UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC

Docket No. MPRSA-04-2019-7500

Respondent.

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

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GREAT LAKES DREDGE & DOCK COMPANY, LLC'S MOTION TO DISMISS

Respondent Great Lakes Dredge & Dock Co., LLC ("Great Lakes") moves to dismiss the Environmental Protection Agency's ("EPA") Complaint for failure to state a claim. The Complaint seeks to assess civil penalties under the Marine Protection Research and Sanctuaries Act ("MPRSA") based on alleged violations of Great Lakes' contract with the U.S. Army Corps of Engineers ("Corps") and provisions of a site management and monitoring plan for an offshore disposal site. The MPRSA does not allow for civil penalties based on alleged violations of a contract or plan, and leaves supervision of Corps contractors to the Corps. Even if the MPRSA did allow for civil penalties based on alleged violations of site management and monitoring plans, the plan in this case is unenforceable because it was promulgated in violation of the Administrative Procedure Act. The Complaint therefore should be dismissed because it "show[s] no right to relief on the part of the complainant," 40 CFR §§ 22.20(a).

I. Background

A. The Port of Miami Project

This case concerns a Federal dredging project. In 2007, Congress authorized the Corps to deepen the Port of Miami to allow larger cargo ships to access the port. Water Resources Development Act of 2007, Pub. L. No. 110-114, § 1001(17), 121 Stat. 1052 (Nov. 8, 2007). The

local sponsor, the Port of Miami, also sought to dredge berthing areas adjacent to the Federal channels. The Corps entered into an agreement with the Port of Miami pursuant to which the Corps conducted the entire project (Federal and local areas) with financial contribution from state and local governments.

The Corps hired contractors to do the work under its supervision. In 2013, the Corps entered into Contract #W912EP-13-C-0015 with Great Lakes (the "Contract") to perform the dredging. Great Lakes dredged the port from November 2013 to September 2015. Approximately 5.7 million cubic yards of dredged material were transported in more than 4,200 trips by dredge scows to an Ocean Dredged Material Disposal Site ("Miami ODMDS"). At the completion of the project, the Corps concluded that Great Lakes did an excellent job ensuring compliance with the environmental requirements, but deducted payment for scow trips where the Corps determined there had been breaches of Contract specifications.

B. Application of the MPRSA to the Project

The MPRSA regulates the transportation of material for disposal in ocean waters. 33 U.S.C. §§ 1401-1420. The statute establishes a permit system, which authorizes agencies to decide whether to allow ocean disposal and to impose conditions on such disposal. EPA is the agency responsible for the permitting of ocean disposal of non-dredged material. *Id.* § 1412.

With regard to dredged material, the MPRSA divides oversight between EPA and the Corps. EPA designates sites where ocean disposal may take place, and prepares site management and monitoring plans in conjunction with the Corps. *Id.* § 1412(c). The Corps is responsible for issuing permits for the transportation of dredged material for the purpose of dumping it into ocean waters. *Id.* § 1413(a). EPA and the Corps coordinate regarding the use of offshore sites for the disposal of dredged material. *Id.* § 1413(c).

While the MPRSA authorizes the Corps to issue dredged material permits to third parties, *id.* § 1413(a), it does not require permits for Federal projects. "In connection with Federal projects involving dredged material," the Corps is allowed to proceed "in lieu of the

permit procedure" pursuant to Corps regulations that "require the application of the same criteria, . . . the same procedures, and the same requirements that apply to issuance of permits." *Id.* § 1413(e). Corps regulations governing "Supervision of Federal Projects" provide that district engineers "should assure that dredged or fill material disposal activities are conducted in conformance with the current plans and description of the project as expressed in the SOF [Statement of Findings] or ROD [Record of Decision]" for a project, and that Corps "[c]ontracting officers should assure that contractors are aware of their responsibilities for compliance with the terms and conditions of state certifications and other conditions expressed in the SOF or ROD." 33 CFR § 337.10. Like all federal agencies, the Corps can enforce its contracts through terminating contractors, deducting payment, and exercising other contract-based remedies.

For the Port of Miami Project, the Corps issued a permit to the Port of Miami authorizing the dredging of the port's berthing areas and disposal of dredged material offshore. Complaint ¶ 18 (Corps Permit No. SAJ-2006-06547, revised permit issued July 2012). For the remaining Federal portions of the project, the Corps proceeded without a permit and entered into the Contract with Great Lakes to conduct the dredging under the Corps' supervision.

The Miami ODMDS is a designated ocean disposal site for dredged material. 40 CFR § 228.15(h)(19). When EPA designated the site in the 1990s, it issued a Site Management and Monitoring Plan ("Site Plan"). 61 Fed. Reg. 2941, 2944 (Jan. 30, 1996) (final rule designating the site, noting that "[t]he SMMP has been developed and was included as an appendix in the Final EIS"). In 2008, EPA in conjunction with the Corps issued a new Site Plan for the Miami ODMDS, and issued revisions to that plan in 2011. Complaint, ¶ 14. In 2011, EPA concurred with the Corps' decision to use the Miami ODMDS for disposal of dredged materials from the Port of Miami Project, and extended that concurrence in 2014 and 2015 to allow for completion of the project. *Id.* ¶¶ 17, 20. Both the Corps' permit to the Port of Miami, and its Contract with

Great Lakes, contain provisions designed to minimize environmental impacts associated with disposal of dredged material at the Miami ODMDS.

C. EPA's Administrative Complaint

On September 27, 2019, EPA filed its Complaint seeking to assess civil penalties against Great Lakes pursuant to 33 U.S.C. § 1415(a). The Complaint alleges that there were violations of project requirements on 96 trips by dredge scows to the Miami ODMDS, such as excessive leakage, scow doors not closing after disposal, disposal in the wrong area of the ODMDS, and other alleged violations. Complaint, ¶ 30 & App. A. The Complaint characterizes this as a "large number of violations," *id.* ¶ 9, but even if true, they represent approximately 2% of the 4,200+ scow trips on the project.

None of these claims are based on alleged violations of Corps Permit No. SAJ-2006-06547. Instead, the Complaint is based entirely on claims that Great Lakes violated provisions of its Contract with the Corps and provisions of the Site Plan. *See, e.g., id.* ¶ 29-30 & App. A. The Complaint asserts that Great Lakes owes penalties for violations of the Contract and Site Plan because the entire Port of Miami project is a "Dredged Material Permit" as defined at 40 CFR § 220.2(h). *Id.* ¶¶ 9, 24, 28, 30. The Complaint also asserts that Great Lakes is subject to civil penalties because violation of the Site Plan constitutes a violation of the EPA regulation designating the Miami ODMDS as an offshore disposal site, 40 CFR § 228.19(h)(19). *Id.* §§ 29-30.

II. The Tribunal Should Dismiss the Complaint for Failure to State a Claim for Civil Penalties Pursuant to the MPRSA

The tribunal may dismiss the Complaint "on the basis of ... grounds which show no right to relief on the part of the complainant." 40 CFR § 22.20(a). This motion, brought pursuant to 40 CFR § 22.16, is analogous to one under Federal Rule of Civil Procedure 12(b)(6) and challenges the legal sufficiency of the Complaint. *In re Asbestos Specialists, Inc.,* 4 E.A.D. 819,

827 (EAB 1993) (motions to dismiss under the Consolidated Rules are analogous to those under Fed. R. Civ. P. 12(b)(6)).

The Complaint fails to state a claim for civil penalties under the MPRSA. The civil penalty provision of the MPRSA provides that, "[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, shall be liable for a civil penalty ... to be assessed by the Administrator [EPA]." 33 U.S.C. § 1415(a).

The MPRSA does not authorize EPA to assess civil penalties for violations of contracts and site plans on Federal dredging projects. Congress gave the primary role in the management of dredged material disposal on Federal projects to the Corps, not EPA. As the contracting agency, the Corps is best positioned to enforce its requirements on its contractors, and the MPRSA does not give EPA an enforcement role in this circumstance.

The Complaint also does not allege a violation of a predicate act for civil penalties. In order to assess civil penalties against Great Lakes, EPA must demonstrate that Great Lakes violated one of three predicates: (i) "any provision of this subchapter," (ii) "the regulations promulgated under this subchapter," or (iii) a permit issued under this subchapter." The claims in the Complaint are based entirely on alleged violations of Great Lakes' Contract with the Corps and the Site Plan for the Miami ODMDS. Neither the Contract nor the Site Plan are a permit. Also, the MPRSA and regulations under the statute do not authorize EPA to assess civil penalties for violations of the Contract or Site Plan.

A. EPA Has Only Limited Authority to Conduct Enforcement on Federal Projects

The MPRSA limits EPA's authority to conduct enforcement related to Federal dredging projects. EPA does not have general authority to assess civil penalties in connection with Federal projects: the only basis for enforcement is if there is a violation of a "permit." This is evidenced by the structure of the statute, the legislative history, and MPRSA regulations. Since

the Complaint is not based on any alleged violations of the permit for the Port of Miami Project (Corps Permit No. SAJ-2006-06547), it fails to state a claim.

The Corps, not EPA, has the authority to manage ocean disposal of dredged material. The Corps has exclusive authority to issue permits for the disposal of dredged material. 33 U.S.C. § 1413(a) ("the Secretary may issue permits . . . for the transportation of dredged material for the purposes of dumping it into ocean waters"). Further, the Corps has the authority to proceed "in lieu of the permit procedure" for its own Federal dredging projects. *Id.* § 1413(e). EPA has no authority to issue permits for the disposal of dredged material. *Id.* § 1412(a) (providing that EPA may issue permits "[e]xcept in relation to dredged material"). EPA's only role in the disposal of dredged material on Federal projects is the designation of disposal sites, *id.* § 1412(c), and coordinating with the Corps regarding use of those sites, *id.* § 1413(c).

EPA's limited permitting role is matched by limited powers of enforcement. The civil penalty statute, 33 U.S.C. § 1415(a), authorizes EPA civil penalty enforcement authority based on the violation of "permits." Congress gave the Corps authority to proceed "in lieu of the permit procedure" on Federal projects. *Id.* § 1413(e). Nowhere in the MPRSA does it say that EPA can assess civil penalties against the Corps or its contractors for violations of a contract, a site plan, or any prohibition or limitation contained in such documents. The obvious purpose of the provision allowing the Corps to proceed "in lieu of the permit procedure" on Federal projects is to limit the ability of EPA to bring enforcement against a fellow agency and its contractors. If EPA nevertheless could impose civil penalties on Federal projects despite the lack of a permit, then the statutory exemption from the permit procedure on those projects would serve no purpose. *Univ. of Texas Southwestern Medical Ctr. v. Nassar,* 570 U.S. 338, 353 (2013) (rejecting interpretation of statute in part due to "its inconsistency with the design and structure of the statute as a whole ... Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices").

The limited grounds for civil penalties stands in contrast to the more expansive grounds for injunctive relief provided in the statute. A separate provision of the MPRSA allows any person to commence a civil suit for injunctive relief against any person "who is alleged to be in violation of any prohibition, limitation, criterion or permit established or issued under this subchapter." 33 U.S.C. § 1415(g)(1). By distinguishing "permits" from "prohibitions," "limitations," and "criteria," Congress made clear that not all prohibitions, limitations and criteria are contained in permits, and allowed actions for injunctive relief based on that more expansive list of restrictions. *Henson v. Santander Consumer USA, Inc.,* 137 S.Ct. 1718, 1723 (2017) (courts "presume differences in language like this convey differences in meaning"). The absence of such expansive language in the civil penalty statute indicates that Congress intended a more limited set of predicates for assessment of civil penalties. *Azar v. Allina Health Servs.,* 139 S.Ct. 1804, 1813 (2019) ("Congress's choice to include a cross-reference to one but not the other [statutory provision] strongly suggests it acted 'intentionally and purposefully in the disparate' decisions.") (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983); *Nassar,* 570 U.S. at 353-54 (the fact that a different portion of a statute referenced certain types of claims "reinforce[ed] the conclusion that Congress acted deliberately when it omitted" those claims from another portion of the statute).

The limitations on EPA enforcement inherent in the language of MPRSA are consistent with the legislative history. The original Nixon Administration proposal for legislation excluded federal agencies and their agents from the definition of "persons" subject to civil penalties. *See* Letter from EPA Administrator William Ruckelshaus to Senate President Spiro T. Agnew (Feb. 10, 1971), 1972 U.S. Code Cong & Admin. News 4234, 4255 ("Federal organizations, employees, and agents . . . are excepted from the definition of 'person' insofar as section 6, providing for penalties, is concerned. Thus, Federal organizations, employees and agents ... would be required to obtain approval from the Administrator of EPA for the transportation for dumping or the dumping of materials in the relevant waters, but they are not liable for or subject

to the penalty provisions."). The original Senate bill followed this approach. S. Rep. No. 92-451, 1972 U.S. Code Cong. & Admin. News 4234, 4249 (Nov. 12, 1971) (in discussing original Senate bill, "Federal employees and agencies are, by the definition of 'person' (see section 3(e)), excluded from the application of civil and criminal penalties provided in subsections (a)-(f) of this section. The Committee is satisfied that Federal administrative disciplinary procedures are adequate for purposes of this Act."). The House bill did not have that limitation on the definition of "person," and 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. H.R. Conf. Rep. 92-1546, 1972 U.S. Code Cong. & Admin. News 4264, 4277-78. The two chambers resolved the issue by adopting the House definition of "person" but gave to the Corps authority to issue permits for dredged material and also allowed the Corps to proceed "in lieu of the permit procedure" on its own projects. *Id.* 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. *Cf.* S. Rep. No. 93-726, 93rd Cong., 2d Sess. 6 (March 6, 1074) (legislative history for 1974 amendments, noting that under the MPRSA "[p]enalties are provided for violation of the permit program").

EPA's own regulations at 40 CFR Part 220 reflect the limitations on its authority to assess civil penalties against the Corps and its contractors. These regulations provide that EPA "shall ... initiate and carry out enforcement activities ... with respect to general, special, emergency, or research permits." 40 CFR § 220.4(a); *see also id.* § 220.4(b) (providing more limited authority to regional offices to "initiate and carry out enforcement activities ...with respect to special permits..."). "General, special, emergency and research permits" are defined as "permits for ocean dumping under section 102 of the Act," *id.* § 220.3 (emphasis added), which is the section of the MPRSA that governs non-dredged materials. These regulations therefore do not authorize EPA to bring enforcement related to permits for dredged material under

MPRSA Section 103, 33 U.S.C. § 1413, much less enforcement where the Corps proceeds "in lieu of the permit procedure." *Compare* 33 CFR § 326.4 (Corps regulations authorizing its oversight and enforcement of authorized activities).

This makes good policy sense with regard to Federal projects. Contractors on Federal projects are acting at the direction of the Corps. Since the Corps is the contracting agency, it is the logical agency to enforce compliance with its contracts. If EPA could enforce those contracts through civil penalties, then EPA would be in a supervisory role over the Corps' contractors and would interfere with the Corps' management of its own projects.

This does not mean that there are no mechanisms to enforce the MPRSA in this situation. Contractors such as Great Lakes act only at the direction of the Corps. The Corps can terminate, deduct payment from, or otherwise take action against its contractors pursuant to standard contract terms. But it does mean that enforcement of contracts is reserved to the Corps. Otherwise, there is the risk of inconsistent treatment of contractors by different federal agencies, which federal law seeks to avoid. *Cf. 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); *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).

The Complaint is predicated entirely upon the limited delegation of EPA enforcement authority to the Regional Administrator of Region 4. Complaint, ¶1. Pursuant to 40 CFR 220.4, that enforcement authority is expressly limited to "initiate and carry out enforcement activities . . . with respect to special permits" which are issued by the EPA pursuant to Section 102 of MPRSA and defined at 40 CFR 220.3(b). That enforcement authority does not extend to Federal projects administered by the Corps pursuant to Section 103 of MPRSA, such as the

Port of Miami Project. Given the limitations on EPA's authority, the Complaint fails to state a claim for civil penalties in in connection with this Federal dredging project.

B. Violations of a Contract Cannot Be the Basis of Civil Penalties

In addition to the general limitations on EPA's authority to conduct enforcement on Federal dredging projects, the Complaint fails to allege a violation of any of the three predicates for civil penalties. The MPRSA authorizes civil penalties only if a respondent violates a "permit," "any provision of this subchapter," or "regulations under this subchapter." 33 U.S.C. § 1415(a). The 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. This section addresses the Contract, and the following section addresses the Site Plan.

1. Great Lakes' Contract Is Not a Permit

Great Lakes' Contract with the Corps is not a "permit" within the meaning of the civil penalty provision of the MPRSA. The Port of Miami project was a Federal project conducted by the Corps through its contractors. The MPRSA authorizes the Corps to conduct such projects pursuant to its regulations "in lieu of the permit procedure." 33 U.S.C. § 1413(e). "In lieu of" means "in place of" or "instead of." Black's Law Dictionary (11th ed. 2019) (definition of "in lieu of": "instead of; in place of; in substitution of"); *see also Blizinger v. Lyng,* 834 F.2d 618, 621-22 (7th Cir. 1987) (interpreting the phrase "in lieu of" in 7 U.S.C. § 2014(k) to mean "instead of" based on "the ordinary meaning of the phrase"); *First Alex Bancshares, Inc. v. United States,* 830 F. Supp. 581, 584-85 (W.D. Okla. 1993) (construing the phrase "in lieu of" in 25 U.S.C. § 585(a)(1) to mean "instead of" based on the phrase's "plain meaning"). By using the phrase "in lieu of" in the MPRSA, Congress expressly stated that alternative procedure for Federal projects undertaken by the Corps is not a "permit."

The Corps does not issue itself permits for its own projects. 33 CFR § 324.3(b) (providing that MPRSA dredged material permit procedures apply to work "done by or on behalf of any Federal Agency other than the activities of the Corps of Engineers"); Corps Regulatory

Guidance Letter ("RGL") 88-9 (July 21, 1988) ("As a matter of policy, the Corps does not issue itself Permits under any of the regulatory authorities it administers . . . [including] Section 103 of the Ocean Dumping Act."); *see also* RGL 05-06 (Dec. 7, 2005) (identifying RGL 88-09 as one that "continue[s] to be generally applicable to the Corps Regulatory Program"). The only time the Corps issues permits connected to one of its projects is when a local sponsor seeks to conduct additional work outside the boundaries of the Federally-maintained port areas. RGL 88-09 ("Where local sponsors perform ancillary work to the Corps-constructed project (e.g., a berthing facility) . . . the sponsor needs a permit.").

That is exactly how the Corps proceeded on the Port of Miami Project. The Corps issued Permit No. SAJ-2006-06547 to the Port of Miami (its local sponsor) for dredging of the berthing areas. Complaint ¶ 18. For the remaining Federal portions of the project, however, the Corps did not issue a permit and simply hired Great Lakes and other contractors to do the work. The fact that the Corps issued a permit, but limited its scope to the local sponsor's berthing areas, confirms that there was no permit for the remainder of the project.

The definition of "Dredged Material Permit" in EPA regulations does not make Great Lakes' Contract with the Corps a "permit." EPA regulations governing coordination with the Corps define the term "Dredged Material Permit" as "a permit issued by the Corps of Engineers under section 103 of the Act (see 33 CFR 209.120) and any Federal projects under section 103(e) of the Act (see 33 CFR 209.145)." 40 CFR § 220.2(h). This definition cannot mean that the Corps' Contract is a "permit" within the meaning of the MPRSA, because Congress expressly said that the Corps could conduct Federal projects "in lieu of the permit procedure," i.e., instead of issuing a permit. 33 U.S.C. § 1413(e).

EPA lacks the authority to issue a regulation that is at odds with the statute's plain language. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000) (where Congress has "directly spoken to the precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress") (quoting *Chevron U.S.A., Inc. v. Nat. Res.*

Def. Council, 467 U.S. 837, 842-43 (1984)); *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue,* 297 U.S. 129, 134-35 (1936) (a regulation that "create[s] a rule out of harmony with the statute is a mere nullity"); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs,* No. 18-10541, 2019 WL 5690619, at *6 (11th Cir. Nov. 4, 2019) ("regulations cannot contradict their animating statutes or manufacture additional agency power"). The Tribunal should avoid an interpretation that makes the regulation contradict the statute. *Goodson-Todman Enterprises, Ltd. v. C.I.R.,* 784 F.2d 66, 73 (2d Cir. 1986) ("regulations should be construed, if possible, in such a way as to preserve their validity").

Properly interpreted, this regulatory definition of "Dredged Material Permit" does not mean that a contract is a permit subject to civil penalties. The definition states that "Dredged Material Permit" includes "any other Federal projects reviewed under section 103(e)." 40 CFR § 220.2(h) (emphasis added). A Federal dredging project is not a document with discrete enforceable requirements, but rather is an overall agency endeavor involving people, activities, funding and the like. Federal projects do not necessarily have to involve contractors, so for some projects there may be no contracts. Moreover, a project the size of the Port of Miami Project has many documents associated with it, not just one that could be treated as a permit.

In this context, it is apparent that the regulation simply identifies the projects subject to coordination between EPA and the Corps. The MPRSA provides that EPA must designate ocean dumping sites, 33 U.S.C. § 1412(c), and that the Corps must coordinate with EPA before using those sites for the disposal of dredged material, *id.* § 1413(c). Since the Corps can authorize disposal of dredged material either pursuant to permits, *id.* § 1413(a), or without permits on its own projects, *id.* § 1413(e), the EPA regulation uses a single term ("Dredged Material Permit") to indicate that it will review both types of projects. The definition itself makes clear that it is concerned with the review of Corps projects, not enforcement. 40 CFR § 220.2(h) ("Dredged Material Permit means . . . any Federal projects reviewed under section 103(e) of the Act") (emphasis added). EPA's regulations expressly state that its defined term "Dredged

Material Permit", like all its defined terms, applies only "as used in this subchapter H." 40 CFR § 220.2. The only purpose of subchapter H with respect to the ocean dumping of dredged materials is to establish criteria to be applied by the Corps in its review of such activities. 40 CFR § 220.1(a). The definition of "Dredged Material Permit" in EPA's regulation therefore only defines the scope of coordination between the EPA and Corps, and does not make documents associated with a Federal project "permits" for purposes of civil penalties.

2. Breach of a Corps Contract Does Not Constitute Violation of the MPRSA

Violations of Great Lakes' Contract do not constitute violations of the MPRSA itself. The civil penalty provision allows EPA to assess civil penalties against "[a]ny person who violates any provision of this subchapter." 33 U.S.C. § 1415(a). The civil penalty provision is found in Subchapter I of the MPRSA, 33 U.S.C. §§ 1411-1420. Nowhere in Sections 1411 through 1420 of the MPRSA is there any prohibition on violating Corps contracts. "Where Congress knows how to say something but chooses not to, its silence is controlling." *Animal Legal Def. Fund v. U.S. Dep't. of Agric.*, 789 F.3d 1206, 1217 (3d Cir. 2015); *see also United States v. Koonce,* 991 F.2d 693, 698 (11th Cir. 1993) ("The canon of statutory construction that the inclusion of one implies the exclusion of others is well established.").

This does not mean that Corps contracts are unenforceable, because the Corps already has contract-based remedies against its contractors. However, the MPRSA does not create any additional prohibition against breaches of contract beyond those found elsewhere in Federal law.

The only section of the statute identified in the Complaint as being violated is 33 U.S.C. § 1411(a). That section provides that, "[e]xcept as may be authorized by a permit issued pursuant to section 1412 [EPA permits for non-dredged material] or section 1413 [Corps permits for dredged materials] of this title, and subject to regulations issued pursuant to section 1418 of this title, . . . no person shall transport from the United States . . . any material for the purpose of dumping it in ocean waters." *Id.* Yet the Complaint acknowledges that this section merely

prohibits transportation "except as authorized by a permit." Complaint, ¶ 4. For Federal projects, Congress authorized the Corps to proceed "in lieu of the permit procedure" and Great Lakes' Contract does not constitute a permit. Violation of the Contract therefore is not a violation of "any provision of this subchapter" that would allow for assessment of civil penalties.

3. Breach of a Corps Contract Does Not Violate MPRSA Regulations

Applicable regulations do not prohibit violations of provisions in Corps contracts. The civil penalty provision allows EPA to assess civil penalties against "[a]ny person who violates any provision . . . of the regulations promulgated under this subchapter." 33 U.S.C. § 1415(a). While a breach of contract may give rise to contract-based remedies, it does not constitute a violation of applicable regulations that allow for civil penalties.

For Federal dredging projects, the MPRSA authorizes the Corps to "issue regulations which will require 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..." 33 U.S.C. § 1413(e). The Corps regulation governing "Supervision of Federal Projects" is 33 CFR § 337.10 (formerly codified at 33 CFR § 209.145). 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.

Id. § 337.10

This regulation places obligations on Corps officials, not private contractors. The regulation directs "district engineers" and "contracting officers" to "assure" compliance with certain conditions; it does not impose self-executing obligations on Corps contractors. As stated by the court *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. There have been no cases cited to the Court that would impose liability on a contractor because of the failure of the Corps of Engineers to comply with regulations directed specifically to it."

Even if this regulation did impose obligations directly on contractors, the only obligation is to comply with "conditions expressed in the SOF and ROD." Statements of Findings and Records of Decision are decision documents issued by the Corps at the end of the project planning process. 33 CFR § 337.6 (explaining that SOF's are issued when the Corps prepares an Environmental Assessment and ROD's are issued when the agency prepares an Environmental Impact Statement). For the Port of Miami Project, the Corps issued a ROD in May 2006 (attached as Exhibit 1, for ease of reference), which contained none of the provisions that are the basis of the claims in the Complaint.

Alleged breaches of the Contract therefore are not a violation of the "regulations promulgated under this subchapter." Since breaches of the Contract do not meet any of the predicates for civil penalties, the Complaint fails to state a claim based on the Contract.

C. Violations of the Site Plan Cannot be the Basis of Civil Penalties

The MPRSA also does not allow for the assessment of civil penalties based on actions inconsistent with a Site Plan. A Site Plan is not a permit, and violation of such a plan does not constitute a violation of "this subchapter" or "regulations promulgated under this subchapter" within the meaning of 33 U.S.C. § 1415(a).

1. The Site Plan Is Not a Permit

The Site Plan is not "a permit issued under this subchapter" that can be the basis of civil penalties. The MPRSA labels it a "plan," not a "permit." The statute provides that "the Administrator [EPA], in conjunction with the Secretary [the Corps], shall develop a site management plan for each site designated pursuant to this subsection." 33 U.S.C. § 1412(c)(3). The reference to it as a "plan" stands in contrast to other provisions of the statute

which refer to "permits." *Compare id.* § 1411(a) (general requirement of compliance with a "permit"); *id.* § 1412(a) (authorizing EPA to issue "permits" for non-dredged material); *id.* 1412(e) (addressing "foreign state permits"); *id.* § 1413(a) (Corps authority to issue dredged material "permits"); *id.* § 1414 (addressing "permit conditions"). Congress clearly knew how to use the term "permit," but pointedly called the Site Plan a "plan." The difference in the language conveys a difference in meaning. *Wis. Cent., Ltd. v. United States,* 138 S.Ct. 2067, 2071 (2018) (applying that principle of statutory interpretation).

In any case, the Site Plan cannot be a permit because EPA lacks authority to issue a permit for dredged material. Congress authorized EPA to issue permits "except in relation to dredged material." 33 U.S.C. § 1412(a). The only agency that has authority to issue permits for dredged material is the Corps. *Id.* § 1413(a). So even if one were to ignore the plain language of the statute, the Site Plan cannot be a permit because EPA lacks authority to issue permits for the transportation and disposal of dredged material.

2. Actions Inconsistent With a Site Plan Do Not Constitute Violation of the MPRSA

An alleged violation of the Site Plan is not an independent violation of a "provision of this subchapter" that would allow assessment of civil penalties under 33 U.S.C. § 1415(a). Nothing in the MPRSA directly prohibits violation of a Site Plan. Section 1411(a), which sets forth "prohibited acts," prohibits violations of a "permit." Section 1414(a)(4), which addresses "permit conditions," provides that permits should include conditions "as are necessary to ensure consistency with any site management plan." If Site Plans were independently enforceable, the statute would have said so and there would be no need to incorporate their terms into permits. The tribunal should avoid interpretations that render language in a statute superfluous. *Hibbs v. Winn,* 542 U.S. 88, 101 (2004) (statutes should be construed "so that that no part will be inoperative or superfluous, void or insignificant") (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000)).

In addition, the MPRSA's more expansive provision authorizing injunctive relief indicates that violation of a Site Plan is not a predicate for civil penalties. As discussed above in part II(A) of this motion, 33 U.S.C. § 1415(g)(1) allows for civil actions seeking injunctive relief based not just on violations of a "permit," but also violations of any other "prohibition, limitation [or] criterion." But this language is not included in the civil penalty statute. The fact that Congress limited civil penalties to violations of "permits," the statute, and regulations indicates that Congress intended a more limited set of predicates for civil penalties. *Wis. Cent.,* 138 S.Ct. at 2017 (differences in language convey differences in meaning).

3. Actions Inconsistent with a Site Plan Do Not Constitute a Violation of Applicable Regulations

The alleged violations of the Site Plan set forth in the Complaint do not constitute violations of "the regulations promulgated under this subchapter" that would authorize assessment of civil penalties under 33 U.S.C. § 1415(a).

Nothing in the Corps' regulations prohibit violation of a Site Plan. For Federal dredging projects, the MPRSA gives the Corps authority to promulgate regulations, not EPA. 33 U.S.C. § 1413(e) ("In connection with Federal projects involving dredged material, the Secretary may . . . issue regulations . . . .") (emphasis added). As discussed above, the Corps regulations do not impose obligations on private contractors, but require Corps officials to ensure that contractors comply with relevant requirements. 33 CFR § 337.10; *In re Katrina Canal Breaches Consol. Litig.,* 2007 WL 763742, at *3 ("These regulations are guidelines for the Corps of Engineers to follow and do not pertain to the Dredging Defendants.").

EPA regulations governing offshore disposal do not govern the Port of Miami Project, because EPA lacks authority to issue regulations governing Federal dredging projects. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated to Congress." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). Agencies lack the power to promulgate rules regulating subject matter not delegated to

them by statute. *Gonzales v. Oregon,* 546 U.S. 243, 258-59 (2006) (Attorney General lacked authority to promulgate interpretive rule on subject over which he had limited powers, despite a general grant of rulemaking authority); *Am. Library Ass'n v. Fed. Commc'ns. Comm'n,* 406 F.3d 689, 691, 705 (D.C. Cir. 2005) (invalidating agency regulation on subject not delegated to it by statute, despite general grant of authority to conduct rulemaking). The ancillary grant of rulemaking authority in the MPRSA only gives authority to EPA, the Corps and the U.S. Coast Guard to issue regulations that "carry[] out the responsibilities and authority conferred by this subchapter," 33 U.S.C. § 1418, which in the case of EPA does include authority to manage the disposal of dredged material.

Even if EPA had authority to issue regulations governing Federal dredging projects, EPA's regulations do not make a Site Plan independently enforceable for purposes of civil penalties. The Complaint cites 40 CFR Part 228 as requiring compliance with the Site Plan. Complaint, ¶¶ 7, 29, 30. Part 228 generally addresses the "criteria for the management of disposal sites for ocean dumping," and sets forth how EPA will regulate disposal at offshore sites. A portion of Part 228 designates the Miami ODMDS as an offshore disposal site, and states that "Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan." 40 CFR § 228.15(h)(19)(vi).

The Complaint takes this sentence in the site designation out of context of the overall regulation. The regulation provides that "[t]his Part 228 is applicable to dredged material disposal sites only as specified in §§ 228.4(e), 228.9, and 228.12." 40 CFR § 228.1 (emphasis added). None of those sections address limitations on disposal at offshore sites: Section 228.4(e) addresses procedures for designating disposal sites, and recognizes that the Corps develops the "specific conditions" governing use of such sites; Section 228.9 addresses monitoring of disposal sites; and Section 228.12 is reserved. Notably absent from the list of sections applicable to dredged material sites is Section 228.7 ("Regulation of Disposal Site Use"), Section 228.8 ("Limitation on Times and Rates of Disposal"), and Section 228.15 (the

section cited in the Complaint). This makes clear that the requirements in Part 228 that relate to anything other than designation and monitoring of a site are inapplicable to dredged material disposal sites. The Complaint cannot assess civil penalties based on inapplicable provisions of the regulations.

In any case, the sentence in the Miami ODMDS site designation does not create a self-executing set of rules that govern Corps contractors on a Federal dredging project. The Site Plan is a planning document. Planning documents typically do not create enforceable obligations absent a clear legal requirement. *See, e.g., Montgomery Envtl. Coal. v. Costle,* 646 F.2d 568, 594 (D.C. Cir. 1980) (holding that planning documents at issue in that case did not impose binding requirements). EPA's MPRSA regulations provide that limitations in a site designation "will be accomplished by . . . the imposition of appropriate conditions on . . . permits." 40 CFR § 228.8. Similar to other environmental statutes, general requirements must be applied to an individual party through a permit in order to be enforceable. *Cf. Student Pub. Interest Research Grp. of N.J. v. AT&T Bell Labs.,* 617 F.Supp. 1190 (D.N.J. 1985) (under Clean Water Act, "[t]he basic mechanism for enforcing the new statutory goal of controlling pollutant discharge is the NPDES permit system . . . which translates the general effluent limitations into specific obligations for each discharger"); *NRDC v. Costle,* 568 F.2d 1369, 1374 (D.C. Cir. 1977) (noting that the "NPDES permit program . . . is central to the enforcement of the FWPCA" because "[i]t translates general effluent limitations into the specific obligations of a discharger"). Since the Corps has the exclusive authority to issue permits for dredged material, and may conduct its own Federal projects "in lieu of the permit procedure," 33 U.S.C. § 1413(e), this means that the Corps must incorporate the provisions of the Site Plan into its permits and contracts.

The Miami ODMDS Site Plan contemplates that its provisions are meant as a guide to the Corps. The document identifies the "[s]pecific responsibilities of EPA and the Jacksonville District Corps of Engineers" as the following:

> "EPA: EPA is responsible for designating/dedesignating MPRSA Section 102 Ocean Dredged Material Disposal Sites, for evaluating environmental effects of disposal of dredged material at these sites and for reviewing and concurring on dredged material suitability determinations.
>
> USACE: The USACE is responsible for evaluating dredged material suitability, issuing MPRSA Section 103 permits, regulating site use and developing and implementing disposal monitoring programs."

Exhibit 2, at 1-2 (2008 Site Plan) (emphasis added). The document does not indicate that EPA has any permitting or regulatory role. Instead, it is the Corps that is responsible for "issuing MPRSA Section 103 permits" and "regulating site use." For that reason, the 2008 Site Plan (and the 2011 revision) provide suggested language in appendices that may be included in permits and contracts. *See* Exhibit 2, Appendices B &C. This is consistent with the fact that the Site Plan is a planning document that is not independently enforceable.

Nothing in the MPRSA or its applicable regulations makes violations of a Site Plan a self-executing basis for civil penalties. Therefore, the Complaint fails to state a claim under 33 U.S.C. § 1415(a) and should be dismissed.

III. The Tribunal Should Dismiss Claims Based on the Site Plan Due to Violations of the Administrative Procedure Act

In the alternative, even if the tribunal were to conclude that violations of a Site Plan could become the basis for civil penalties under the MPRSA, the Site Plan for the Miami ODMDS cannot be enforced because it was promulgated in violation of the Administrative Procedure Act.

The Administrative Procedure Act establishes mandatory procedures for agencies to follow when issuing and revising agency rules. The key requirement is that agencies publish a "[g]eneral notice of proposed rule making ... in the Federal Register," 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments," *id.* § 553(d). This requirement applies to all substantive rules (also known as "legislative rules"), which are those "that have the 'force and effect of law.'" *Azar,* 139 S.Ct. at 1811 (quoting *Perez v. Mortgage Bankers Assn.,* 135 S.Ct. 1199, 1204 (2015)). Every amendment or modification of an agency's substantive rules constitutes

rulemaking subject to the APA's notice-and-comment requirements. 5 U.S.C. § 551(5) (defining "rule making" as the "agency process for formulating, amending or repealing a rule"); *Utility Solid Waste Activities Group v. EPA,* 236 F.3d 749, 752-54 (D.C. Cir. 2001) (EPA must follow notice-and-comment rulemaking procedures even when correcting technical errors in a regulation). Agency rules promulgated in violation of this requirement are invalid and unenforceable. *Chrysler Corp. v. Brown,* 441 U.S. 281, 312-14 (1979) ("regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act"); *Guilford College v. McAleenan,* 389 F.Supp.3d 377, 392 (M.D.N.C. 2019) ("Failure to comply with the APA's notice and comment procedures renders a 'legislative' or 'substantive' rule invalid") (quoting *Chen Zhou Chai v. Carroll,* 48 F.3d 1331, 1341 n.9 (4th Cir. 1995)).

The Site Plan for the Miami ODMDS is clearly a substantive rule, under EPA's theory of this case. The Complaint seeks civil penalties against Great Lakes based on alleged violation of the Site Plan, which it can only do if the Site Plan has the force and effect of law. "An agency action that purports to impose legally binding obligations or prohibitions on regulated parties – and that would be the basis for an enforcement action for violations of those obligations or requirements – is a legislative rule." *National Mining Ass'n v. McCarthy,* 758 F.3d 243, 251 (D.C. Cir. 2014); *accord Kisor v. Wilkie,* 139 S.Ct. 2400, 2420 (2019) (plurality opinion of Justice Kagan) ("An enforcement action must ... rely on a legislative rule, which (to be valid) must go through notice and comment.") (parentheses in original); *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (a rule is legislative where "in the absence of the rule there would not be an adequate legislative basis for enforcement action").

Neither the 2008 Site Plan, nor its 2011 revisions, went through notice-and-comment rulemaking. The Administrative Procedure Act requires notice in the Federal Register. 5 U.S.C. § 553(b); *Utility Solid Waste Activities Group,* 236 F.3d at 754 (internet notice is not an

acceptable substitute for publication in the Federal Register). A search of the Federal Register finds no notice for either the 2008 Site Plan or 2011 plan revisions referenced in the Complaint.

A previous Site Plan for the Miami ODMDS, prepared in 1995 in connection with the Environmental Impact Statement for EPA's designation of the Miami ODMDS, was subject to Federal Register notice. 59 Fed. Reg. 53951, 53955 (Oct. 27, 1994) (proposed rule designating Miami ODMDS, referencing original Site Plan in EIS); 61 Fed. Reg. 2941, 2945 (Jan. 30, 1996) (final rule designating Miami ODMDS, referencing original Site Plan in EIS). However, the Complaint does not bring claims based on the 1995 Site Plan. *See* Complaint, ¶ 14 (referencing the September 2008 Site Plan and September 26, 2011 Site Plan revisions). The obvious reason is that the 1995 Site Plan had none of the provisions that are the basis of the claims in the Complaint. *Compare* Exhibit 3 (1995 Site Plan, taken from the 1995 Environmental Impact Statement) *with* Exhibit 2 (2008 Site Plan).

The 2008 Site Plan and its 2011 Amendments also are not enforceable for the related reason that they violate requirements related to incorporation of documents by reference into the Code of Federal Regulations. The Administrative Procedure Act provides that documents may be incorporated by reference into the Code of Federal Regulations only "with the approval of the Director of the Federal Register." 5 U.S.C. § 552(a)(1). It is unclear whether EPA obtained the approval of the Director of the Federal Register when it included the reference to the Site Plan in its regulation. *See* 61 Fed. Reg. 2941, 2945-46 (Jan. 30, 1996) (final rule designating the Miami ODMDS, not indicating whether EPA obtain approval of the Director of the Federal Register to incorporate the Site Plan by reference). However, when the Miami ODMDS was designated as a disposal site, the only Site Plan was the version issued in 1995. Although the Miami ODMDS designation provides that "[d]isposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan," 40 CFR § 228.15(h)(19)(vi), such incorporation of a future version of the plan violates the prohibition that "[f]uture amendments or revisions of the publication [incorporated by reference] are not

included" in a regulation. 1 CFR § 51.1(f): *id.* § 51.7(a)(1) ("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"). The failure of EPA to comply with the publication requirements of the Administrative Procedure Act governing incorporation by reference means that the 2008 Site Plan (as revised in 2011) is ineffective to impose obligations upon Great Lakes. *Appalachian Power Co. v. Train,* 566 F.2d 451, 457 (D.C. Cir. 1977).

As argued above in part II of this motion, the 2008 Site Plan is simply a planning document, which does not impose legal requirements that can be the independent basis for civil penalties under the MPRSA. However, if the Tribunal is inclined to agree with EPA that the 2008 Site Plan is directly enforceable, then it is an invalid substantive rule because the agency failed to promulgate it in compliance with the Administrative Procedure Act. The Complaint cannot bring claims based on an invalid rule, therefore claims based on the Site Plan must be dismissed.

IV. Conclusion

Congress limited EPA's authority to assess civil penalties under the MPRSA to violations of permits, the statute, and applicable regulations. The MPRSA does not give EPA the authority to assess civil penalties for breaches of another agency's contract or actions inconsistent with a Site Plan. Instead, it leaves to the Corps responsibility to oversee and manage its contractors on Federal projects. Even if the Site Plan for the Miami ODMDS could be directly enforceable against Corps contractors, it is an invalid substantive rule because EPA promulgated it in violation of the Administrative Procedure Act. The Tribunal therefore should dismiss the Complaint for failure to state a claim.

Pursuant to the Tribunal's Prehearing Order, undersigned counsel contacted counsel for EPA, who indicated that EPA does not agree to the relief sought in this motion.

Dated: November 26, 2019

Respectfully Submitted,

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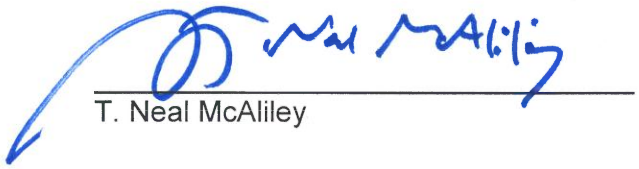
CERTIFICATE OF SERVICE

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



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