issued permit, including "such requirements, limitations, or conditions as are necessary to assure consistency with any site management plan approved pursuant to section 1412(c) of this title."

implemented at each site that are necessary for protection of the environment." 33 U.S.C. § 1412(c)(3).

The MPRSA also gives EPA exclusive authority to engage in civil penalty enforcement of its provisions, providing that "[a]ny person who violates any provision of this title, or of the regulations promulgated under this title, or a permit issued under this title shall be liable to a civil penalty of not more than $50,000 for each violation to be assessed by the [EPA] Administrator." 33 U.S.C. § 1415(a) (1972).[12]

Finally, the Act authorizes both the COE and EPA to issue regulations to carry out their respective responsibilities and authorities. 33 U.S.C. § 1418. The COE has issued regulations to implement the Act, including the "in lieu of" provision in 33 U.S.C. § 1413(e). *See* 33 C.F.R. Parts 324-325, 335-338. Consequently, the "in lieu of" regulations provide for the same public notice, state coordination, preparation of environmental impact statements, statements of findings and records of decisions, reporting to high echelons, and supervision to assure compliance, as required of permits issued under the Act. 33 C.F.R. § 337.1-337.4, 337.6, 337.8, 337.10. *See also* 33 U.S.C. §§ 1413(a)-(d), 1414(a), (d).

EPA has also issued regulations implementing the Act. *See* 40 C.F.R. Parts 220-230. In its regulations, EPA defines a "Dredged Material Permit" as meaning both "a permit issued by the Corps of Engineers under section [1413] of the Act [ ] and any Federal projects reviewed under section [1413(e)] of the Act [ ]." 40 C.F.R. § 220.2.[13] *See generally* 40 C.F.R. Part 225 (EPA regulations for COE permits). EPA also designated ocean dumping sites by regulation, including those for dredged material, and established restrictions on their use. 40 C.F.R. § 228.15.

IV. <u>THE COMPLAINT</u>

The Complaint seeks imposition of a civil penalty "not to exceed $75,000" for each of the ninety-five (95) times Respondent allegedly violated the MPRSA, its regulations, or a permit issued thereunder, via the "unauthorized transportation and discharge of material into the ocean." Compl. ¶¶2, 31. As background, EPA explains that it designated a one square nautical mile site approximately 4.7 miles offshore of Miami, Florida as an "Ocean Dredge Material Disposal Site" ("Site") in accordance with MPRSA section 1412(c)(1) and 40 C.F.R. § 228.15(h)(19). Compl. ¶¶ 6, 7, 13. Further, as provided by the Act, EPA in cooperation with COE developed a Site Management and Monitoring Plan ("SMMP") for the Site, which was revised in 2008, with an addendum added on September 26, 2011. Compl. ¶¶6, 14. On August 15, 2011, under

[12] The penalty amount has increased to a maximum of $75,000 per violation occurring after December 6, 2013. 28 U.S.C. § 2461. Both the EPA and COE, "as the case may be," are also authorized to revoke or suspend a permit. 33 U.S.C. § 1415(f).

[13] This regulation references two others, 33 C.F.R. § 209.120 and 33 C.F.R. § 209.145, which are no longer in effect. It appears they were enacted in the early 1970s and subsequently superseded by other regulations enacted under the MPRSA and the Clean Water Act, 33 U.S.C. §1344. *See, e.g.*, 33 C.F.R. § 323.3 (defining discharges of dredged material as those requiring COE permits) and 33 C.F.R. § 323.4(d) (noting Federal projects are exempt from permit requirements).

MPRSA section 1413, the COE submitted a "103 Evaluation Report" requesting EPA's concurrence on disposal at the Site of dredged material from new work and maintenance during Phase 3 of its Miami Harbor Construction Dredging Project ("Phase 3"). Compl. ¶ 15. Phase 3 was a Federal project with a Local Sponsor, the Port of Miami, and consisted of construction dredging and improvements in navigable waters of the United States, including deepening, widening, and modifying cuts, basins, channel, and berthing areas at the Miami Port. Compl. ¶ 16.

On December 29, 2011, EPA gave its preliminary conditional concurrence to the use of the Site for the COE's transport to and disposal of dredged material from Phase 3. Compl. ¶ 17. This concurrence was conditioned upon the inclusion of implementation of the SMMP in any contract between COE and the party selected to complete Phase 3. Compl. ¶ 17. Subsequently, COE submitted additional information to EPA, including draft contract provisions, and based on this information, EPA issued to the COE an unconditional concurrence letter on June 11, 2012. Compl. ¶ 17. Thereafter, the COE modified an existing permit, SAJ-2006-06547 (IP-MLC), that it had issued to the local sponsor, the Port of Miami ("Port Permit"), allowing for increased dredge depth at certain berthing areas on Port property with dredge disposal at the Site. Compl. ¶ 18.

In regard to Respondent, EPA alleges that on May 15, 2013, Respondent entered into a contract (# W912EP-13-C-0015) with the COE to transport by vessel dredged material from the entirety of the Phase 3 Federal project, including work on Port-owned berthing areas, with disposal at the Site. Compl. ¶ 19. The contract required Respondent to comply with EPA's concurrence letters and the SMMP during its work. Compl. ¶ 19. Thereafter, based upon the need for additional work, EPA twice extended its concurrence in six-month intervals, on December 19, 2014, and June 5, 2015. Compl. ¶ 20. By virtue of the foregoing, EPA alleges that Respondent performed its work under a Federal project that was governed by a "Dredged Material Permit" as defined in 40 C.F.R. § 220.2(h), the terms and conditions of which were contained in the 103 Evaluation Report, SMMP, and its 103 Concurrence Letters. Compl. ¶¶ 24-26. As to the violations, EPA claims that in carrying out its work, on 95 occasions between December 16, 2013, and July 12, 2015, Respondent acted inconsistently with the Dredged Material Permit and did not comply with the SMMP's conditions, thereby violating MPRSA section 1411, its implementing regulation at 40 C.F.R. 228.15(h)(19), and subjecting it to penalties under section 1415. Compl. ¶¶ 27-30. The incidents of violation involved leakage during transport, exiting the Site with open doors, disposing of dredged material outside of the Site release zone, not complying with reporting requirements, and wrongfully transiting the Florida Keys Particularly Sensitive Sea Area. Compl. ¶ 30.

V. <u>RESPONDENT'S MOTION</u>

In its Motion, Respondent acknowledges the truth of many of the facts underlying the Complaint's allegations:

1. The dredging activities at issue were part of a Federal construction project authorized by Congress to be carried out by the COE, with the Port of Miami as the local sponsor. Mot. at

1-2 (citing Water Resources Development Act of 2007, Pub. L. No. 110-114, § 1001(17), 121 Stat. 1052 (Nov. 8, 2007)).

2. In 2011, EPA concurred with the COE's use of the Miami Site for dumping of the dredged material, extending its concurrence in 2014 and 2015. Mot. at 3.

3. The Site's original SMMP was issued in 1996, issued anew in 2008, and revised in 2011. Mot. at 3 (citing 61 Fed. Reg. 2941, 2944 (Jan. 30, 1996)).

4. While the COE issued a dredging permit in July 2012 to the Port of Miami (COE Permit # SAJ-2006-06547) for the locally owned berthing areas, in actuality, the COE itself undertook dredging of the entire project, including the locally owned berthing areas, with financial contribution from state and local governments. Mot. at 2, 3.

5. The COE contracted with Respondent to perform the dredging, which it did from November 2013 to September 2015, undertaking 4,200 trips and transporting 5.7 million cubic yards of material. Mot. at 2.

6. Respondent's COE contract contained provisions to minimize the environmental impact of the dredging/disposal work (as did the Port of Miami permit), consistent with COE regulations. Mot. at 3-4.

7. Upon completion of the project, the COE concluded Respondent had done an "excellent job," Respondent alleges, "but deducted payment for scow trips where the [COE] determined there had been breaches of the contract specifications." Mot. at 2.

Respondent then offers two legal arguments for dismissing the Complaint on the basis of failure to state a claim.[14] Mot. at 1. First, that this enforcement action is beyond EPA's limited penalty authority under the Act, and more particularly, that the MPSRA "does not allow civil penalties based upon alleged violations of a contract or plan, and leaves supervision of [COE] contractors to the [COE]." Mot. at 1. Alternatively, Respondent asserts, "[e]ven if the MPRSA did allow for civil penalties based on alleged violations of [the SMMP], the plan in this case is unenforceable because it was promulgated in violation of the Administrative Procedure Act [APA]." Mot. at 1.

a. <u>Respondent's Arguments in Support of EPA's Limited Penalty Authority</u>

Citing the MPRSA's structure, legislative history, and implementing regulations, Respondent's Motion begins by broadly arguing that EPA's enforcement authority is limited to

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[14] Respondent submitted with its Motion to Dismiss three exhibits: a ROD for the Miami Harbor, the 2008 SMMP for the Miami Site, and 1995 SMMP for the Site. These documents were neither filed with the Complaint nor incorporated into it by reference. As such, this Tribunal has the discretion to consider the Motion as having been converted into a motion for summary judgment. *See, e.g.*, *Spears v. Arizona Bd. of Regents*, 372 F. Supp. 3d 893, 908 (D. Ariz. 2019). In this instance, however, the Tribunal chooses not to exercise such discretion because the exhibits do not appear relevant or determinative to the outcome of this Motion. *Id.* (declining to convert a motion to dismiss into a motion for summary judgment while considering documents outside of the complaint).

permitted project violations and that it has no authority to assess penalties in regard to non-permitted Federal projects. Mot. at 5. Because this action is not based upon a permitted project, the Complaint fails to state a claim, Respondent concludes. Mot. at 6.

In support, Respondent notes that under MPRSA section 1413, the COE is given exclusive authority to issue permits for dredged material or to act "in lieu of the permit procedure" for its own Federal dredging projects. Mot. at 6 (citing and quoting 33 U.S.C. § 1413(a), (e)). "EPA's limited [or non-existent] permitting role [in Federal projects] is matched by limited powers of enforcement," Respondent submits, alleging that nowhere does the Act state that EPA can assess penalties against COE or its contractors for violating a COE contract or SMMP or any provision contained therein. Mot. at 6. It suggests that if EPA could impose a penalty under such circumstances, "the statutory exemption from the permit procedure on those projects would serve no purpose." Mot. at 6 (citing *Univ. of Texas Southwestern Medical Ctr. Nassar*, 570 U.S. 338, 353 (2013)). As further statutory support for EPA's limited penalty authority, Respondent contrasts the grounds for a penalty assessment by EPA in MPRSA's section 1415*(a)* (for violations of an MPRSA's "provision," "regulations" or "permit"), to the grounds for citizens actions to obtain injunctive relief in section 1415(*g)(1)* (violations of the Act's "prohibitions," "limitations" or "criteria"). Mot. at 7. Respondent suggests the difference in language used by Congress is presumed to have different meanings, and in this case it means that not all "prohibitions, limitations or criteria" are "contained in permits." Mot. at 7 (citing, inter alia, *Henson v. Santander Consumer USA, Inc*., 137 S.Ct. 1718, 1723 (2017)).

Respondent further asserts that the Act's legislative history supports its position that EPA has limited penalty authority, advising that the original legislation passed by the Senate excluded all "Federal organizations, employees and agents" from the definition of "persons" under the Act, thereby exempting them both from EPA permits and penalties. Mot. at 7-8 (citing Letter from EPA Administrator William Ruckelshaus to Senate President Spiro T. Agnew (1971), *reprinted in* 1972 U.S.C.C.A.N. 4234, 4255; S. REP. NO. 92-451 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249). The House-passed bill had no such exclusion, Respondent advises, and further "the respective roles of EPA and the Corps became an 'extremely complex and controversial question' that needed to be resolved in the House-Senate conference." Mot. at 8 (quoting H.R. REP. NO. 92-1546 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 4264, 4277-78). The question was resolved by Congress adopting the House's definition of "person," which included federal agencies, but gave the COE authority to issue permits for dredged material and also allowed the Corps to proceed "in lieu of the permit procedure" on its own projects, Respondent notes. Mot. at 8. "The effect of this compromise was to restrict EPA's ability to control the disposal of dredged material or to assess civil penalties against the Corps and its contractors, which was the original goal of the Nixon Administration and the Senate," Respondent suggests. Mot. at 8 (citing *cf.* S. REP. NO. 93-726, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2792, 2793 ("[p]enalties are provided for violation of the permit program")).[15]

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[15] The Tribunal accessed this Senate Report at:
https://heinonline.org/HOL/Page?men_tab=srchresults&handle=hein.leghis/mprsaa0001&id=32&size=2&collection=leghis&terms=Penalties%20are%20provided%20for&termtype=phrase&set_as_cursor=

Moreover, Respondent claims that EPA's own regulations reflect its limited penalty authority, suggesting that they allow EPA only to "initiate and carry out enforcement activities" as to "permits," defined as those issued "under section [1412] of the Act" for non-dredged materials. Mot. at 8 (citing 40 C.F.R. §§ 220.3, 220.4(a), 220.4(b)). The regulations, therefore, do not authorize EPA to bring enforcement actions where COE proceeds "in lieu of the permit procedure," Respondent surmises. Mot. at 8-9 (citing COE regulation 33 C.F.R. § 326.4). In addition, Respondent also cites the EPA Administrator's delegation of authority to the Region 4 Regional Administrator to initiate enforcement actions as to "special permits" issued by EPA under MPRSA section 1412 as defined by 40 C.F.R. § 220.4. Mot. at 9.

Lastly, Respondent asserts that limiting EPA's penalty authority as to Federal projects "makes good policy sense," because otherwise EPA would have a supervisory role over COE contractors and improperly interfere with COE management of those contractors. Mot. at 9 (citing *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 3 (1972) (in case of contract dispute, "absent fraud or bad faith, the federal [contracting] agency's settlement under the disputes clause is binding on the Government" despite disagreement by other agencies)). The COE has numerous mechanisms to enforce the MPRSA against its contractors who "only act at the direction of the Corps," Respondent advises. Mot. at 9. For example, it notes, the COE can "terminate, deduct payment from, or otherwise take action against its contractors pursuant to standard contract terms." Mot. at 9. This arrangement avoids the risk of inconsistent treatment of contractors by different federal agencies, which federal law seeks to avoid, Respondent proclaims. Mot. at 9 (citing *Paradyne Corp. v. U.S. Dept. of Justice*, 647 F. Supp. 1228, 1237 (D.D.C. 1986) (government acted arbitrarily and capriciously where one agency renewed a contract and another sought civil and criminal penalties against contractor for entering into the contract)).

Diving down with more granularity, Respondent argues that contract violations cannot be the basis of a civil penalty, noting that the MPRSA only authorizes civil penalties for violations of (1) a "permit," (2) "any provision of this subchapter," or (3) "regulations under this subchapter." Mot. at 10 (quoting 33 U.S.C. § 1415(a)). Respondent declares that its contract with COE is not a "permit." Rather, argues Respondent, it represents work undertaken in "lieu of the permit procedure," i.e., "in place of" or "instead of," as authorized by 33 U.S.C. § 1413(e), because the COE does not issue permits to itself. Mot. at 10 (citing, inter alia, 33 C.F.R. § 324.3(b); COE Regulatory Guidance Letter (RGL), 88-09 (July 21, 1988), RGL 05-06 (Dec. 7, 2005); Black's Law Dictionary (11th ed. 2019)). The only permit issued in this case was for the local sponsor's berthing areas, it reiterates. Mot. at 10. Further, Respondent asserts that EPA's regulatory definition of a "dredged material permit," which includes both COE permitted projects and other "federal projects under section [1413](e)," cannot turn such a contract into a permit because such language is inconsistent with the "in lieu of" language in the statute. Mot. at 11-12 (quoting 40 C.F.R. § 220.2(h) and citing, inter alia, *Ctr for Bio. Diversity v. COE*, 2019 WL 5690619, at *6 (11th Cir. Nov. 4, 2019) ("regulations cannot contradict their animating statutes or manufacture additional agency power")). "Properly interpreted," Respondent suggests, the regulation simply identifies projects subject to coordination between EPA and COE, including that EPA will "review[]" both permitted and Federal projects with regard to dumping sites. Mot. at 12-13.

Moreover, breach of the COE contract is not violation of any statutory provision itself, as there is no prohibition in the MPRSA on violating a COE contract, Respondent declares. Mot. at 13. It notes the one section of the MPRSA cited in the Complaint, 33 U.S.C. § 1411(a), only prohibits transportation except as authorized by a "permit," and here Respondent was transporting consistent with its COE contract "in lieu of" a permit. Mot. at 13-14.

Similarly, a breach of the COE contract is not a violation of MPRSA regulations, as those regulations also do not explicitly prohibit such breaches. Mot. at 14. Further, while the Act's section 1413(e) authorizes the COE to "issue regulations which will require application to such [federal] projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits," Respondent notes that the applicable COE regulation, 33 C.F.R. § 337.10, governing "Supervision of Federal Projects," only "places obligations on [COE] officials, not private contractors" regarding the application of the criteria.[16] Mot. at 14 (quoting 33 U.S.C. § 1413(e) and 33 C.F.R. § 337.10 and citing *In re Katrina Canal Breaches Consolidated Litigation*, No. 06-4066, 2007 WL 763742, at *5 (E.D. La. 2007) ("The regulations are primarily designed so that the Corps of Engineers will follow the appropriate practices and procedures . . .These regulations are guidelines for the Corps of Engineers to follow and do not pertain to the Dredging Defendants.")). Even if the regulation did apply to it, Respondent states, the only obligations it would have would be to comply with the SOF and ROD, documents that are issued by the COE at the end of a project and that are not bases for the claims made in the Complaint. Mot. at 15 (citing 33 C.F.R. § 337.6; Mot. Ex. 1 (May 2006 Port of Miami Project ROD)).

Similarly, Respondent explains that violations of the SMMP also do not fall within any of the three categories of violations subject to penalties under 33 U.S.C. § 1415(a). Mot. at 15. A site management plan is not a "permit" issued under sections 1412(a) or 1413(a) but is rather the separately labeled "plan" issued by EPA under 33 U.S.C. § 1412(c)(3). Mot. at 16. Further, violations of a site plan are not independent MPRSA violations, as there are no statutory prohibitions on site plan violations, but the Act provides that "permits should include conditions 'as are necessary to ensure consistency with any site management plan.'" Mot. at 16 (quoting 33 U.S.C. § 1414(a)(4)). If site plans were independently enforceable, Respondent suggests, there would be no need to incorporate their terms into a permit. Mot. at 16. It further reiterates that injunctive remedies are available more broadly for violations of any other "prohibition, limitation [or] criterion," but this language is not included in the civil penalty statute which refers to "permits." Mot. at 17 (quoting 33 U.S.C. § 1415(g)(1)).

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[16]That regulation provides:

> District engineers should assure that dredged or fill material disposal activities are conducted in conformance with current plans and description of the project as expressed in the SOF [Statement of Findings] or ROD [Record of Decision]. Conditions and/or limitations required by a state (e.g., water quality certification), as identified through the coordination process, should be included in project specifications. Contracting officers should assure that contractors are aware of their responsibility for compliance with the terms and conditions of state certifications and other conditions expressed in the SOF or ROD.

33 C.F.R. § 337.10 (formerly codified at 33 C.F.R. § 209.145).

Violations of a site plan also do not constitute violations of the applicable regulations, according to Respondent. Nothing in COE regulations prohibit violations of a site plan, Respondent claims, noting further that the applicable COE regulation applies only to COE officials and that the EPA has no authority to issue regulations covering Federal dredging projects. Mot. at 17-18. In any case, the EPA regulations cited in the Complaint, 40 C.F.R. Part 228, as requiring compliance with the SMMP are taken out of context, Respondent argues. Mot. at 18 (citing Compl. ¶¶ 7, 29, 30). That Part, including 40 C.F.R. § 228.15(h)(19)(vi) – which states "Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan" – is explicitly limited to "dredged material disposal sites only as specified in § 228.4(e), 228.9, and 228.12." Mot. at 18 (citing 40 C.F.R. § 228.1). Those sections, Respondent advises, relate only to EPA's "designation" and "monitoring" of disposal sites.[17] Mot. at 18. The provision, 40 C.F.R. § 228.15(h)(19)(vi), it notes, does not cite regulatory sections 40 C.F.R. §§ 228.7, 228.8 or 228.15, which relate to disposal site use including times and rate of disposal. Mot. at 18-19. Thus, the SMMP requirement of Part 228 is limited to EPA designation and monitoring only.

In any case, Respondent declares, the SMMP is not a "self-executing set of rules" governing COE contractors on Federal dredging projects, but a "planning document," and "[p]lanning documents do not typically create enforceable obligations absent a clear legal requirement." Mot. at 19 (citing *Montgomery Envtl. Coal v. Costle*, 646 F.2d 568, 594 (D.C. Cir. 1980). Rather, EPA's MPRSA regulations provide that the general requirements of the site plan can only become the legal obligations of an individual party via conditions set forth in a permit. Mot. at 19. Respondent notes that in this case, the Miami SMMP limits EPA to designating sites and makes the COE responsible for issuing dredging permits and "regulating site use." Mot. at 19-20 (citing Mot. Ex. 2 (Miami Site Plan)). As such, to impose the SMMP terms on Respondent, the COE explicitly would have to incorporate them in a permit issued to Respondent or a contract, in the case of a project undertaken in lieu of the permit process. Mot at 19.

b. Respondent's Arguments that the SMMP's Promulgation Violated the APA

Respondent alternatively argues that the claims in the Complaint based upon the SMMP should be dismissed on the basis that the SMMP was promulgated in violation of the Administrative Procedure Act (APA). Mot. at 20 (citing 5 U.S.C. § 553). Specifically, it claims that EPA has characterized the 2008 SMMP and its 2011 revision as legislative or "substantive rules," which it may directly enforce and obtain civil penalties for violation. Mot. at 21-22. However, based on its own search of the Federal Register, Respondent claims that neither the 2008 Site Plan nor its 2011 revision ever went through the requisite APA notice and comment process to give it the "force and effect of law." Mot. at 20-21. Further, according to Respondent, the Site Plan and its revision are also unenforceable "for the related reason" that the Agency failed to obtain the necessary approval of the Director of the Federal Register to incorporate the documents into the Code of Federal Regulations "by reference" as required by 5 U.S.C. § 552(a)(1). Mot. at 22. It notes that EPA referenced the initial 1995 Miami Site Plan in

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[17] Respondent advises that section 40 C.F.R. § 228.12 is "reserved." Mot. at 18.

its published regulation (40 C.F.R. § 228.15(h)(19)(vi)) designating the Miami disposal site. Mot. at 22 (citing 61 Fed. Reg. 2941, 2945-46 (Jan. 30, 1996)). However, it suggests there is no evidence that EPA obtained the Director's approval for such incorporation by reference in regard to the 1996 publication and/or that the incorporation of the subsequent versions of the plan in the regulation would violate the provision stating that "'[f]uture amendments of the publication [incorporated by reference] are not included' in a regulation." Mot. at 22-23 (quoting 1 C.F.R. §§ 51.1(f), 51.7(a)(1)). Therefore, Respondent states the SMMP is unenforceable on procedural as well as substantive grounds. Mot. at 23.

VI. COMPLAINANT'S RESPONSE

a. EPA's Arguments in Response to Claim of its Limited Penalty Authority

In its lengthy Response to the Motion, EPA takes the position that under the MPRSA "a Federal project operates as the functional equivalent of a permit and is required to comply with the same enforceable conditions as a non-federal project operating under a [COE]-issued permit, and this includes complying with any conditions set forth in EPA's concurrence letters, the SMMP, and section 101(a) of the MPRSA." Resp. at 7.

In support, EPA's Response begins by implicitly denying Respondent's assertion that the legislative intent and/or statutory language of the MPRSA restricts the Agency's role in Federal projects to merely designating dredge disposal sites. Resp. at 2-4 (citing 33 U.S.C. § 1415(a)). EPA reiterates that Congress found that unregulated dumping endangers human health and the environment and enacted the MPRSA to strictly regulate transportation and dumping into ocean waters. Resp. at 2 (citing 33 U.S.C. §§ 1401(b), (c), 1415(a)). Further, EPA asserts that the Act accomplishes this goal by explicitly prohibiting transport for the purposes of dumping without a permit issued pursuant to it. Resp. at 2-3 (citing 33 U.S.C. § 1411(a)). While acknowledging that the Secretary of the Army is authorized to issue regulations in regard to Federal projects "in lieu of the permit procedure," EPA stresses that the Act mandates that those regulations "must apply the same criteria, evaluation factors, procedures and requirements" to Federal projects as is applicable to permits. Resp. at 3 (citing 33 U.S.C. § 1413(e)). Thus, the "two scenarios have matching requirements" and a "federal project acts as the functional equivalent of a permit," EPA concludes. Resp. at 7. Therefore, EPA explains, its regulation, 40 C.F.R. § 220.2(h), properly defines the term "dredged material permit" as including Federal projects conducted pursuant to COE regulations. Resp. at 3, 7. *See also* Resp. at 2, n.1 ("Under EPA regulations, the term 'Dredged Material Permit' includes not only a [COE]-issued permit as that term is traditionally understood, but also any 'Federal project' reviewed under MPRSA section [1413](e)."); Resp. at 7 (EPA asserts that contrary to Respondent's position, its regulation "does not contradict," "but clarifies" the statute). As such, "Respondent's activities are subject to Section [1413] of the MPRSA," EPA concludes. Resp. at 3. Because EPA, and only EPA, may impose civil penalties for violations of the MPRSA, its regulations, and/or permits issued under it, EPA may impose penalties upon Respondent, the Agency implies. Resp. at 3 (citing 33 U.S.C. § 1415(a)). *See also* Resp. at 13 (asserting that COE may possess contract remedies but only EPA can impose civil penalties under the MPRSA).

Next, using as a springboard its proposition of "functional equivalency," EPA argues that

Respondent was obliged to comply with the Miami Site SMMP because all permits, including dredged material permits issued under section 1413, are required by section 1414(a) to include "such requirements, limitations, or conditions as are necessary to assure consistency with any [SMMP]." Resp. at 4 (citing 33 U.S.C. §§ 1413(e), 1414(a); 33 C.F.R. § 335.2).[18] To the extent that Respondent transported dredged material for disposal in a manner inconsistent with the SMMP, the Agency claims, "it was unauthorized under section [1413] of the MPRSA and in violation of section [1411]," and "EPA has a right to relief because Section [1415] authorizes EPA to assess civil penalties for violations of the MPRSA." Resp. at 5-6. In connection with this point, EPA clarifies that while it cited the contract between 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.[19] Resp. at 5.

Additionally, in a fairly convoluted argument, EPA offers a second basis for Respondent being obliged to comply with the SMMP. Resp. at 6. Specifically, EPA reasons that subsection (e) of section 1413 provides that Federal projects are subject to EPA's concurrence process set out in subsection (c). Resp. at 6 (citing 33 U.S.C. § 1413(c), (e)). Subsection 1413(c), in turn, "as reinforced in 33 C.F.R. § 336.2 grants EPA the authority to concur (entirely or with conditions) or decline to concur with the [COE] on compliance with criteria, conditions, and restrictions relating to the environmental impacts of permits or projects," and if EPA concurs with conditions "that the permit or project include such conditions." Resp. at 6 (citing 33 U.S.C. § 1413(c)(3)). In this case, prior to any permit or contract being issued, EPA initially concurred with COE's request for disposal at the Miami site but conditioned its final concurrence on the "implementation through contract conditions of the requirements of the Miami [Site] SMMP." Resp. at 6 (quoting Attach. 2). After reviewing the proposed contract provisions for such compliance, EPA "fully concurred." Resp. at 6 (citing Attach. 3). Thereafter, COE contracted with Respondent, so when Respondent transported dredged material in a manner inconsistent with the SMMP, it was in violation of MPRSA sections 1413 and 1411, and thus subject to

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[18] This COE regulation simply reiterates the authority granted to the Secretary by the MPRSA. In part, it states –

> Section 103(e) of the [MPRSA] provides that the Secretary of the Army may, in lieu of permit procedures, issue regulations for Federal projects involving the transportation of dredged material for ocean disposal which require the application of the same criteria, procedures, and requirements which apply to the issuance of permits. Similarly, the Corps does not issue itself a CWA [Clean Water Act of 1977] permit to authorize Corps discharges of dredged material or fill material into U.S. waters, but does apply the [CWA §] 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.

33 C.F.R. § 335.2. EPA asserts the "'in lieu of' provision is not intended to shield entities engaging in ocean dumping . . . as part of a federal project from the compliance obligations under the MPRSA." Resp. at 5.

[19] EPA also indicates that in this case, COE solicited bids for the entire project including that portion as to which it had granted the Port of Miami a permit. Resp. at 4. It implies that the COE offer of solicitation required Respondent to agree to comply with the SMMP, a term which it accepted in its bid. Resp. at 4 (citing Attach. 1).

penalties under section 1415, EPA reasons.[20] Resp. at 7 (citing 33 U.S.C. § 1415).

As a third basis for Respondent being bound to comply with the SMMP, EPA reiterates its argument that Federal projects are equivalent to permits under the Act and must comply with sections 1414(a) and 1413(c). Resp. at 7-8. Thus, when Respondent transported material in a manner inconsistent with the SMMP, it was unauthorized under section 1413 and in violation of section 1411, and subject to a penalty action brought by EPA. Resp. at 8 (citing 33 U.S.C. § 1415).

In addition to the statutory provisions, EPA argues that Respondent was also required by regulation to comply with the SMMP. Resp. at 8. It notes that the MPRSA gave both COE and EPA authority to issue implementing regulations. Resp. at 8 (citing 33 U.S.C. § 1418). EPA regulation 40 C.F.R. § 228.15(h)(19) set forth SMMP compliance as a condition for disposal at the Miami site.[21] Resp. at 8. As such, when Respondent transported dredged material for disposal at the Miami site inconsistent with the SMMP, it violated the regulation, which is in turn a violation of the statute, and subjected itself to penalties. Resp. at 8.

EPA also claims that a COE contract with a third-party for a Federal project under section 1413(e) "serves as a regulation for the federal project, and violations of the terms of the contract are violations of [MPRSA section 1411(a)] and subject to penalties under section [1415]." Resp. at 9. In support, EPA states that "rule and regulation have the same meaning," and rule means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Resp. at 9 (citing and quoting 1 U.S.C. § 1.1, 5 U.S.C. § 551). As Respondent's COE contract specified the terms of the dredging, the "contract served as the regulation," and that contract required compliance with EPA's section 103 Concurrence Letters and the SMMP.[22] Resp. at 9 (citing Attach. 5). Thus, when Respondent acted inconsistent with the SMMP as required by the contract, it violated a MPRSA "regulation" and becomes liable for penalties under section 1415(a). Resp. at 9-10 (citing 33 U.S.C. § 1415(a)).

EPA's final argument that its action is well-founded is simply that the Act prohibits the unauthorized transport of dredged material for disposal. Resp. at 10 (citing 33 U.S.C. § 1411(a)). "If Respondent argues that it has no permit or is not subject to any functionally-equivalent form of authorization, then each transit of dredged material for the purpose of

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[20] In its Response, EPA notes that due to concerns with reports of leakage from disposal vessels, on December 19, 2014, the Agency conditioned its granting to COE of an extension of its section 1413(c) concurrence "on compliance with all the requirement of the Contract Specifications ...". Resp. at 7 (citing Attach. 4). This appears to be the basis for its claim that Respondent was subject to the terms of such Agency concurrences.

[21] This regulation, 40 C.F.R. § 228.15(h)(19)(vi), lists "dumping sites designated on a final basis" by EPA. It identifies as one "Restriction" on the use of the Miami disposal site that "Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan."

[22] EPA advises that under the APA, contracts are exempt from the notice requirements. Resp. at 9 (citing 5 U.S.C. § 553(a)(2)).

dumping is without a permit or authorization and is a violation of Section 101 of the MPRSA for which EPA can assess civil penalties pursuant to Section 105(a)," EPA concludes. Resp. at 10 (citing 33 U.S.C. § 1415(a)).

At the very end of its Response, EPA adds a few general points pushing back against Respondent's claim that the COE regulations issued pursuant to the "in lieu of" language in section 1413(e) recognizes that Federal projects are removed from the MPRSA requirements, suggesting such claim "diminishes the purpose of the statute and creates inequitable enforcement."[23] Resp. at 13.

First, it asserts that Federal contractors are required to comply with environmental statutes. Resp. at 14. It notes that COE "dredging projects are large and complex and touch many environmental statutes." Resp. at 15. It points out that COE's regulation, 33 C.F.R. § 335.1, issued pursuant to the MPRSA and the Clean Water Act, 33 U.S.C. §§ 1251-1387, states that its purpose is to ensure that federal projects comply with those environmental statutes governing the transportation and disposal of dredged material. Resp. at 13-14. In addition to the MPRSA and the Clean Water Act, the Agency advises that dredging activities are also covered by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Under COE regulations issued pursuant to NEPA, the COE is obliged to conduct an environmental assessment or environmental impact statement where appropriate and issue Statement of Findings ("SOF") or a Record of Decision ("ROD"). Resp. at 14. EPA suggests that under Respondent's "in lieu of" theory, if these requirements were not included in the Navigation Study, which long predated the dredging project at issue here, they would not exist. Resp. at 14.

Second, federal contractors are not immune from EPA's penalty authority, EPA advises. Resp. at 15. The Agency notes that the Act allows it to assess penalties against "any person," which includes another Federal Agency or its contractors. Resp. at 15 (citing 33 U.S.C. §§ 1411, 1402(e), 1415). For example, EPA can assess penalties against other agencies to whom the COE issues dredging permits in regard to non-Federal projects under section 1413. Resp. at 15 (citing 33 C.F.R. § 324.3). It can also assess penalties against those other federal agencies to whom EPA itself has issued permits under section 1412. Resp. at 15 (citing 33 U.S.C. §§ 1412, 1415). It suggests that to hold COE immune from the Act's penalties but not other agencies would be "inequitable." Resp. at 15. Moreover, because EPA is the only agency which can impose penalties under the Act, there is no risk of "contradictory penalty actions against the same contractor." Resp. at 15. Finally, it reiterates that the omission in the final version of the MPRSA of proposed language excluding Federal agencies and their agents from civil penalties and no limiting language in section 1415 evidences the absence of any limitation on EPA's authority. Resp. at 15.

Third, EPA alleges that MPRSA's enforcement provisions themselves reinforce EPA's singular role in assessing penalties. Resp. at 16. In particular, it points out that the Coast Guard,

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[23] The Agency describes its civil penalty authority under the Act stating that is "broad, exclusive and not limited." Resp. at 13-14. It notes that while the COE may have contract remedies for violations, the Act gives it no authority to impose civil penalties. Resp. at 13, and n.7. EPA also states it does not have any evidence that COE deducted payments from Respondent for breach of contract specifications and/or that it concluded Respondent did an "excellent job ensuring compliance with environmental requirements," as alleged in the Motion. Resp. at 13, n.7.

which is authorized to conduct surveillance activities in support of compliance and enforcement under the Act, is required to provide the evidence it gathers only to EPA and the Attorney General and not to the COE. Resp. at 16 (citing 33 U.S.C. § 1417(c)).

Fourth, EPA suggests that Respondent incorrectly cites various regulations in support of its arguments. Resp. at 16-17. In particular, EPA points to 33 C.F.R. § 326.4, which Respondent suggests is evidence of COE's enforcement authority. Resp. at 16. EPA, however, states that that regulation covers only activities conducted pursuant to a COE permit, not Federal projects. Resp. at 16. The COE regulations covering federal projects are those at 33 C.F.R. §§ 335-338, it states. Resp at 16-17. Similarly, EPA argues that Respondent incorrectly cites 40 C.F.R. § 220.4 as evidence of EPA's limited penalty authority, when that regulation only addresses EPA's authority to issue permits. Resp. at 17.

b. <u>EPA's Arguments that the SMMP's Promulgation Did Not Violate the APA</u>

Rebutting Respondent's argument regarding rulemaking and procedural defects in regard to the SMMP's promulgation, EPA states that the MPRSA and/or APA only required that EPA/COE "provide an opportunity for public comment" in developing the SMMP, and it was not required to use the "traditional method for informal 'rulemaking'" of publishing notice of the document for comment in the Federal Register. Resp. at 10-11 (citing 33 U.S.C. § 1412(c)(3)). It compares the language regarding plan publication in § 1412(a) to that regarding permit publication in 1413(a), noting that the latter requires "notice and opportunity for public hearings." Resp. at 11 (citing 33 U.S.C. §§ 1412(a), 1413(a)). EPA also asserts that the statute has "multiple avenues for implementation of the SMMP," including (1) requiring that issued EPA and COE permits comply with it; and (2) allowing EPA to condition its concurrence on compliance, implying that publication of the plan was unnecessary. Resp. at 11 (citing 33 U.S.C. § 1413(a); Resp. Attach. 2). Furthermore, it argues opportunity for public comment was provided by EPA when it published the regulation requiring disposal at the Miami Site to comply with the "most recent approved SMMP" (i.e. the 2008 edition with 2011 revision) in the Federal Register and Code of Federal Regulations. Resp. at 11-12 (citing 40 C.F.R. § 228.15(h)(19); Resp. Attach. 7).

In any case, EPA asserts, Respondent had "actual notice" of the SMMP, which is sufficient under the APA. Resp. at 12 (citing 5 U.S.C. § 552(a)(1) (APA "expressly states that its notice requirements are met when 'a person has actual and timely notice' of a matter that otherwise is required to be published in the Federal Register.")). EPA notes that "public notice" was provided through publication of 40 C.F.R. § 228.15(h)(19) in the Federal Register and Code of Federal Regulations. Further, according to EPA, Respondent was directly and individually provided with "actual and timely notice" of its responsibility to comply with the SMMP through COE's bid solicitation, award, and Respondent's acceptance of the award. Resp. at 12 (citing Resp. Attachs. 5-7);[24] Mot. Ex. 2. As such, EPA states that "Respondent cannot reasonably assert that it cannot be 'required to resort to, or be adversely affected by' the terms and conditions that apply to transportation to and dumping at the Miami ODMDS as provided in the

[24] EPA advises in its Response that the Respondent's "technical approach" to the contract is CBI and "housed with the [COE] to prevent accidental release." Resp. at 12, n.5. As such, it does not include it as an attachment to its Response.

currently approved SMMP, which is the 2008 SMMP and the 2011 Revision." Resp. at 13 (citing *Stickland v. Flue-Cured Tobacco Co-op. Stabilization Corp*., 643 F. Supp. 310, 320-321 (D.S.C. 1986) ("plaintiff's actual notice of rebate program precludes them from complaining that the plan should have been published in the Federal Register")).

Finally, EPA offers a general policy argument to the effect that granting the motion and finding Respondent exempt from compliance with MPRSA sections 1411 or 1415 while performing a federal navigation project "would create inequitable results." Resp. at 17. In support, the Agency notes that had the Port of Miami hired Respondent to perform the Phase 3 work in accordance with the Port's own COE permit, or had the COE elected to directly issue Respondent a permit for such work, then EPA could clearly have penalized Respondent for permit violations. Resp. at 17. However, under Respondent's theory of the case, EPA could not, creating what EPA describes as "inequitable enforcement results for the same conduct." Resp. at 17-18. EPA further suggests that Respondent's theory also results in federal contractors on federal navigation projects not being "persons" subject to Section 1411, which makes it illegal to dump without a permit. Resp. at 18. For such contractors, "contract remedies would be the only deterrent to unfettered disposal," and "[t]his is counter to the purpose of MPRSA," EPA decrees. Resp. at 18.

VII. <u>RESPONDENT'S REPLY</u>

Respondent submitted a very lengthy Reply to Complainant's Response. However, the Reply merely reiterates Respondent's previously made arguments that, while it is not exempt from the requirements of the MPRSA, the statute does not authorize EPA to bring a civil penalty action against it as a COE contractor on a federal project. Reply at 2. Respondent suggests that EPA's Response is weak, noting in particular the lack of authorities offered by the Agency in support thereof. Reply at 1-5. Further, based upon the Response, Respondent states that it is now clear that EPA is not actually seeking to directly sanction it based upon either the Miami Port Permit (COE permit No. SAJ-2006-6547) or the provisions of its contract with COE, but nevertheless goes on to explain that the contract is not a "permit." Reply at 1, 5. In addition, Respondent notes the distinction between obligations and remedies, acknowledging its obligation to the COE to perform its contract and being subject to the remedies contained therein. Reply at 6. It takes particular umbrage at EPA's assertion that 40 C.F.R. § 220.2(h) merely "'clarifies' that a 'Federal project operates as a functional equivalent of a permit,'" stating that such an interpretation "would read Section 1413(e) out of existence." Reply at 7 (citing Resp. at 11-12). Respondent reiterates the belief that such regulation can be interpreted to apply to dredged material permits and ocean disposal sites, thereby preserving its validity. Reply at 7.

VIII. <u>RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY AND COMPLAINANT'S RESPONSE THERETO</u>

In its Notice of Supplemental Authority ("Notice"), Respondent directs this Tribunal to *United States v. Blankenship* in support of its argument that an alleged breach of the contract between itself and the COE gives rise only to contract based remedies and is not otherwise a violation of law that may be the basis of penalties imposed by EPA. Notice at 1 (citing 382 F.3d 1110 (11th Cir. 2004)). Respondent represents that in *Blankenship*, the Court held, in the context

of a criminal case, that "[i]t is not illegal for a party to breach a contract; a contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose." Reply at 1 (quoting *Blankenship*, 382 F.3d at 1133-34). As Respondent noted in its Reply, the Agency has stated that it is not seeking penalties based directly upon the COE contract.

In its Response to the Notice of Supplement Authority ("Notice Response"), Complainant points out that the 2004 *Blankenship* case was available at the time it filed its Reply in December of 2019. Notice Resp. at 1. Further, EPA argues that that case has no relevance here, noting the Court in that case spoke only to the issue of criminally convicting a contracting party of false statements, holding that "promises contained in a contract, between a contractor and a subcontractor are not 'false' even if either party never intended to follow through." Notice Resp. at 1-2. EPA points out that *Blankenship* does not address a contract's relevance to the MPRSA, APA, or the specific issue here of "the status of the Respondent as a 'person' transporting dredged material for the purpose of ocean disposal." Notice Resp. at 2. EPA reiterates that in this case it is seeking penalties based only upon "allegations that Respondent violated MPRSA, the regulations promulgated pursuant to MPRSA, and a permit issued pursuant to MPRSA." Notice Resp. at 2.

IX. DISCUSSION OF EPA'S PENALTY AUTHORITY

The threshold issue raised by the Motion is whether the Agency's civil penalty authority under the MPRSA extends to a dredging contractor whose transport work on a Federal project was authorized by COE regulations rather than by permit. As such, this case involves a matter of statutory interpretation. It also appears that this is a case of first impression as neither party has cited a decision directly on point, and this Tribunal has located none on its own.[25] Statutory interpretation follows a set of well-established rules. A tribunal begins with the language of the statute itself, and if it has a plain and unambiguous meaning with regard to the dispute at issue, the inquiry ends there. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citing, inter alia, *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997) (The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'")); *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984) (If the intent of Congress is clear from the plain language of the statute, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Microban Products Co.*, 11 E.A.D. 425, 446, 2004 WL 1658590, *17 (EAB 2004) (The language of the Act itself is the primary consideration in interpreting any statute).

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[25] It does appear, however, that this is *not* the first MPRSA penalty action instituted by EPA against a COE contractor or subcontractor, including the Respondent here, for violation of MPRSA § 1411(a) or 40 C.F.R. § 228.15. *See Great Lakes Dredge And Dock Co. LLC.*, MPRSA-04-2016-7500, 2019 WL 6533977 (EPA Sept. 29, 2016) (Administrative Consent Agreement and Final Penalty Order) (alleging violation of 33 U.S.C. § 1411(a)); *Northeast Dredging Equipment Company, LLC, Hillside, New Jersey*, MPRSA-02-2015-6001 *et seq.*, 2017 WL 11462439 (EPA Apr. 23, 2017) (Consent Agreement and Final Order) (alleging violation of 33 U.S.C. § 1411(a)); *Dann Marine Towing, LC Chesapeake City, Maryland*, MPRSA-04-2009-7500, 2009 WL 3338134 (EPA Sept. 9, 2009) (Complaint, Consent Agreement and Final Order) (alleging violation of 33 U.S.C. § 1411(a)); and *Dutra Dredging Company,* MPRSA-09-2006-0001, 2006 WL 4472581 (EPA Aug. 10, 2006) (Complaint, Consent Agreement and Final Order) (alleging violation of 40 C.F.R. § 228.15).

Focusing on different provisions of the MPRSA, the parties come to contradictory conclusions as to the meaning of the statute. Respondent's position is grounded in the Act's provision granting the COE its authority to act by regulation, 33 U.S.C. § 1413(e), while the Agency relies upon the Act's penalty provision, 33 U.S.C. § 1415(a). As such, it is appropriate for this Tribunal to undertake review of these MPRSA provisions to determine if Congressional intent on the disputed issue is clear from the "plain language of the statute" and creates a "statutory scheme that is coherent and consistent." *Chevron*, 467 U.S. 842-43; *Robinson,* 519 U.S. at 340.

Congressional intent motivating passage of the MPRSA is expressed in the Act's first section, which cites the danger of "unregulated dumping" of materials into ocean waters, the United States' policy to "prevent or strictly limit" such dumping, and the Act's purpose, which is to "regulate" the transport and dumping of material into ocean waters. 33 U.S.C. § 1401. The main provision of the Act effectuating this intent is section 1411(a), which prohibits transporting any material, including dredged material, for the purpose of dumping it into ocean waters, "[e]xcept as may be authorized *by a permit* issued pursuant to section 1412 [by EPA] or section 1413 [by COE] of this title, *and* subject to regulations issued pursuant to section 1418 of this title." 33 U.S.C. § 1411(a) (emphasis added).

Standing by itself, section 1411(a) suggests that a "permit" is unequivocally required to lawfully transport material to dump in the ocean. However, as Respondent emphasizes, section 1413(e) of the Act provides an exception to the permit requirement. That exception is stated as follows –

> In connection with Federal projects involving dredged material, the Secretary may, *in lieu of the permit procedure*, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under subsections (a), (b), (c), and (d) of this section [1413] and section 1414(a) and (d) of this title.

33 U.S.C. § 1413(e) (emphasis added). Respondent correctly interprets the phrase "in lieu of" as meaning "instead of" or "in place of." Mot. at 6; *Conroy v. Keith Cty. Bd. of Equalization*, 288 Neb. 196, 205 (2014) (citing Webster's Third New International Dictionary of the English Language, Unabridged 1306 (1993)); *Greene v. Conlon Const. Co.*, 184 N.C. App. 364, 366 (2007) (citing 803 Black's Law Dictionary 8th Ed.). Thus, for Federal dredging projects only, section 1413(e) allows the Secretary to authorize the transport of dredged materials for the purpose of ocean dumping *by regulation*, rather than by permit as stated in section 1411.

Based upon this provision, Respondent asserts that authorizations granted by regulation are not subject to the penalty provisions of the Act, 33 U.S.C. § 1415(a).[26] The rationale for its

[26] That section reads in pertinent part: "[a]ny person who violates any provision of this title, or of the regulations promulgated under this title, or a permit issued under this title shall be liable to [sic] a civil penalty of not more than $50,000 for each violation to be assessed by the [EPA] Administrator." 33 U.S.C. § 1415(a). As noted above, for

position is, in essence, that the "in lieu of the permit procedure" language in section 1413(e) represents a further split in the statutory scheme beyond that between EPA and COE as to the granting of permits. Specifically, Respondent asserts the scheme differentiates between transporters authorized by an EPA or COE permit on the one hand, and those authorized by COE regulations or contract on the other. Respondent suggests that those operating under a permit are legally bound by the statute, regulations, and permit, and subject to EPA civil penalties, but that those operating under COE regulations are bound solely by the terms of their COE contract and are subject only to contractual remedies for breaches sought by the COE. Mot. at 5-6.

Upon consideration, this Tribunal finds Respondent's arguments in support of this statutory interpretation unpersuasive.

First, the broad and clear language of the Act's penalty provision in section 1415(a) puts the lie to Respondent's assertion that under the Act "EPA's limited [or non-existent] permitting role [as to dredged material] is matched by limited powers of enforcement." Mot. at 5-6. While there is no question that both sections 1412 and 1413 indicate that EPA has no permitting authority over dredged materials, the Act's penalty provision, section 1415, contains no such corresponding limit on EPA's enforcement or penalty authority. Rather, section 1415 expansively authorizes EPA to sanction literally "*any person*," defined as including any entity, private or public, *including the COE itself*, for violation of "*any* provision" of the Act, its regulations, or a permit issued under it. 33 U.S.C. § 1415(a) (emphasis added). Obviously, if Congress wished to limit EPA's enforcement authority over COE's contractors who are authorized to transport material by regulation or contract, as Respondent suggests, it could have easily stated such an exclusion, as it did with permitting authority over dredged material. *See* 33 U.S.C. § 1412(a). However, it did not, and to imply that Congress had a limiting intent from the absence of an express affirmative statement of authority, as Respondent proposes, in light of the extremely broad language of section 1415, is simply specious. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15, 22 (1981) (holding the regulatory scheme of the MPRSA is comprehensive with respect to ocean dumping and there is no implied right of additional judicial remedies, stating that "[i]n the absence of strong indicia of a contrary congressional intent we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").[27]

Second, contrary to Respondent's claim, giving EPA penalty authority over violative conduct arising from ocean transport of dredging materials approved via COE regulations does

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the purposes of the Act the term "person" is defined to include "any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government." 33 U.S.C. § 1402(e).

[27] I also find meritless Respondent's claim that its position is supported by the fact that under the MPRSA the grounds for obtaining jurisdiction in a citizens' suit is broader than that for EPA to obtain penalties. Mot. at 7. *Compare* 33 U.S.C. § 1415(a) (EPA can penalize "[a]ny person who violates any provision of this subchapter, or of the regulations promulgated under this subchapter, or a permit issued under this subchapter), *with* 33 U.S.C. §1415(g)(1) (private parties may commence civil suit to enforce "any prohibition, limitation, criterion, or permit"). In *Middlesex*, the Supreme Court interpreted this broad language in regard to citizen suits as intending to foreclose the remedy of suits under 42 U.S.C. § 1983 (civil action for deprivation of rights) and federal common law action claims such as for nuisance. 453 U.S. at 22.

not undermine the purpose of the "in lieu of" exemption provided by section 1413(e). Mot. at 6. To the contrary, such authority reinforces the full exemption as written and the statutory intent behind it. Specifically, it appears clear from section 1413(e) that Congress did not wish to necessarily impose upon the COE the technical burden of obtaining permits from either EPA or itself for work it did carrying out Federal projects. At the same time, however, it wanted the COE to be as restricted in its transport and ocean dumping activities as permitted contractors. Therefore, while it offered the exemption, Congress simultaneously required that the regulations the COE enacted to cover its work must "require the application to such projects of the *same* criteria, . . .the *same* procedures, and the *same* requirements which apply to the issuance of permits . . .". 33 U.S.C. § 1413(e) (emphasis added); *Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292, 302-303 (D.R.I. 1974)[28] ("consistent with the intent of this act, the disposal activities of private dredges and the Corps of Engineers will be treated similarly" and "the Corps must either follow the permit issuance procedures under 33 U.S.C. § 1413 or, pursuant to § 1413(e), apply to such projects the same criteria and follow the same procedures . . . as would be applicable to a private permit applicant" (quoting H.R. REP. NO. 92-1546 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 4264, 4279)). There is no question that EPA has enforcement authority over permitted parties. Thus, granting EPA's enforcement authority over contracting parties working under regulatory authorization would put all those transporting for ocean dumping on equal footing, as Congress intended.[29]

Third, the Act's legislative history supports – rather than undercuts, as Respondent claims – a broad reading of EPA's penalty authority. Respondent's Motion correctly conveys the MPRSA legislative history regarding a dispute between the two houses of Congress as to which federal entity, EPA or COE, would regulate the transport of dredged material. But the conclusion Respondent draws from that history, and more importantly from the compromise reached, that Congress intended to restrict EPA's ability to assess civil penalties against the COE's dredging contractors, is incorrect.[30] *See* Mot. at 8. Specifically, as the enacted legislation

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[28] *Callaway* was an injunctive action brought against the Secretary/COE, *and the Respondent here*, as the private COE-contracted dredger, for failure to comply with the MPRSA and other statutes. *Callaway*, 387 F. Supp. at 294. The Plaintiffs alleged in that case that in connection with a Federal project, the defendants had failed, inter alia, to apply for permits in regard to dumping dredged spoil. *Id.* at 296. The Court held that the COE was not exempt from the Act's permit requirement and was obliged under section 1413 to either obtain a permit or apply the same criteria and procedures as would be applicable to a private permit applicant. *Id*. at 302-03. As the defendants had not done either, the injunction was granted. *Id*. at 310.

[29] In particular, it would put Respondent in this case on equal footing with itself in other cases, in that Respondent previously engaged in dredging work on Federal projects under authority of a permit and was sanctioned for violations of it. See *Port of Oakland and Great Lakes Dredge and Dock Company*, EPA Docket No. MPRSA-IX-88-01, 1991 WL 311859 (ALJ, Oct. 24, 1991) (Initial Decision), rev'd and aff'd, 4 E.A.D. 170, 1992 WL 211981 (EAB Aug. 5, 1992) (On appeal, Respondent penalized $125,000 under the MPRSA for dredging violations in regard to work performed pursuant to a contract with the Port holding a COE MPRSA permit).

[30] *See generally* Environmental Law Institute, Law of Environmental Protection, 3 L. of Envtl. Prot. § 23:14-23.19 (Nov. 2019 update) setting forth in detail, with extensive citations, the legislative history behind the MPRSA's enactment. That publication recalls that in 1971, "[t]he Conference Committee named to resolve differences between the House and Senate ocean dumping bills immediately hit a snag that tied up action for almost a year. The issue in disagreement concerned which agency would regulate dredge spoil dumping, EPA or the U.S. Army Corps of Engineers." *Id.* § 23:16 (citing 118 Cong. Rec. 13401 (1972)). The House Bill divided permit authority between the agencies, continuing the COE's existing permit authority over dredged material and included federal employees

reflects, in the end Congress accepted the House's provisions, rather than the Senate's, which resulted in EPA's permitting authority being slightly narrowed to exempt dredged materials, but its penalty authority greatly expanded to cover all federal employees, agents and agencies, including the COE, as well as all private persons and entities.[31] 33 U.S.C. § 1415.

Fourth, Respondent claims that EPA's own regulations at Part 220 reflect an acknowledgment of its own limited penalty authority in that they allow EPA only to "initiate and carry out enforcement activities" as to "permits," defined as those issued "under section [1412] of the Act," which are for non-dredged materials. Mot. at 8 (citing 40 C.F.R. §§ 220.3, 220.4(a), (b)).[32] Although these particular regulations primarily address EPA-issued permits, at the time of their promulgation EPA expressly stated that they were not a comprehensive statement of its authority under the Act, which appears self-evident from the face of the regulations themselves as they make no provision for EPA to institute enforcement actions for unpermitted dumping, surely within the Agency's remit. Final Revision of Regulations and Criteria, 42 Fed. Reg. 2462-01 (Jan. 11, 1977) (Final Rule) (enacting Part 220 and noting "[t]he revisions announced today do not include changes to 40 CFR Parts 223 and 226. Significant changes will be made to those Parts in the near future. Parts 223 and 226 will be greatly expanded to present more

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and entities in the penalty provisions. H.R. REP. NO. 92-1546 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 4264, 4277. The Senate bill gave EPA sole authority over issuing permits, including those for dredged material, requiring the COE to seek a permit from EPA for its federal projects. However, the Senate bill excluded from the definition of "person" any officer, employee, agent, department, agency or instrumentality of the Federal Government "as to the penalty provisions," stating that "Federal administrative disciplinary procedures are adequate for the purposes of this Act." H.R. REP. NO. 92-1546 (1972), *reprinted in* 1972 U.S.C.C.A.N. at 4277; S. REP. NO. 92-451 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4234, 4244, 4249, 4255. "This extremely complex and controversial question was resolved by the committee on conference by allowing the Secretary to issue permits for transportation of dredged material for dumping, following the criteria set down by the Administrator under section 102(a) of the act." H.R. REP. NO. 92-1546, *reprinted in* 1972 U.S.C.C.A.N. at 4277-78. "The section also authorized the Secretary to handle Federal dredging projects through the use of regulatory powers in lieu of the permit procedures described above, subject to the same general requirements for issuance of permits." H.R. REP. NO. 92-1546, *reprinted in* 1972 U.S.C.C.A.N. at 4278. The definition of person was broadened to include "any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government." H.R. REP. NO. 92-1546, *reprinted in* 1972 U.S.C.C.A.N. at 4265.

[31] In its Motion, Respondent offers no actual citation to the Act's legislative history which directly supports its argument that EPA has no penalty authority over transporters authorized by regulation. Mot. at 8. The sole citation it references for comparison consists of a brief overview of the Act as a whole and includes the line that "[p]enalties are provided for violation of the permit program." Mot at 8 (citing S. REP. NO. 93-726 at 2 (1974)). It is clear from the context that the reference to the "permit program" is to the statutory scheme set up as a whole and not a statement on EPA's limited authority.

[32] 40 C.F.R. § 220.3 enumerates the four categories of permits (general, special, emergency, and research) that EPA may issue under the MPRSA; 40 C.F.R. § 220.4(a) enumerates the actions EPA may take in regard to such permits, including initiating and carrying out enforcement activities; and 40 C.F.R. § 220.4(b) delegates to EPA Regional Administrators authority to act in regard to special permits affecting State ocean waters and inter-regional transport and dumping. Additionally, 40 C.F.R. § 220.4(c) provides that Regional Administrators have the authority to "review, to approve or to disapprove or to propose conditions upon Dredged Material Permits," which are defined in 40 C.F.R. § 220.2(h) as including COE-issued permits as well as "any Federal projects reviewed under section [1413](e) of the Act." Respondent asserts that subsection (b) does not authorize the Regional Administrator to institute this action because it does not involve a "special permit," and subsection (c) is overly broad in that COE has exclusive authority over Federal projects, with EPA's role limited to site selection. Mot. at 9, 11-12. I find neither of these arguments persuasive for the reasons stated in the rest of the order.

detailed procedures for enforcement proceedings."). Moreover, even if EPA failed in such regulations to provide for enforcement action against transporters authorized by COE regulations, the Agency cannot by regulation forgo the power given to it by statute. *Perez-Sanchez v. U.S. Attorney Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (an agency cannot fashion a procedural rule to limit jurisdiction bestowed upon it by Congress).

Lastly, Respondent asserts that limiting EPA's penalty authority as to Federal projects "makes good policy sense" because otherwise EPA would have a supervisory role over COE contractors and interfere with COE management and enforcement mechanisms the COE has in regard to its contractors. Mot. at 9 (citing *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 3 (1972) (in case of contract dispute, "absent fraud or bad faith, the federal [contracting] agency's settlement under the disputes clause is binding on the Government" despite disagreement by other agencies)). However, it appears clear from the Act itself that Congress actually intended that EPA play a supervisory role under the Act. Specifically, while the Act gives the COE authority to issue permits for dredged material, it requires the COE: (a) to notify EPA before issuing any permit and to obtain EPA's concurrence thereon; (b) to apply the criteria established by EPA relating to the effects of dumping in determining whether to issue a permit or grant regulatory approval to dump; and (c) "to the maximum extent feasible," utilize EPA's recommended dumping sites or obtain EPA concurrence on an alternative site. 33 U.S.C. § 1413. Moreover, the Act explicitly states that "[i]n any case where the Administrator makes a determination to concur (with or without conditions) or to decline to concur . . . the determination *shall prevail*." 33 U.S.C. § 1413(c)(3) (emphasis added). *See also* H.R. REP. NO. 92-1546 (Conf. Rep.) (1972), *reprinted in* 1972 U.S.C.C.A.N. 4264, 4278-79 ("The conferees fully expect that the Secretary is capable of performing, and will perform, his duties reasonably and intelligently, and foresee very few occasions where the Administrator would disagree with the Secretary in his determinations relative to the two specific points raised. Nevertheless, to take care of the rare case, subsection (c) provides that in the case of such a disagreement, the Administrator's determination shall prevail."). As such, having EPA assume penalty authority over COE contractors authorized to transport by regulation would be consistent with the "good policy sense" as expressed by the Act itself. 38 CONG. REC. E3327-02 (daily ed. Oct. 29, 1992) (statement of Rep. John P. Hammerschmidt), 1992 WL 312427 (noting that Congressional compromise on revisions to the Act in 1992 "provide(s) EPA with what amounts to a veto over Corps of Engineers' permitting decisions for the ocean dumping of dredged materials.").

In addition, the fact that the COE has numerous contract mechanisms it may use with respect to its contractors, including to "terminate, deduct payment from, or otherwise take action against its contractors pursuant to standard contract terms," does not change this conclusion. Mot. at 9. Breach of contracts and violations of law are very different, with violations of law reflecting social harm and punishment relative thereto. Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 Ga. St. U. L. Rev. 559, 595-97 (2012). Further, although Respondent rightly suggests that inconsistent treatment of a contractor by different federal agencies is to be avoided, the possibility of such inconsistency occurring is not a basis for interpreting a statute contrary to its plain language. *See* Mot. at 9.

For the foregoing reasons, I find that the MPRSA does not impose any statutory limitation on EPA's authority to bring an enforcement action within the context of a "federal project."

X. DISCUSSION OF EPA'S GROUNDS FOR ISSUING A PENALTY IN THIS CASE

A significant portion of Respondent's Motion is devoted to the argument that "[t]he claims in the Complaint are based entirely on alleged violations of the Contract and Site Plan, neither of which meets any of the predicates for civil penalties." Mot. at 10, 11-20. This argument further presumes that the contract and site plan are not enforceable by EPA because they do not constitute a "permit." Mot. at 10-20.

However, it is not necessary that the contract and site plan be treated as a permit for the Agency to make out a prima facie case. Although there is a slight discrepancy between the prohibitory language of section 1411, authorizing transport via only a permit, and section 1413's exception, allowing for authorization by regulation, a coherent statutory scheme can be deduced if the conjunction term "and" in section 1411 is read as "or," such that the provision prohibits transport for the purposes of ocean dumping: "[e]xcept as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, ***or*** subject to regulations issued pursuant to section 1418 of this title." By doing so, section 1411 then captures both methods by which the Secretary may authorize the lawful transport of dredged material for ocean dumping under the Act, i.e., by permit or regulation, without losing any of section 1411's restrictive intent. Further, such a reading is fully permissible within an analysis of statutory interpretation. *Armijo v. FedEx Ground Package Sys., Inc.*, 285 F. Supp. 3d 1209, 1214 (D.N.M. 2018) ("'When analyzing a statute from a particular statutory act,' courts 'must read the act in its entirety and construe all the provisions together and attempt to view them as a harmonious whole.'[] 'The plain meaning of particular statutory language will sometimes be modified when considered in the context of other statutes from the same act.'" (quoting *Cummings v. X–Ray Assocs. of N.M., P.C.*, 121 N.M. 821, 918 P.2d 1321, 1334 (1996))); *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958) ("[T]he word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings. Nor has the law looked upon it as such. It is ancient learning, recorded authoritatively for us nearly one hundred years ago, echoing that which had accumulated in the previous years and forecasting that which was to come, that, 'In the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or." (citing *United States v. Fisk*, 70 U.S. 445, 448 (1866))); *Lubbock Compress Co.*, 252 F.2d at 893 n.1 ("Hundreds of cases are conveniently collected in Vol. 3, Words and Phrases, under the title word 'And,' . . . especially . . . under the heading of 'Civil Statutes.' Whatever the particular meaning attributed to the word or words may be in each of these collected cases, the universal test may be summarized. The words 'and' and 'or' when used in a statute are convertible, as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes, when the evident intention of the lawmaker requires it."); *Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988) ("The word 'and' is therefore to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear

legislative intent. (citing *Lubbock Compress Co.,* 252 F.2d at 894–95)). *See generally* 1A N. Singer, Sutherland on Statutes and Statutory Construction § 21.14 (4th ed. 1980)).

Moreover, resolving the language discrepancy between the sections in this simple "Occam's razor" manner effectuates the overall legislative intent of Congress to "regulate" the transport of all material for the purposes of ocean dumping and creates a statutory scheme that is "coherent and consistent," in that it places dredgers operating under permit or regulation on equal footing as the Act intended. Such an interpretation also effectuates the very broad language of 33 U.S.C. § 1415(a), the enforcement and penalty provision of the Act, which gives teeth to its aspirational intent. Through 33 U.S.C. § 1415, a contractor whose work on a federal project was authorized by COE regulation, rather than permit, can nevertheless be held liable for a civil penalty by EPA if it violated an MPRSA statutory provision or regulation. Thus, to the extent that EPA can make out a prima facie claim that Respondent violated a specific statutory provision or regulation in performing its dredging work, the Complaint would be well founded.

Additionally, contrary to Respondent's characterization, the COE contract and the SMMP are not the ultimate bases for the violations alleged in this action. Instead, they provide evidence of such violations. The standards and conditions set forth in Respondent's contract with COE describe what conduct the COE "authorized" by regulation with respect to transporting and dumping dredged material at the Site. Respondent's conduct that deviated from these standards and conditions would not have been authorized by COE regulation and therefore were unauthorized under section 1411(a). It is the fact that this conduct was not authorized – not that the conduct was, simultaneously, a breach of Respondent's contractual obligations to the 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. Similarly, Respondent's alleged violations of the SMMP are not the grounds for the Complaint inasmuch as they amount to noncompliance with a document. Rather, Respondent's alleged violations of the site plan are evidence of its violation of COE's regulatory authorization provided for in 1411(a) and, more specifically, EPA's regulation issued under section 1418, which expressly requires compliance with conditions set forth in the site plan. It is this regulatory violation, in addition to the aforementioned statutory violation, that is the predicate for civil penalties in this proceeding.

Consequently, in this case, EPA has alleged that Respondent violated the Act's primary prohibitory statutory provision, section 1411, in its transport of dredged material. The language of the Act, specifically section 1411(a), indicates that the elements to establish a prima facie cause of action for a violation under that section are: (1) unauthorized (2) transporting from the United States (3) of material (4) for the purpose of dumping it into ocean waters. 33 U.S.C. § 1411(a). The Complaint, as described above, appears to set forth facts supporting all of these elements, specifically that on numerous occasions Respondent transported from the United States, i.e., the Port of Miami, dredged material for the purposes of ocean dumping in a manner not authorized by the COE. Compl. ¶¶ 27-30. As such, to that extent it appears to establish a prima facie case of violations under MPRSA section 1411(a).

The Complaint also alleges more specifically that Respondent violated MPRSA regulation 40 C.F.R. § 228.15(h)(19). Compl. ¶19. That regulation contains a list of EPA final

approved sites for ocean dumping, and with regard to the site at issue here states in pertinent part:

> (19) Miami, Florida; Ocean Dredged Material Disposal Site.
>
> (i) Location: 25°45'30" N; 80°03'54" W; 25°45'30" N; 80°02'50" W; 25°44'30" N; 80°03'54" W; 25°44'30" N; 80°02'50" W (NAD27). Center coordinates are 25°45'00" N and 80°03'22" W (NAD27).
>
> * * *
>
> (vi) Restriction: Disposal shall be limited to suitable dredged material from the greater Miami, Florida vicinity. *Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.*

40 C.F.R. § 228.15(h)(19)(emphasis added).

Administrative authority for issuing this regulation is clear. Section 1412(c) of the Act requires EPA and COE to jointly establish SMMPs for dredge disposal sites. 33 U.S.C. § 1412(c)(1), (2). Section 1414(a) provides that permits shall include "such requirements, limitations, or conditions as are necessary to assure consistency with any site management plan approved pursuant to section 1412(c) of this title." 33 U.S.C. § 1414(a). Section 1413, in turn, provides that the regulations issued "in lieu of the permit procedure" require the application to such projects "the same requirements" of section 1414(a). 33 U.S.C. § 1413. Therefore, application of this regulation to Respondent is fully authorized by the MPRSA.

EPA has alleged that Respondent violated this regulation on a number of occasions by dumping outside of the "Site release zone" and not complying with SMMP conditions. Compl. ¶¶ 27-30. In doing so, EPA has stated a sufficient prima facie case of regulatory violations. *Cf. United States v. Reilly*, 827 F. Supp. 1076, 1078 (D. Del. 1993) (under the Act, "[c]ivil penalties can be imposed for violations of the regulations on the basis of strict liability.").

A more granular issue is whether EPA could charge Respondent with violating the specific conditions imposed by the Administrator's concurrences. The Complaint alleges that EPA issued a series of concurrences to COE's request to dispose of dredged material at the Miami Site. Compl. ¶¶ 15, 17. It further suggests that Respondent's contract with COE, which constituted its regulatory authorization to transport dredge, required Respondent to comply with such concurrences. Compl. ¶ 19. In support of its right to penalize Respondent for directly violating the concurrence terms contained in its contract, the Agency asserts that "a Federal project operates as the 'functional equivalent' of a permit and is required to comply with the same enforceable conditions as a non-federal project operating under a [COE]-issued permit, and this includes complying with any conditions set forth in EPA's concurrence letters . . . ." Resp. at 7. Respondent, on the other hand, as mentioned above, argues that a COE contract is not a permit, that breach of the contract itself constitutes neither a statutory, regulatory, nor permit violation, and thus is not a basis for imposing a penalty. Mot. at 10-15.

As Respondent argues, it is well-established that generally permits are not contracts, and thus, contrapositively, contracts are not permits. *Haymon v. City of Chattanooga*, 513 S.W.2d 185, 188 (Tenn. Ct. App. 1973) ("[A] building permit is not a contract and may be changed or entirely revoked even though based upon a valuable consideration if necessary in the exercise of the police power."); *Hartford Acc. & Indem. Co. v. Moraldo*, 84 Misc. 2d 1082, 1085 (N.Y. Dist. Ct. 1975) ("[A] license or permit is not a contract between the issuing governmental authority and the licensee."). *Brooks v. Vill. of Canfield*, 34 Ohio App. 2d 98, 109 (Ohio Ct. App. 1972) (permit is not a contract); *Boyd v. Allen*, 246 N.C. 150, 153 (1957) (a permit grants the holder a special privilege or permission to engage in an activity "and is limited by the statutes under which such permit or license is granted. The permit is not a contract, and confers no contract rights. It is generally held that the permit or license is not property or a vested right, in the ordinary meaning of those terms, in any legal or constitutional sense."); *City of Winston-Salem v. Robertson*, 81 N.C. App. 673, 674–75 (1986) (granting of a permit application permit is not a contract but a "a regulatory action taken by the State"); *Cty. of Mendocino v. Williams Commc'ns*, No. C 05-4429 PJH, 2006 WL 1009029, at *4 (N.D. Cal. Apr. 18, 2006) (a permit is not a contract); *Com. ex rel. Shooster v. Devlin*, 305 Pa. 440, 444 (1932) (permit is not a contract; it is exactly what it says it is - a *permit*, it does not require the holder to act but only permits him to do so.). *See also Blankenship*, 382 F.3d at 1133-34 ("A contract is a document that serves only to establish a legal relationship between two parties; it gives each party nothing more than a legal expectancy in having the other party either perform or (generally) respond in damages.").

Additionally, contrary to EPA's assertion, COE contracts are generally not themselves "regulations." Resp. at 9. "[G]enerality of application and futurity of effect [] is the distinguishing characteristic of rulemaking." *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 127 (D.C. Cir. 1980). COE dredging contracts for federal projects have neither of those attributes as they apply only to a specific entity and project for a singular, limited period. Moreover, government contracts are explicitly not covered by the rulemaking notice provisions of the APA. 5 U.S.C. §553(a)(2) ("This section applies . . . except to the extent that there is involved [ ] a matter relating to agency . . . contracts."); *Peterson v. Nat'l Tele. & Info. Admin.*, 505 F. Supp. 2d 313 (E.D. Va. 2006), *aff'd* 478 F.3d 626 (4th Cir. 2007) (APA notice and comment requirements did not apply to contract with company to manage the ".us" Internet domain). Rather, in entering into such contracts the COE is bound by the Federal Acquisition Regulation System. *See* U.S. Army Corps of Engineers, Acquisition Instruction and Desk Guide (Jan. 25, 2017), *available at* https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2013/. In addition, resolution of disputes between contractors and the COE is limited in a manner that regulatory disputes are not. *See Canpro Investments Ltd. v. United States*, 130 Fed. Cl. 320, 335 (2017) (describing Court of Claims jurisdiction regarding monetary claims brought against the government).

Still, the issue remains, are "federal projects" the functional equivalent of a permit under the Act, as the Agency suggests, such that contractors operating on a federal project would be legally obliged to comply generally with all MPRSA regulations applicable to permit holders? Resp. at 7. The MPRSA does not define the term "Federal projects" and utilizes the term in only one section of the Act other than 1413(e). Specifically, in three subsections of section 1416, the

MPRSA provides that: (1) a state may not impose upon a Federal project a more stringent requirement than provided for under the Act if EPA finds it is not supported by scientific evidence, is arbitrary and capricious, or not applicable to all government projects (33 U.S.C. § 1416(d)(2)); (2) "[t]he President may exempt a Federal project from any State requirement respecting dumping of materials into ocean waters if it is in the paramount interest of the United States to do so." (33 U.S.C. § 1416(d)(3)); and (3) "[i]n addition to other provisions of law and not withstanding [sic] the specific exclusion relating to dredged material in the first sentence in section 1412(a) of this title, the dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic yards shall comply with the requirements of this subchapter." 33 U.S.C. § 1416(f)

The use of both terms "Federal project" and "Federal authorization" in section 1416(f) suggest that a Federal project is not in fact the same as a Federal authorization to transport dredge provided by the COE under the Act. Moreover, other sections of the Act suggest that federal "authorizations" issued under 1413(e) are more akin to permits than would be "Federal projects." *See* 33 U.S.C. § 1412(c)(4) ("no permit for dumping pursuant to this Act or authorization for dumping under section 1413(e) of this title shall be issued for a site . . . unless such site has received a final designation . . ."); 33 U.S.C. § 1416(a) ("After the effective date of this subchapter, all licenses, permits, and authorizations other than those issued pursuant to this subchapter shall be void and of no legal effect, to the extent that they purport to authorize any activity regulated by this subchapter . . ."); 33 U.S.C. § 1416(f). Unlike permits, the penalty provision of the MPRSA, section 1415, did not authorize EPA to penalize persons directly for violations of Federal "authorizations" issued under section 1413(e). As such, unless EPA can cite to a regulation applicable to Respondent and its activities at the relevant time requiring compliance with EPA's concurrences, or can establish under the Act that Respondent engaged in transport inconsistent with its authorization that required compliance with such concurrences, then EPA would not have authority under the Act to directly enforce the terms of concurrences it granted to the COE against the Respondent.[33]

Finally, it should be noted that in regard to the alleged violations of law or regulation, to the extent that Respondent believes that such violation was directed, authorized, or necessitated by virtue of its compliance with COE's authorization, then it would be free to raise such claim as a defense in an enforcement proceeding and/or proceed with a claim for contribution and/or indemnification against the COE outside of an administrative enforcement proceeding.

XI. DISCUSSION OF APA ISSUES

In its Motion, Respondent raises two additional arguments uniquely addressed to the claims in the Complaint that are based upon violations of the SMMP. First, it asserts that those claims should be dismissed because the 2008 SMMP and its 2011 revision were not subject to

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[33] In that EPA clarified in its Response (at 4-5) that it is not seeking to directly enforce the provisions of the Miami Port Permit (COE permit No. SAJ-2006-6547) or the terms of the COE contract, the arguments made by Respondent in relation thereto are not addressed further.

notice and comment and therefore promulgated in violation of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Mot. at 20. Second, according to Respondent, the 2008 SMMP and its 2011 revision are also unenforceable because the Agency failed to obtain the necessary approval of the Director of the Federal Register to incorporate the documents into the Code of Federal Regulations "by reference" as required by 5 U.S.C. § 552(a)(1).[34]

In response to both points, EPA makes a series of claims: (1) that it was not required to provide notice and comment by publication in the federal register for the SMMP under the MPRSA or APA; (2) that the MPRSA provides EPA with "multiple avenues for implementation of the SMMP;" (3) that it provided an opportunity for public comment when it published 40 C.F.R. § 228.15(h)(19), which refers to the SMMP, in the Federal Register and Code of Federal Regulations; and (4) that Respondent had "actual notice" of the SMMP, which is sufficient under the APA. Resp. at 10-12

a. <u>APA Section 553</u>

Section 553 of the APA is titled "Rule making" and provides in relevant part that –

> (a) This section applies, according to the provisions thereof, *except to the extent that there is involved*--
>
> * * *
>
> (2) *a matter relating to . . . public property* . . . .
>
> (b) General notice of proposed rule making[35] shall be published in the Federal Register, unless persons subject thereto . . . have actual notice thereof in accordance with law. . . .
>
> * * *
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

5 U.S.C. § 553 (emphasis added).

As indicated above, the MPRSA authorizes the EPA Administrator to designate sites in "ocean waters" for dumping of materials. 33 U.S.C. § 1412(a), (c). The Act provides further

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[34] The original 1995 SMMP, which is not a basis for the EPA's claims, was subject to Federal Register notice, Respondent acknowledges. Mot. at 22 (citing 59 Fed. Reg. 53951, 53955 (Oct. 27, 1994) (Proposed Rule) (designating Miami site and referencing SMMP in Environmental Impact Statement); 61 Fed. Reg. 2941, 2945 (Jan. 30, 1996) (Final Rule) (designating Miami site)).

[35] Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). *See also* 5 U.S.C. § 551(5) ("Rule making" under the APA "means agency process for formulating, amending, or repealing a rule.").

that "[i]n the case of dredged material disposal sites, the Administrator, in conjunction with the Secretary, shall develop a site management [and monitoring] plan [SMMP] for each site designated pursuant to this section." 33 U.S.C. § 1412(c)(3).

The terms "ocean waters" is defined for the purposes of the MPRSA as meaning "those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone[.]" 33 U.S.C. § 1402(b) (citing Law of the Sea: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 1506, 1964 WL 70232) ("Convention"). "The baseline from which the territorial sea is measured is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Convention, § 2, art. 3. The titular boundary of each coastal state within the United States is generally considered to be "a line three geographical miles distant from its coast line." 43 U.S.C. § 1312. "The federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1255–56 (D. Or. 2016), *rev'd and remanded on other grounds*, 947 F.3d 1159 (9th Cir. 2020) (citing Restatement (Third) of The Foreign Relations Law of the United States § 511(a) (1987) (international law permits a nation to claim as its territorial sea an area up to twelve miles from its coast); Proclamation No. 5928, 3 C.F.R. § 547 (1989) (President Reagan expanding United States' claim from three-mile territorial sea to twelve-mile territorial sea)). *See also* 33 U.S.C. § 1411(b) (noting the prohibition on dumping *from outside of the United States* "into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured"); *United States v. Maine*, 420 U.S. 515, 526–27 (1975) ("Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when [] it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U.S.C. § 1331 et seq.").

EPA has identified the Miami disposal site as being located "east of Miami, Florida," with its western boundary situated about "3.6 nmi [nautical miles]" offshore of the Miami, Florida coast. "The site is an approximate 1 nmi by 1 nmi square configuration."[36] Ocean Dumping; Final Site Designation, 61 Fed. Reg. 2941-01 (Jan. 30, 1996) (Final Rule). As such, it falls within the area of the "ocean waters" owned by the Federal government and is "public property."[37] Therefore, by its very terms, APA section 553 does not apply to it. EPA was not

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[36] EPA provides the site's exact global coordinates in 40 C.F.R. § 228.15(h)(19)(i). *See also* SMMP at 2 ("The site is 4.7 nmi offshore (as measured to the center) with an area of approximately 1 nmi"), *available at* https://www.epa.gov/sites/production/files/2015-10/documents/region_4_miami_smmp_2008.pdf. As background, EPA explains that it designated a one square nautical mile site approximately 4.7 miles offshore near Miami as an "Ocean Dredge Material Disposal Site" ("Site"), in accordance with the MPRSA section 1412(c)(1) and 40 C.F.R. § 228.15(h)(19). Compl. ¶¶ 6, 7, 13.

[37] The term "public property" is not defined under the APA. 5 U.S.C. § 551(4). However, in *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *opinion adopted in part*, 539 F.2d 220 (D.C. Cir. 1976), the Court interpreted the exemption in 5 U.S.C. § 553 and cited the meaning of "public property" provided in the Attorney General's Manual on the Administrative Procedure Act, which it quoted as follows:

> Public Property. This embraces rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. Thus, the making of

required under that section to provide for notice and comment in connection with the issuance or revision of an SMMP for the site. *See* 5 U.S.C. § 553(a)(2) ("This section applies . . . except to the extent that there is involved . . . a matter relating to . . . public property"). *See also Oahe Conservancy Sub-District v. Alexander*, 493 F. Supp. 1294 (D.S.D. 1980) (because of APA §553 "public property" exemption, COE was not required to follow statutory notice and hearing procedure in adopting reservoir regulation manuals and lack of notice did not render the manuals and regulations void); *United States v. Thompson*, 687 F.2d 1279 (10th Cir. 1982) (holding that Federal regulation prohibiting unlawful entry on Atomic Energy Commission facilities, i.e., public property, came within express exception of this section, and noting that Congress intended the exception to confer "complete discretion on the agencies what, if any, public rule making procedures they will adopt in a given situation" involving such property); *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1 (D.D.C. 1994) (under APA exception for public property, National Park Service was not required to follow notice and comment requirement in implementing new procedure for allocating permits for ships to enter Glacier Bay); *Ono v. Harper*, 592 F. Supp. 698 (D. Haw. 1983) (APA section 553's public property exemption is not limited to day-to-day internal management decisions but encompasses any agency action where public property is directly involved); *Northrop University v. Harper*, 580 F. Supp. 959 (D. Cal. 1983) (GSA not required to comply with rule-making provisions of APA § 553 in adopting new guidelines for disposition of surplus property).

Therefore, Respondent's first APA argument for dismissal is utterly invalid.

b. APA Section 552

APA Section 552(a)(1) generally provides in pertinent part –

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

> rules relating to the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of Section 4.

Duke City Lumber Co. v. Butz, 382 F. Supp. at 376.

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

5 U.S.C. § 552(a)(1).

According to Respondent, the 2008 SMMP Plan and its 2011 revisions are "substantive rules" under 5 U.S.C. § 552(a)(1)(D), in that EPA seeks civil penalties based upon their violation "which it can only do if it has the force and effect of law." Mot. at 21. However, Respondent asserts, those rules are unenforceable because in regard to the 2008 SMMP, the Agency incorporated it by reference in its regulation[38] published in the 1996 Federal Register, but it never obtained the necessary approval of the Director of the Federal Register as required by 5 U.S.C. § 552(a)(1). And in regard to the 2011 SMMP revision, the Agency did not publish it at all, Respondent contends. Mot. at 22. It notes further that even if EPA had obtained the Director's approval for incorporating the original 1995 SMMP by reference, that approval would not apply to subsequent versions of the plan. Mot. at 22-23 (citing 1 C.F.R. §§ 51.1(f), 51.7(a)(1)).[39]

Respondent's argument as to why the 2008 SMMP Plan and its 2011 revisions are "substantive rules of general applicability" is not well fleshed out in its Motion, and I am unpersuaded by the negligible argument made. The SMMP is a management and monitoring *plan* amicably agreed upon by EPA and COE for a site-specific ocean dumping location. A review of the Miami site's 2008 SMMP evidences that it was developed and drafted to set forth and allocate responsibilities between the two agencies in regard to that site. *See* SMMP, *available at* https://www.epa.gov/sites/production/files/2015-10/documents/region_4_miami_smmp_2008.pdf. There is nothing of "general" or public applicability contained in the SMMP itself. Moreover, the SMMP contains nothing suggesting that it is self-executing or legally enforceable by itself. To the contrary, among the SMMP's appendices are two templates, one titled "Generic Special Conditions for MPRSA Section 103 Permits" (Appendix B), and the other "Typical Contract Language for Implementing the Miami ODMDS SMMP Requirements" (Appendix C). The SMMP suggests this template language would need to be incorporated by COE into its permits and contracts, respectively, in order to make the permittee and/or contractor obligated to assure its dredging work was compliant with

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[38] *See* 40 C.F.R. § 228.15(h)(19)(vi). As noted above, this regulation includes the Miami site among a list of dumping sites designated on a final basis by EPA and identifies as one of the "restrictions" thereon that "[d]isposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan."

[39] 1 C.F.R. § 51.7 provides that "[a] publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it [] [c]onforms to the policy stated in § 51.1." Under § 51.1, "[i]ncorporation by reference of a publication [in the Federal Register] is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included." 1 C.F.R. § 51.1(f).

the terms of the SMMP. As such, it appears that the SMMP and its revision was not required to be made available to the public through publication under 5 U.S.C. § 552(a)(1).

In any case, even if the SMMP was covered by 5 U.S.C. § 552(a)(1), due to the reference to it as a restriction on the use of the Miami disposal site in 40 C.F.R. § 228.15(h)(19)(vi), and even if its incorporation by reference in the EPA regulation was not approved by the Director, it appears that Respondent had actual notice of its terms. EPA represents in its Response that the COE's solicitation for bids included the requirement for compliance with both the 2008 SMMP and its 2011 Revision. Resp. at 12 & Attach. 5. The SMMP is also publicly accessible via an online search.[40] As such, Respondent had actual notice of the revised SMMP when it submitted its bid on the project and acknowledged that the contract resulting therefrom included the "terms and conditions of solicitation." Resp. Attach. 6. Therefore, Respondent's second APA argument is not sustained, and Respondent may be "adversely affected" by the 2008 SMMP and its 2011 revision despite their lack of publication under the terms of 5 U.S.C. § 552(a)(1).

ORDER

Upon consideration of the foregoing, Respondent's Motion to Dismiss is **DENIED**.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Dated: May 28, 2020
Washington, D.C.

[40] *See* https://www.epa.gov/sites/production/files/2015-10/documents/region_ 4_miami_smmp_2008.pdf (2008 SMMP); https://www.epa.gov/sites/production/files/2015-08/documents/region_4_miami_smmp_rev_2011.pdf (2011 Revisions).

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Respondent's Motion to Dismiss**, dated May 28, 2020, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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