

in accordance with § 3001.193(e) over the duration of the agreement utilizing the methodology employed by the Commission in its recommendation of the existing agreement; and

(6) If applicable, the identification of circumstances unique to the request.

(b) When the Postal Service submits a request to modify a negotiated service agreement, it shall provide written notice of its request, either by hand delivery or by First-Class Mail, to all participants in the Commission docket established to consider the original agreement.

(c) The Commission will schedule a prehearing conference for each request. Participants shall be prepared to address at that time whether or not it is appropriate to proceed under § 3001.198, and whether or not any material issues of fact exist that require discovery or evidentiary hearings. After consideration of the material presented in support of the request, and the argument presented by the participants, if any, the Commission shall promptly issue a decision on whether or not to proceed under § 3001.198. If the Commission's decision is to not proceed under § 3001.198, the docket will proceed under § 3001.195 or § 3001.196, as appears appropriate.

(d) The Commission will treat requests to modify negotiated service agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under § 3001.198, a schedule will be established which allows a recommended decision to be issued not more than:

(1) Forty-five (45) days after the determination is made to proceed under § 3001.198, if no hearing is held; or

(2) Ninety (90) days after the determination is made to proceed under § 3001.198, if a hearing is scheduled.

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 228

[FRL-7919-9]

#### Ocean Disposal; Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, CT

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** With the publication of this final rule, EPA is designating two open-water dredged material disposal sites, Central Long Island Sound (CLIS) and Western Long Island Sound (WLIS), for the disposal of dredged material from harbors and navigation channels in the Long Island Sound vicinity in the states of Connecticut and New York. This action is necessary to provide long-term, open-water, dredged material disposal sites as an alternative for the possible future disposal of such material. The basis for this action is described in a Final Environmental Impact Statement (FEIS) published by EPA in March 2004. The FEIS identifies designation of the CLIS and WLIS dredged material disposal sites as the preferred alternatives from the range of options considered. On September 12, 2003, EPA published in the **Federal Register** a proposed rule and a notice of availability of a Draft EIS (DEIS) for this action. These disposal site designations are subject to various restrictions designed to support the goal of terminating or reducing the disposal of dredged material into Long Island Sound, as explained below in subsection E. 3 of the Supplementary Information section.

EPA has conducted the disposal site designation process consistent with the requirements of the Marine Protection, Research, and Sanctuaries Act (MPRSA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and other relevant statutes and regulations. Under NEPA, federal agencies prepare a public record of decision (ROD) at the time of their decision on any action for which an FEIS has been prepared. This **Federal Register** notice for the final rule will also serve as EPA's ROD for the site designations.

The site designations are intended to be effective for an indefinite period of time. EPA has agreed, however, that use of the sites pursuant to these designations may be suspended or terminated in accordance with the Restrictions included in the final rule.

The designation of these two disposal sites does not by itself authorize the disposal of dredged material from any particular dredging project at either site. The designation of the CLIS and WLIS disposal sites simply makes those sites available for use for the dredged material from a specific project if no environmentally preferable, practicable alternative for managing that dredged material exists, and if analysis of the dredged material indicates that it is suitable for open-water disposal.

Thus, each proposed dredging project will be evaluated to determine whether there are practicable, environmentally preferable alternatives to open-water disposal. In addition, the dredged material from each proposed disposal project will be subjected to MPRSA and/or CWA sediment testing requirements to determine its suitability for possible open-water disposal at an approved site. Alternatives to open-water disposal that will be considered include upland disposal and beneficial uses such as beach nourishment. If environmentally preferable, practicable disposal alternatives exist, open-water disposal will not be allowed. In addition, the dredged material will undergo physical, chemical, and biological analysis to determine its suitability for open-water disposal. EPA will not approve dredged material for open-water disposal if it determines that the material has the potential to cause unacceptable adverse effects to the marine environment or human health. The review process for proposed disposal projects is discussed in more detail below and in the FEIS.

As dredged material disposal sites designated by EPA under the MPRSA, CLIS and WLIS also will be subject to newly developed, detailed management and monitoring protocols to track site conditions and prevent the occurrence of unacceptable adverse effects. These management and monitoring protocols are described in the CLIS and WLIS Site Management and Monitoring Plans (SMMPs), which are incorporated in the FEIS as Appendix J. EPA is authorized to close or limit the use of these sites to further disposal activity if their use causes unacceptable adverse impacts to the marine environment or human health.

**DATES:** This final regulation is effective on July 5, 2005.

**ADDRESSES:** EPA has established a file supporting this action that includes the **Federal Register** notice for this final rule, the FEIS and its appendices, including the SMMPs and responses to public comments, and other supporting documents.

1. *In person.* The file is available for inspection at the following location: EPA New England Library, One Congress St., Suite 1100, Boston, MA 02114-2023. For access to the documents, call Peg Nelson at (617) 918-1991 between 10 a.m. and 3 p.m. Monday through Thursday, excluding legal holidays, for an appointment.

2. *Electronically.* You also may review and/or obtain electronic copies of the rule, FEIS, and various support documents from the EPA home page at <http://www.epa.gov/fedrgstr/>, or on the

EPA Region 1 homepage at <http://www.epa.gov/region1/eco/lisdreg/>.

The **Federal Register** notice for this final rule and the responses to public comments on the FEIS also are available for review by the public at the following locations. The DEIS and FEIS and its appendices, including the SMMPs and responses to public comments on the DEIS, also were provided to most of these sources at the time of their publication, and may still be available for review there.

1. *In person.* A. Cold Spring Harbor Library, Goose Hill Rd., Cold Spring Harbor, NY. B. East Hampton Library, 159 Main St., East Hampton, NY. C. Mamaroneck Public Library Inc., 136 Prospect Ave., Mamaroneck, NY. D. Montauk Library, 871 Montauk Highway, Montauk, NY. E. New York State Library, Cultural Education Center 6th Floor, Empire State Center, Albany, NY. F. Northport Library, 151 Laurel Ave., Northport, NY. G. Port Jefferson Free Library, 100 Thompson St., Port Jefferson, NY. H. Port Washington Public Library, 1 Library Dr., Port Washington, NY. I. Riverhead Free Library, 330 Court St., Riverhead, NY. J. Bridgeport Public Library, 925 Broad St., Bridgeport, CT. K. Connecticut State Library, Information Service Division, 231 Capital Ave., Hartford, CT. L. Milford City Library, 57 New Haven Ave., Milford, CT. M. New Haven Free Public Library, 133 Elm St., New Haven, CT. N. New London Public Library, 63 Huntington St., New London, CT. O. Norwalk Public Library, 1 Belden Ave., Norwalk, CT. P. Acton Public Library, 60 Old Boston Post Rd., Old Saybrook, CT. Q. Ferguson Library, 752 High Ridge Road, Stamford, CT. R. Boston Public Library, 700 Boylston St., Copley Square, Boston, MA.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jean Brochi, U.S. Environmental Protection Agency, One Congress St., Suite 1100 (COP), Boston, MA 02114–2023; telephone number: (617) 918–1070; fax number: (617) 918–1505; e-mail address: [Brochi\\_Jeanlis@epa.gov](mailto:Brochi_Jeanlis@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

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#### **A. Purpose**

The two dredged material disposal sites in Long Island Sound designated

by this action are necessary to provide long-term, environmentally acceptable disposal options for potential use by the U.S. Army Corps of Engineers (USACE, or Corps) and other federal, state, municipal and private entities who must dredge channels, harbors, marinas and other aquatic areas in the Long Island Sound vicinity in order to maintain conditions for safe navigation for the purposes of marine commerce and recreation.

#### **B. Potentially Affected Entities**

Entities potentially affected by this action are persons, organizations, or government bodies seeking to dispose of dredged material in waters of Long Island Sound, subject to the requirements of the MPRSA and/or the CWA and their implementing regulations. This final rule is expected to be primarily of relevance to: (a) Parties seeking permits from the USACE to transport more than 25,000 cubic yards of dredged material for the purpose of disposal into the waters of the central and western regions of Long Island Sound; (b) to the Corps itself for its own dredged material disposal projects; and (c) to other federal agencies seeking to dispose of dredged material in the central and western regions of Long Island Sound. Potentially affected categories and entities that may seek to use the dredged material disposal sites and would be subject to this final rule may include:

Category	Examples of potentially affected entities
Federal Government.	U.S. Army Corps of Engineers Civil Works Projects, and other federal agencies.
Industry and General Public.	Port authorities, harbors, shipyards, marine repair facilities, marinas, yacht clubs, and berth owners.
State, local and tribal governments.	Governments owning and/or responsible for ports, harbors, and/or berths, government agencies requiring disposal of dredged material associated with public works projects.

This table lists the types of entities that could potentially be affected by this final rule. EPA notes that nothing in this final rule alters the jurisdiction or authority of EPA or the types of entities regulated under the MPRSA and/or CWA. Questions regarding the applicability of this final rule to a particular entity should be directed to the contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

#### **C. Disposal Site Descriptions**

The following site descriptions are based on information in section 3.4.3 of the FEIS and supporting documents.

##### *1. Central Long Island Sound (CLIS)*

The CLIS site has been used for the disposal of dredged material from central and western Long Island Sound since the early 1940s and possibly earlier. An actively used site, CLIS has received close to 14 million cubic yards since 1941. Predecessors to the CLIS site in the same general vicinity received dredged material since the late 1800s. Between 1982 and 2001, CLIS received approximately seven million cubic yards, with an average annual volume of 350,000 cubic yards.

In recent years, dredged material disposal at CLIS has been conducted pursuant to either the Corps' short-term site selection authority under section 103(b) of the MPRSA or, for small (25,000 cubic yards or less), non-federal dredging projects, the Corps' CWA section 404 permitting authority. Prior disposal activity dating back to 1941 and possibly earlier was conducted under other applicable federal and state legal requirements. The availability of CLIS for use by the USACE under its most recent short-term site selection expired on February 18, 2004. Under MPRSA section 103(b), the term of the Corps site selection may not be extended. Therefore, the CLIS site is currently available only for disposal from non-federal projects generating 25,000 cubic yards or less of dredged material that satisfy CWA section 404 requirements.

The CLIS disposal site is a 1.1 by 2.2 nautical mile (nmi) rectangular area, about 2.4 square nautical miles (nmi<sup>2</sup>) in size. It is located 5.6 nmi south of South End Point near East Haven, Connecticut, and over 10 nmi north of Shoreham Beach, New York, in water depths ranging from 56 to 77 feet (17 to 23.5 meters). The site is entirely within Connecticut state waters, approximately 2.5 nmi north of the New York state border.

This final rule designates the CLIS site with boundaries slightly reconfigured from those of the current site. The northern boundary was extended 700 feet (213 meters) to the north, and the eastern boundary was extended 1,230 feet (375 meters) to the east, to encompass two historic disposal mounds, the FVP and CS2 mounds, that lie outside the current site boundaries. This reconfiguration will allow for management and monitoring of these two mounds. The coordinates (North

American Datum 1983: NAD 83) for the CLIS site are as follows:

41° 9.5' N 72° 54.4' W  
 41° 9.5' N 72° 51.5' W  
 41° 8.4' N 72° 54.4' W  
 41° 8.4' N 72° 51.5' W

The sediments at the site are predominantly clayey silt, with areas of mixed sand, clay, and silt. These sediments are typical of those found in central Long Island Sound, which is generally a fine-grained depositional environment. In addition to the ambient silts from this region, the site also contains deposits of material of mixed grain sizes dredged from harbors and navigation channels throughout the central and western Long Island Sound region.

## 2. Western Long Island Sound (WLIS)

The WLIS site has been used for dredged material disposal since 1982 when it was identified by the Corps in an EIS as the preferred alternative for a regional dredged material disposal site to serve the dredging needs of western Long Island Sound. Between 1982 and 2001, WLIS received 1.7 million cubic yards, with an average annual volume of 85,000 cubic yards. Prior to 1982, sites in the immediate vicinity of WLIS, including the Eaton's Neck, Stamford, and Norwalk historical disposal sites, served the dredging needs of the western Sound. In recent years, the WLIS site has been used pursuant to the Corps' short-term site selection authority under MPRSA section 103(b). Under that authority, the site could potentially be used for an additional five years starting with its next use for a project regulated under the MPRSA.

The WLIS disposal site is a 1.2 by 1.3 nmi rectangular area, about 1.56 nmi<sup>2</sup> in size. It is located 2.5 nmi south of Long Neck Point near Noroton, Connecticut, and two nmi north of Lloyd Point, New York, in water depths of 79 to 118 feet (24 to 36 meters). The site is entirely within Connecticut state waters, approximately 200 yards north of the New York state border.

This final rule designates the WLIS site with boundaries that have been slightly reconfigured from its existing location. The entire site has been shifted to the west by approximately 1,106 feet (337 meters) and to the north by 607 feet (185 meters). This shift will move the WLIS site out of a rapidly shoaling area in the southeast portion of the existing site. The coordinates (North American Datum 1983: NAD 83) for the reconfigured WLIS site are as follows:

41° 00.1' N 73° 29.8' W  
 41° 00.1' N 73° 28.1' W  
 40° 58.9' N 73° 29.8' W

40° 58.9' N 73° 28.1' W

The sediments at the site are heterogeneous, with clayey silt in the northeast corner and a mixture of sand-silt-clay in the center and southeast corner. These sediments are typical of those found in the western basin of Long Island Sound, which is generally a fine-grained depositional environment. In addition to the ambient silts from this region, the site also contains deposits of material of mixed grain sizes dredged from harbors and navigation channels throughout the western Long Island Sound region.

## D. Statutory and Regulatory Authorities

The dredged material disposal site designation process has been conducted consistent with the requirements of the Marine Protection, Research, and Sanctuaries Act (MPRSA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and any other applicable legal requirements.

### 1. Marine Protection, Research, and Sanctuaries Act (MPRSA); Clean Water Act (CWA)

The primary statutes governing the aquatic disposal of dredged material in the United States are the MPRSA, 33 U.S.C. 1401, *et seq.*, and the CWA, 33 U.S.C. 1251, *et seq.* The waters of Long Island Sound are landward of the baseline from which the territorial sea of the United States is measured. As with other waters lying landward of the baseline, all dredged material disposal activities in Long Island Sound, whether from federal or non-federal projects of any size, are subject to the requirements of section 404 of the CWA, 33 U.S.C. 1344. The MPRSA generally only applies to dredged material disposal in waters seaward of the baseline and would not apply to Long Island Sound but for the 1980 amendment that added section 106(f) to the statute, 33 U.S.C. 1416(f). This provision—commonly referred to as the “Ambro Amendment” after former New York Congressman Jerome Ambro—requires that the disposal of dredged material in Long Island Sound from federal projects (projects carried out under the USACE civil works program or by other federal agencies) and non-federal projects involving more than 25,000 cubic yards of material, must be carried out to comply with the requirements of both CWA section 404 and the MPRSA. This applies to both the authorization of

specific disposal sites and the assessment of the suitability of specific dredged material for disposal. Disposal from non-federal projects involving 25,000 cubic yards or less of dredged material, however, is subject only to CWA section 404.

Section 102(c) of the MPRSA, as amended, 33 U.S.C. 1412(c), *et seq.*, gives the Administrator of EPA authority to designate sites where ocean disposal of dredged material, among other things, may be permitted. *See also* 33 U.S.C. 1413(b) and 40 CFR 228.4(e). The statute places no specific time limit on the term for use of an EPA-designated disposal site. Thus, an EPA site designation can be for an indefinite term, and are generally thought of as long-term designations, but EPA may place restrictions or limits on the use of the site based on the site's capacity to receive dredged material or other environmental concerns. *See* 33 U.S.C. 1412(c). On October 1, 1986, the Administrator delegated authority to designate dredged material disposal sites to the Regional Administrator of the EPA Region in which the sites are located. The CLIS and WLIS sites are located in Connecticut waters in Long Island Sound and, therefore, are subject to the site designation authority of the Regional Administrator of the EPA New England Regional Office.

Section 103(b) of the MPRSA, 33 U.S.C. 1413(b), provides that any ocean disposal of dredged material should occur at EPA-designated sites when feasible. In the absence of an available EPA-designated site, however, the Corps is authorized to “select” appropriate disposal sites. In 1992, Congress amended MPRSA section 103(b) to place maximum time limits on the use of Corps-selected disposal sites. Specifically, the statute restricted the use of such sites to two separate five-year terms. Thus, open-water disposal in Long Island Sound of dredged material from projects subject to MPRSA requirements under section 106(f) of the statute (*i.e.*, federal projects or private projects involving more than 25,000 cubic yards of material) has been conducted at sites used pursuant to the Corps' site selection authority. The CLIS disposal site can no longer be used under this authority, however, because the second five-year term for the site under the Corps' most recent site selection expired on February 18, 2004. (The site can still be used if approved under CWA section 404 for non-federal projects involving less than 25,000 cubic yards of dredged material.) Meanwhile, the first five-year Corps site selection for the WLIS site has expired and use of the site under a Corps site

selection will be limited to five years from the date of the next such selection.

The Ocean Dumping Regulations prescribe general and specific criteria at 40 CFR 228.5 and 228.6, respectively, to guide the selection of disposal sites for final designation. EPA regulations at 40 CFR 228.4(e)(1) provide, among other things, that EPA will designate any disposal sites by promulgation in 40 CFR part 228. Ocean dumping sites designated on a final basis are promulgated at 40 CFR 228.15. Section 102(c) of the MPRSA and 40 CFR 228.3 also establish requirements for EPA's ongoing management and monitoring, in conjunction with the USACE, of the disposal sites designated by EPA to ensure that unacceptable, adverse environmental impacts do not occur. Examples of such management and monitoring include the following: regulating the times, rates, and methods of disposal, as well as the quantities and types of material that may be disposed; conducting pre- and post-disposal monitoring of sites; conducting disposal site evaluation and designation studies; and recommending modification of site use and/or designation conditions and restrictions. *See also* 40 CFR 228.7, 228.8, 228.9.

Finally, a disposal site designation by EPA does not actually authorize any dredged material to be disposed of at that site. It only makes use of that site available as a possible management option if various other conditions are met first. Authorization to use the site for dredged material disposal must be provided by the Corps under MPRSA section 103(b), subject to EPA review, and such disposal at the site can only be authorized if: (1) It is determined that there is a need for open-water disposal for that project (*i.e.*, that there are no practicable alternatives to such disposal that would cause less harm to the environment); and (2) the dredged material satisfies the applicable environmental impact criteria specified in EPA's regulations at 40 CFR part 227. Furthermore, the authorization for disposal is also subject to review for compliance with other applicable legal requirements, including the ESA, the MSFCMA, the CWA (including any applicable state water quality standards), NEPA, and the CZMA.

EPA's evaluation of CLIS and WLIS pursuant to the applicable site evaluation criteria, and its compliance with site management and monitoring requirements, are described below in the Compliance with Statutory and Regulatory Requirements section.

## 2. National Environmental Policy Act (NEPA)

NEPA, 42 U.S.C. 4321, *et seq.*, requires the public analysis of the potential environmental effects of proposed federal agency actions and reasonable alternative courses of action to ensure that these effects, and the differences in effects among the different alternatives, are understood in order to ensure high quality, informed decision-making and to facilitate avoiding or minimizing any adverse effects of proposed actions, and to help restore and enhance environmental quality. *See* 40 CFR 6.100(a) and 1500.1(c) and 1500.2(d)–(f). NEPA requires substantial public involvement throughout the decision-making process. *See* 40 CFR 6.400(a) and 40 CFR part 1503 and 1501.7, 1506.6.

Section 102(c) of NEPA, 42 U.S.C. 4321, *et seq.*, requires federal agencies to prepare an EIS for major federal actions significantly affecting the quality of the human environment. An EIS should assess: (1) The environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. The required content of an EIS is further described in regulations promulgated by the President's Council on Environmental Quality (CEQ). *See* 40 CFR part 1502.

EPA disposal site designation evaluations conducted by EPA under the MPRSA have been determined to be "functionally equivalent" to NEPA reviews, so that they are not subject to NEPA analysis requirements as a matter of law. Nevertheless, as a matter of policy, EPA voluntarily uses NEPA procedures when evaluating the potential designation of ocean dumping sites. *See* 63 FR 58045 (Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents, October 29, 1998). While EPA voluntarily uses NEPA review procedures in conducting MPRSA disposal site designation evaluations, EPA also has explained that "[t]he voluntary preparation of these documents in no way legally subjects the Agency to NEPA's requirements" (63 FR 58046).

In this case, EPA prepared an EIS to evaluate the possibility of designating

open-water disposal sites in the central and western regions of Long Island Sound. As part of the NEPA EIS process, federal agencies prepare a public record of decision (ROD) at the time of their decision on any action for which an FEIS has been prepared. In this case, this final rule will serve as EPA's ROD for the site designations. *See* 40 CFR 1505.2 and 1506.4 (the ROD may be integrated into any other agency document prepared in carrying out its action). EPA's use of NEPA procedures to evaluate this action is further described in the following section, Compliance with Statutory and Regulatory Requirements.

## 3. Coastal Zone Management Act (CZMA)

The CZMA, 16 U.S.C. 1451, *et seq.*, authorizes states to establish coastal zone management programs to develop and enforce policies to protect their coastal resources and promote uses of those resources that are desired by the state. Sections 307(c)(1)(A) and (C) of the CZMA require federal agencies to provide relevant states with a determination that each federal agency activity, whether taking place within or outside the coastal zone, that affects any land or water use or natural resource of the state's coastal zone, will be carried out in a manner consistent to the maximum extent practicable with the enforceable policies of the state's approved coastal zone management program. EPA's compliance with the CZMA is described in the following section, Compliance with Statutory and Regulatory Requirements.

## 4. Endangered Species Act (ESA)

Under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), federal agencies are required to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined \* \* \* to be critical \* \* \*." Depending on the species involved, a federal agency is required to consult with either the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) if the agency's action "may affect" an endangered or threatened species or its critical habitat (50 CFR 402.14(a)). EPA's compliance with the ESA is described in the following section, Compliance with Statutory and Regulatory Requirements.

*5. Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA)*

The 1996 Sustainable Fisheries Act amendments to the MSFCMA, 16 U.S.C. 1801, *et seq.*, require the designation of essential fish habitat (EFH) for federally managed species of fish and shellfish. Pursuant to section 305(b)(2) of the MSFCMA, federal agencies are required to consult with the NMFS regarding any action they authorize, fund, or undertake that may adversely affect EFH. An adverse effect has been defined by the Act as, “[a]ny impact which reduces the quality and/or quantity of EFH [and] may include direct (e.g., contamination or physical disruption), indirect (e.g., loss of prey, reduction in species’ fecundity), site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions” (50 CFR 600.810(a)). EPA’s compliance with the MSFCMA is described in the following section, Compliance with Statutory and Regulatory Requirements.

**E. Compliance With Statutory and Regulatory Requirements**

*1. Marine Protection, Research, and Sanctuaries Act (MPRSA)*

EPA undertook its evaluation of whether to designate any dredged material disposal sites in the central and western portions of Long Island Sound pursuant to its authority under MPRSA section 102(c) in response to several factors. These factors include the following:

- The prohibition on further use of the CLIS disposal site pursuant to the Corps’ site selection authority under MPRSA section 103(b);
- The five-year cap on any future use of the WLIS disposal site pursuant to the Corps’ site selection authority under MPRSA section 103(b);
- The understanding that in the absence of an EPA-designated disposal site or sites, any necessary open-water disposal would either be stymied or the USACE would have to undertake additional short-term site selections, perhaps many of them, in the future;
- The clear Congressional preference expressed in MPRSA section 103(b) that any open-water disposal of dredged material take place at EPA-designated sites, if feasible; and
- EPA’s policy view that it is generally environmentally preferable to concentrate any open-water disposal at sites that have been used historically and at fewer sites, *see* 40 CFR 228.5(e). EPA’s evaluation considered whether there was a need for any disposal site

designations for long-term dredged material disposal, including an assessment of whether other dredged material management methods could reasonably be judged to obviate the need for such designations. Having concluded that there was a need for open-water disposal sites, EPA then assessed whether there were sites that would satisfy the applicable environmental criteria to support a site designation under MPRSA section 102(c).

The MPRSA and EPA regulations promulgated thereunder impose a number of requirements related to the designation of dredged material disposal sites. These include procedural requirements, specification of criteria for use in site evaluations, and the requirement that a Site Management and Monitoring Plan (SMMP) must be developed for all designated sites. As discussed below, EPA complied with each of these requirements in designating the CLIS and WLIS disposal sites.

**a. Procedural Requirements**

MPRSA sections 102(c) and 103(b) indicate that EPA may designate ocean disposal sites, including for dredged material. EPA regulations at 40 CFR 228.4(e) specify that dredged material disposal sites will be “designated by EPA promulgation in this [40 CFR] part 228 \* \* \*.” EPA regulations at 40 CFR 228.6(b) direct that when an EIS is prepared under EPA policy in order to assess the proposed designation of one or more disposal sites, that EIS should include the results of an environmental evaluation of the proposed disposal site(s) and the Draft EIS (DEIS) should be presented to the public along with a proposed rule concerning the disposal site designations. According to 40 CFR 228.6(b), a Final EIS (FEIS) should be provided at the time of final rulemaking for the site designation.

EPA complied with all of these procedural requirements. The Agency prepared a thorough environmental evaluation of both the sites proposed for designation and other alternative sites and courses of action (other than designating open-water disposal sites). This evaluation was presented in a DEIS (and related documents) and a proposed rule for promulgation of the disposal sites. EPA published the proposed rule (68 FR 53687) and a notice of availability of the DEIS (68 FR 53730) for public review and comment in September 2003. In addition, EPA went beyond the requirements of 40 CFR 228.6(b) by publishing a FEIS for public review in April 2004, more than a year before issuance of this final rule, thus

giving the public an additional opportunity to comment on the proposed site designations, and giving EPA further opportunity to consider public input, before the final rulemaking for the site designations. By this final rule, EPA is now completing the designation of these disposal sites by promulgation in 40 CFR part 228.

Finally, MPRSA sections 102(c)(3) and (4) dictate that EPA must, in conjunction with the USACE, develop a site management plan for each dredged material disposal site it proposes to designate. MPRSA section 102(c)(3) also states that in the course of developing such management plans, EPA and the Corps must provide an opportunity for public comment. EPA and the Corps also met this obligation by publishing for public review and comment Draft SMMPs for both the CLIS and WLIS sites. The Draft SMMPs were published together with the Draft EIS (as Appendices J-1 and J-2, respectively) and the proposed rule in September 2003. After considering public comments regarding the SMMPs, EPA and the Corps published the Final SMMPs for the two disposal sites in April 2004 as Appendices J-1 and J-2 of the FEIS.

**b. Disposal Site Selection Criteria**

EPA regulations under the MPRSA identify five general criteria and 11 specific criteria for use in evaluating locations for the potential designation of dredged material disposal sites. *See* 40 CFR 228.4(e), 228.5 and 228.6. The evaluation of the CLIS and WLIS disposal sites with respect to the five general and 11 specific criteria is discussed in detail in the FEIS and supporting documents and is summarized below.

**General Criteria (40 CFR 228.5)**

As described in the FEIS, and summarized below, EPA has determined that the CLIS and WLIS disposal sites satisfy the five general criteria specified in 40 CFR 228.5. This is discussed in Chapter 5 and summarized in Table 5-13, “Summary of Impacts at the Alternative Sites,” of the FEIS.

1. Sites must be selected to minimize interference with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation (40 CFR 228.5(a)).

EPA’s evaluation demonstrated that both the CLIS and WLIS disposal sites would cause minimal interference with the aquatic activities identified in the criterion. The sites were selected because they are not located in shipping

lanes or other major navigation areas and are expected to cause minimal interference with fisheries, shellfisheries, and regions of commercial or recreational navigation. EPA used Geographic Information System (GIS) software to overlay the locations of various uses and natural resources of the marine environment on the disposal site locations and surrounding areas (including their bathymetry). Analysis of this data indicated that use of each site would have minimal potential for interfering with other existing or ongoing uses of the marine environment in and around the site locations, including lobstering or fishing activities. Furthermore, the locations of the two sites should minimize any interference with navigation since they lie outside areas of heavy commercial or recreational navigation. In addition, both the CLIS and WLIS sites have been used for dredged material disposal for many years and their use has not significantly interfered with the uses identified in the criterion, and mariners in the area are accustomed to use of the sites. Finally, time-of-year restrictions (also known as "environmental windows") imposed in order to protect fishery resources will typically limit dredged material disposal activities to the months of October through April, thus further minimizing any possibility of interference with the various activities specified in the criterion.

2. Sites must be situated such that temporary perturbations to water quality or other environmental conditions during initial mixing caused by disposal operations would be reduced to normal ambient levels or to undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery (40 CFR 228.5(b)).

EPA's analysis concluded that both the CLIS and WLIS sites satisfy this criterion. First, both sites are significant distances from any beach, shoreline, marine sanctuary (in fact, there are no federally-designated marine sanctuaries designated in Long Island Sound), or known geographically limited fishery or shellfishery. Second, the sites will be used only for the disposal of dredged material determined to be suitable for open-water disposal by application of the MPRSA ocean dumping criteria. See 40 CFR part 227. These criteria include provisions related to water quality and accounting for initial mixing. See 40 CFR 227.4, 227.5(d), 227.6(b) and (c), 227.13(c), 227.27, and 227.29. Data evaluated during development of the EIS, including data from monitoring

conducted during and after past disposal activities, indicates that any temporary perturbations in water quality or other environmental conditions at the site during initial mixing from disposal operations will be limited to the immediate area of the site and will neither cause any significant environmental degradation nor reach any beach, shoreline, marine sanctuary, or other important natural resource area.

3. If site designation studies show that any interim disposal sites do not meet the site selection criteria, use of such sites shall be terminated as soon as an alternate site can be designated (40 CFR 228.5(c)).

There are no interim sites in central and western Long Island Sound as defined under the Ocean Dumping Regulations (40 CFR 228.14). Neither the CLIS nor WLIS sites have ever been subject to an interim site designation by EPA. Therefore, this criterion is not applicable to the present disposal site designations. While the CLIS site has been used for dredged material disposal for many decades, it has never been an interim designated site. Prior to the 1980 Ambro Amendment, the MPRSA did not apply to Long Island Sound, and disposal was regulated under the Clean Water Act and/or other applicable authorities. Since the Ambro Amendment, both the CLIS and WLIS disposal sites have been used pursuant to the Corps' site selection authority under MPRSA section 103(b) for federal projects and large private projects (*i.e.*, those involving more than 25,000 cubic yards of material). Both sites also have been used for smaller private projects under CWA section 404 authority. Furthermore, EPA's evaluation concludes that both the CLIS and WLIS sites satisfy the applicable site selection criteria. Therefore, even if this criterion applied, the CLIS and WLIS sites would satisfy it.

4. The sizes of disposal sites will be limited in order to localize for identification and control any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-range impacts. Size, configuration, and location are to be determined as part of the disposal site evaluation (40 CFR 228.5(d)).

EPA has determined, based on the information presented in the FEIS, that the CLIS and WLIS sites are limited in size to localize for identification and control any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-range impacts. The combined size of the two sites is approximately 3.96 nmi<sup>2</sup>, which is just

half of one-percent of the 675 square miles that comprise the entire central and western Long Island Sound regions that comprised the study area for the EIS. As discussed in the FEIS, both sites are located in depositional areas, meaning the material placed in them will tend to stay there. As a result, any short-term impacts will be localized and this, together with other regulatory requirements (*e.g.*, application of sediment testing and MPRSA criteria), will facilitate control of any such impacts. The information presented in the FEIS indicates that historical disposal at these sites over many years has neither resulted in significant long-term adverse environmental effects nor had any significant effect outside the sites themselves.

Furthermore, due to their past use for dredged material disposal, these sites have been monitored for many years under the Corps' Disposal Area Monitoring System (DAMOS). Thus, experience indicates that the site configurations will enable effective short-term and long-term monitoring. In addition, as described above in the Disposal Site Descriptions section, the existing site boundaries of the CLIS site have been reconfigured to include two historical disposal mounds outside of the existing boundary so that they could be managed and monitored along with the rest of the site. As previously described, the WLIS site also has been reconfigured from its historical boundaries by shifting the entire site to the northwest to exclude a rapidly shoaling area within those prior site boundaries. Thus, EPA developed the site configurations in conjunction with, and in response to, the substance of the site evaluations. The sites are identified by specific coordinates spelled out in the regulations promulgated by this rulemaking, and the use of precision navigation equipment in both dredged material disposal operations and monitoring efforts will enable accurate disposal operations and contribute to effective management and monitoring of the sites. Detailed plans for the management and monitoring of the two sites are described in the SMMPs (Appendix J of the FEIS).

5. EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites where historical disposal has occurred (40 CFR 228.5(e)).

EPA evaluated sites beyond the edge of the continental shelf as well as historical disposal sites in Long Island Sound as part of the alternatives analysis conducted for the EIS. This evaluation determined that the long distances and travel times between the

dredging locations in central and western Long Island Sound and the continental shelf (*e.g.*, 140 miles from Mamaroneck Harbor in Westchester County, NY) posed significant environmental, operational, safety, and financial concerns, rendering such options unreasonable. Environmental concerns include increased risk of encountering endangered species during transit, increased fuel consumption and air emissions, and greater potential for accidents in transit that could lead to dredged material being spilled in unintended areas. As described in the Disposal Site Descriptions section, the CLIS and WLIS disposal sites both encompass the footprint of historically used sites. Long-term monitoring of these sites has shown minimal adverse impacts to the adjacent marine environment and rapid recovery of the benthic community in the disposal mounds. While there are also other historically used disposal sites in the Sound, the analysis in the FEIS concluded that the CLIS and WLIS sites were the preferable locations. Thus, the designation of the CLIS and WLIS disposal sites is consistent with this criterion.

#### Specific Criteria (40 CFR 228.6)

In addition to the five general criteria discussed above, 40 CFR 228.6(a) lists eleven specific factors to be used in evaluating the impact of the use of the site(s) for disposal under the MPRSA. Compliance with the criteria is described in detail in Chapter 5 and summarized in Table 5–13, “Summary of Impacts at the Alternative Sites,” of the FEIS, and is summarized below.

##### 1. Geographical Position, Depth of Water, Bottom Topography and Distance From Coast (40 CFR 228.6(a)(1))

Based on analyses described in the FEIS, EPA has concluded that the geographical position (*i.e.*, location), water depth, bottom topography (*i.e.*, bathymetry), and distance from coastlines of the two sites will facilitate containment of dredged material within site boundaries, and reduce the likelihood of material being transported to the adjacent sea floor or any areas of special environmental concern. As described in the preceding Disposal Sites Description section and above regarding compliance with general criteria 3 and 4 (40 CFR 228.6(c) and (d)), both sites are located far enough from shore, are deep enough, and have appropriate bathymetry to prevent adverse effects to the marine environment and coastlines. The CLIS site is located 5.6 nmi south of South End Point near East Haven, Connecticut,

and more than ten nmi north of Shoreham Beach, New York, in water depths ranging from 56 to 77 feet (17 to 23.5 meters). The WLIS site is located 2.5 nmi south of Long Neck Point near Noroton, Connecticut, and two nmi north of Lloyd Point, New York, in water depths of 79 to 118 feet (24 to 36 meters). As discussed in the FEIS, long-term monitoring of disposal sites in Long Island Sound found that creating mounds above a depth of 46 feet (14 meters) can result in material being removed from the mounds by currents (FEIS, p. 3–17). Both sites are of a sufficient depth to allow the disposal of the amount of material that is projected over the 20-year planning horizon without exceeding this depth threshold. As was also discussed in the FEIS, both sites are located in depositional areas, meaning the material placed in them will tend to stay there. As a result, any short-term impacts will be localized and this, together with other regulatory requirements described elsewhere in this document, will facilitate control of any such impacts.

##### 2. Location in Relation To Breeding, Spawning, Nursery, Feeding, or Passage Areas of Living Resources in Adult or Juvenile Phases (40 CFR 228.6(a)(2))

EPA considered the proposed CLIS and WLIS disposal sites in relation to breeding, spawning, nursery, feeding, or passage areas for adult and juvenile phases (*i.e.*, life stages) of living resources in Long Island Sound. From this analysis, EPA concluded that, while disposal of suitable dredged material at the CLIS and WLIS sites would cause some short-term, localized adverse effects, overall it would not cause unacceptable or unreasonable adverse effects to the habitat functions and living resources specified in the above criterion. The combined size of the two sites is approximately 3.96 nmi<sup>2</sup>, which is just half of one-percent of the 675 square miles that comprise the entire central and western Long Island Sound regions that comprised the study area for the EIS.

Generally, there are three primary ways that dredged material disposal can adversely affect marine resources. First, disposal can cause physical impacts by injuring or burying less mobile fish, shellfish, and benthic organisms, as well as their eggs and larvae. Second, tug and barge traffic transporting the dredged material to a disposal site may collide or otherwise interfere with marine mammals and reptiles. Third, contaminants in the dredged material may bioaccumulate through the food chain. However, EPA and the other federal and state agencies involved with

regulating dredging and dredged material disposal have adopted management techniques that greatly reduce the potential for these impacts to occur.

One such technique is the use of environmental windows, or time-of-year restrictions, for both dredging and dredged material disposal. This type of restriction has been a standard practice for more than a decade in Long Island Sound, and New England generally, and is incorporated in Corps permits or authorizations in response to consultation with federal and state natural resource agencies (*e.g.*, NMFS). Dredged material disposal in Long Island Sound is generally limited to the period between October 1 and April 30, but dredging windows are often shorter depending on the location of specific dredging projects in relation to certain fish and shellfish species. For example, dredging in nearshore areas where winter flounder spawning occurs is generally prohibited between February 1–April 1, dredging that may interfere with anadromous fish runs is generally prohibited between April 1–May 15, and dredging that may adversely affect shellfish is prohibited between June 1–September 30. These dredging windows, in effect, serve to further restrict periods during which dredged material would be disposed.

Another benefit of using environmental windows is that they reduce the likelihood of dredged material disposal activities interfering with marine mammals and reptiles. While there are several species, such as harbor porpoises, long-finned pilot whales, seals, and sea turtles, that either inhabit or migrate through Long Island Sound, most of them either leave the Sound during the winter months for warmer waters to the south or are less active and remain near the shore. There also are many other mobile species of fish (*e.g.*, striped bass, bluefish, scup) and invertebrates (*e.g.*, squid) that leave the Sound during the winter for either deeper water or warmer waters to the south, thus avoiding the time of year when most dredging and dredged material disposal occurs. The use of environmental windows has been refined over time and is now considered an effective management tool to minimize impacts to marine resources.

There will be some localized impacts to fish, shellfish, and benthic organisms, such as clams and worms, that are present at a disposal site (or in the water column directly above the site) during a disposal event. The sediment plume may entrain and smother some fish in the water column, and may bury some fish, shellfish, and other marine



organisms on the sea floor. There usually is a short-term loss of forage habitat in the immediate disposal area, but the DAMOS program has documented the recolonization of disposal mounds by benthic infauna within 1–3 years after disposal.

To further reduce potential environmental impacts associated with dredged material disposal, the dredged material from each proposed dredging project will be subjected to the MPRSA sediment testing requirements set forth at 40 CFR part 227 to determine its suitability for open-water disposal. Suitability for open-water disposal is determined by testing the proposed dredged material for toxicity and bioaccumulation and by quantifying the risk to human health from consuming marine organisms that are exposed to dredged material and its associated contaminants using a risk assessment model. If it is determined that the sediment is unsuitable for open-water disposal—that is it may unreasonably degrade or endanger human health or the marine environment—it cannot be disposed at disposal sites designated under the MPRSA. *See* 40 CFR 227.6.

EPA complied with the ESA by consulting with and receiving concurrence from the NMFS and USFWS that the designation of WLIS and CLIS was not likely to adversely affect federally listed species under its jurisdiction. Additionally, EPA consulted with NMFS under the MSFCMA on potential impacts to essential fish habitat (EFH). NMFS determined that the use of environmental windows and the stringent testing requirements were sufficient steps to minimize impacts to EFH and did not offer any additional conservation recommendations. Further details on these consultations are provided in the FEIS and the section below describing compliance with the ESA and MSFCMA.

EPA recognizes that dredged material disposal causes some short-term, localized adverse effects to marine organisms in the immediate vicinity of each disposal event. But because disposal is restricted to two small sites (see above regarding compliance with general criteria 5 (40 CFR 2285(e)) and to only several months of the year, EPA concludes that designating WLIS and CLIS will not cause unacceptable or unreasonable adverse impacts to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases.

### 3. Location in Relation to Beaches and Other Amenity Areas (40 CFR 228.6(a)(3))

EPA's analysis concluded that both the CLIS and WLIS sites satisfy this criterion. Both sites are far enough away from beaches, parks, wildlife refuges, and other areas of special concern to prevent adverse impacts to these amenities and, as previously noted, there are no marine sanctuaries in Long Island Sound. As previously described, the CLIS and WLIS disposal sites are 5.6 nmi and two nmi from the nearest shore, respectively. Therefore, the closest beaches, parks, wildlife refuges, or other areas of special concern are at least two nmi from either of the two disposal sites. Based on modeling results that are presented in section 5.5.3 of the FEIS, and past monitoring of actual disposal activities, this distance is beyond any expected transport of dredged material due to tidal motion or currents. As noted above, any temporary perturbations in water quality or other environmental conditions at the site during initial mixing from disposal operations will be limited to the immediate area of the site and will not reach any beach, parks, wildlife refuges, or other areas of special concern.

Thus, EPA does not anticipate that the continued use of the CLIS and WLIS disposal sites will cause any adverse impacts to beaches or other amenity areas.

### 4. Types and Quantities of Wastes Proposed To Be Disposed of, and Proposed Methods of Release, Including Methods of Packing the Waste, if Any (40 CFR 228.6(a)(4))

The typical composition of dredged material to be disposed at the sites is expected to range from predominantly "clay-silt" to "mostly sand." This expectation is based on data from historical dredging projects from the central and western regions of Long Island Sound. For federal dredging projects and private projects generating more than 25,000 cubic yards of dredged material, EPA and the USACE will conduct suitability determinations following applicable criteria for testing and evaluating dredged material under 40 CFR part 227 and further guidance in the "Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters" (EPA, 2004), before authorizing disposal under the MPRSA. Private dredging projects generating up to 25,000 cubic yards will continue to be regulated under CWA section 404. The requirements under the MPRSA and the

CWA are discussed in detail in the EIS. The CLIS and WLIS sites would receive dredged material that is transported by either government or private contractor hopper dredges or oceangoing bottom-dump barges towed by tugboat. Both types of equipment release the material at or very near the surface, which is the standard operating procedure for this activity. The disposal of this material will occur at specific coordinates marked by buoys and will be placed so as to concentrate material from each disposal project. This concentrated placement is expected to help minimize bottom impacts to benthic organisms. In addition, there are no plans to pack or package dredged material prior to disposal.

Furthermore, it should be emphasized that the CLIS and WLIS sites are only being designated for the disposal of dredged material; disposal of other types of material will not be allowed at these sites. It also should be noted that the disposal of certain other types of material is expressly prohibited by the MPRSA and EPA regulations (e.g., industrial waste, sewage sludge, chemical warfare agents, inadequately characterized materials) (33 U.S.C. 1414b; 40 CFR 227.5). For all of these reasons, no significant adverse impacts are expected to be associated with the types and quantities of dredged material that may be disposed at the sites.

### 5. Feasibility of Surveillance and Monitoring (40 CFR 228.6(a)(5))

Monitoring and surveillance are expected to be feasible at both sites. Both sites are readily accessible for bathymetric and side-scan sonar surveys and have been successfully monitored by the Corps over the past 20 years under the DAMOS program. Upon designation of the sites, monitoring will continue under the DAMOS program in accordance with the most current approved Site Management and Monitoring Plan (SMMP) for each site. A Draft SMMP for each site was issued for public comment in conjunction with the DEIS and was incorporated as Appendix J to the DEIS, while Final SMMPs were then completed and incorporated as Appendix J to the FEIS. The SMMPs may be subject to periodic revisions based on the results of site monitoring and other new information. Any such revisions will be closely coordinated with other federal and state resource management agencies and other stakeholders during the review and approval process, and will become final only when approved by EPA in conjunction with the USACE. *See* 33 U.S.C. 1413 (c)(3).



6. Dispersal, Horizontal Transport and Vertical Mixing Characteristics of the Area, Including Prevailing Current Direction and Velocity, if Any (40 CFR 228.6(a)(6))

Although the interactions of bathymetry, wind-generated waves, and river and ocean currents in Long Island Sound are complex, the CLIS and WLIS sites are located in areas that are generally calm except during storms, when dredging and dredged material disposal would not be occurring anyway. Past monitoring of disposal activity at these two sites has revealed minimal drift of sediment out of the disposal site as it passed through the water column, and disposal site monitoring has confirmed that peak wave-induced bottom current velocities are not sufficient to cause significant erosion of dredged material placed at either of the two sites. Monitoring has indicated that the CLIS and WLIS sites are depositional locations that collect, rather than disperse, sediment. For these reasons, EPA has determined that the dispersal, horizontal transport, and vertical mixing characteristics, as well as the current velocities and directions at the CLIS and WLIS sites are appropriate to support their designation as dredged material disposal sites.

7. Existence and Effects of Current and Previous Discharges and Dumping in the Area (Including Cumulative Effects) (40 CFR 228.6(a)(7))

As previously described in the Disposal Sites Descriptions section, the CLIS site has received close to 14 million cubic yards of dredged material since 1941, and predecessors to the CLIS site in the same general vicinity received dredged material since the late 1800s (with no reliable records of volumes disposed). The WLIS site has been used for dredged material disposal since 1982, receiving 1.7 million cubic yards since then. Prior to 1982, sites in the immediate vicinity of WLIS, including the Eaton's Neck, Stamford, and Norwalk historical disposal sites, served the dredging needs of the western Sound.

Until the passage of the CWA in 1972, dredged material disposal was not a heavily regulated activity. Since 1972, open-water disposal in Long Island Sound has been subject to the sediment testing and alternatives analysis provisions of section 404 of the CWA. With passage of the first Ambro Amendment in 1980, dredged material disposal from all federal projects and non-federal projects generating more than 25,000 cubic yards of material became subject to the requirements of

both CWA section 404 and the MPRSA. The result of these increasingly stringent regulatory requirements for dredged material disposal is that there has been a steady, measurable improvement in the quality of material that has been placed at the CLIS and WLIS disposal site over the past 33 years.

The CLIS and WLIS disposal sites have both been used on a consistent basis since the early 1980s pursuant to the Corps' short-term site selection authority under section 103(b) of the MPRSA (33 U.S.C. 1413(b)). Since then, disposal operations at these sites have been carefully managed and the material disposed there has been monitored. Past use of these sites generally makes them preferable to more pristine sites that have either not been used or have been used in the more distant past. *See* 40 CFR 228.5(e). Beyond this, however, EPA's evaluation of data and modeling results indicates that these past disposal operations have not resulted in unacceptable or unreasonable environmental degradation, and that there should be no such adverse effects in the future from the projected use of the CLIS and WLIS disposal sites. As part of this conclusion, discussed in detail in the FEIS, EPA found that there should be no significant adverse cumulative environmental effects from continuing to use these sites on a long-term basis for dredged material disposal in compliance with all applicable regulatory requirements regarding sediment quality and site usage.

8. Interference With Shipping, Fishing, Recreation, Mineral Extraction, Desalination, Fish and Shellfish Culture, Areas of Special Scientific Importance and Other Legitimate Uses of the Ocean (40 CFR 228.6(a)(8))

In evaluating whether disposal activity at the sites could interfere with shipping, fishing, recreation, mineral extraction, desalination, fish or shellfish culture, areas of scientific importance and other legitimate uses of the ocean, EPA considered both the effects of placing dredged material on the bottom of the Sound at the CLIS and WLIS sites and any effects from vessel traffic associated with transporting the dredged material to the disposal sites. From this evaluation, EPA concluded there would be no unacceptable or unreasonable adverse effects on the considerations noted in this criterion. Some of the factors listed in this criterion have already been discussed above due to its overlap with aspects of certain other criteria. Nevertheless, EPA will address each point below.

The disposal sites are not located in shipping lanes, and the vessel traffic generated by disposal activity is expected to be similar to that which has occurred over the past 20 years without interfering with other shipping activity. Moreover, research by EPA and the USACE concluded that after disposal at the sites, resulting water depths will be sufficient to permit navigation in the area without interference. (And by providing an open-water disposal alternative for use in the absence of environmentally preferable practicable alternatives, the sites are likely to facilitate navigation in many of the harbors, bays, rivers and channels around the Sound.) A U.S. Coast Guard (USCG) lightering area currently overlaps the northeast corner of the CLIS site, which could have resulted in anchors disturbing disposal mounds and causing sediment resuspension, but the USCG has agreed to shift the designated lightering area boundary to ensure that existing mounds and future disposed dredged material will not be disturbed. This shift is also not expected to have any adverse effect on local navigation. Moreover, as discussed above, dredged material disposal at the site will only occur in a limited number of months during each year to due to environmental windows that restrict when dredging and related disposal may occur.

EPA carefully evaluated the potential effects on commercial and recreational fishing for both finfish and shellfish (including lobster) of designating the CLIS and WLIS sites for dredged material disposal and concluded that there would be no unreasonable or unacceptable adverse effects. As discussed above in relation to other site evaluation criteria, dredged material disposal will only have incidental, insignificant effects on organisms in the disposal sites and no appreciable effects beyond the sites. Indeed, since past dredged material disposal has been determined to have no significant adverse effects on fishing, the similar projected levels of future disposal activities at the designated sites also are not expected to have any significant adverse effects. The following are the four main reasons why EPA came to the conclusion of no unacceptable adverse effects.

First, as discussed above, EPA has concluded that any contaminants in material permitted for disposal—having satisfied the dredged material criteria in the regulations that restrict any toxicity and bioaccumulation—will not cause any significant adverse effects on fish, shellfish, or other aquatic organisms. Furthermore, because both the CLIS and

WLIS sites are depositional, dredged material disposed at the sites is expected to remain there. Second, as also discussed above, the disposal sites do not encompass any especially important, sensitive, or limited habitat for the Sound's fish and shellfish, such as key spawning or nursery habitat for species of finfish. Furthermore, while some commenters in the EIS process expressed the concern that dredged material disposal has caused or contributed to the recent "die-off" of lobster in the western region of the Sound, or recent increases in the incidence of shell disease in the eastern portion of the Sound, EPA explained in detail in the EIS and Responses to Comments why dredged material disposal is not regarded to have caused or contributed significantly to either problem.

Third, while EPA found that a small number of demersal fish (*e.g.*, winter flounder), shellfish (*e.g.*, clams and lobsters), benthic organisms (*e.g.*, worms), and zooplankton and phytoplankton could be lost due to the physical effects of disposal (*e.g.*, burial of organisms on the bottom by dredged material and entrainment of plankton in the water column by dredged material upon its release from a disposal barge), EPA also determined that these minor adverse effects would be neither unreasonable nor unacceptable. This determination was based on EPA's conclusion that the numbers of organisms potentially affected represent only a minuscule percentage of those in the central and western regions of the Sound, and the Corps' disposal site monitoring showing the rapid recovery of the benthic community in an area covered with dredged material. In addition, any physical effects will be limited by the relatively few months in which disposal is permitted by the "environmental window" restrictions.

Fourth, EPA has determined that vessel traffic associated with dredged material disposal will not have any unreasonable or unacceptable adverse effects on fishing. As explained above, environmental window restrictions will limit any disposal to the period between October 1 and April 30, and often fewer months depending on species-specific dredging windows for each dredging project, each year. Moreover, there is generally far less vessel traffic in the months when disposal would occur due to the seasonal nature of recreational and commercial boating.

There currently are no mineral extraction activities or desalinization facilities in the central and western Long Island Sound region with which disposal activity could potentially

interfere. Energy transmission pipelines and cables are located near the sites, but none are within their boundaries. While at the time of this evaluation only three pipelines were in place, development of several new pipelines is anticipated in the future and will be prohibited from traversing the sites.

No fish farming currently takes place in Long Island Sound, and the only form of shellfish culture in the area, oyster production, occurs in nearshore locations far enough away from the two designated disposal sites that it should not be impacted in any manner by this action. Finally, neither site is in an area of special scientific importance; in fact, areas with such characteristics were screened out very early in the alternatives screening process.

Accordingly, depositing dredged material at the sites will not interfere with any of the activities described in this criterion or other legitimate uses of Long Island Sound.

#### 9. The Existing Water Quality and Ecology of the Sites as Determined by Available Data or by Trend Assessment or Baseline Surveys (40 CFR 228.6(a)(9))

EPA's analysis of existing water quality and ecological conditions at the site in light of available data, trend assessments and baseline surveys indicates that use of the designated disposal sites will cause no unacceptable or unreasonable adverse environmental effects. Considerations related to water quality and various ecological factors (*e.g.*, sediment quality, benthic organisms, fish and shellfish) have already been discussed above in relation to other site selection criteria, and are discussed in detail in the FEIS and supporting documents. In considering this criterion, EPA took into account existing water quality and sediment quality data collected at the disposal sites, including from the Corps' DAMOS site monitoring program. Furthermore, EPA and the Corps have, following solicitation of public comments, prepared Final SMMPs for both the CLIS and WLIS sites to guide future monitoring of site conditions.

#### 10. Potentiality for the Development or Recruitment of Nuisance Species in the Disposal Sites (40 CFR 228.6(a)(10))

Monitoring at disposal sites in Long Island Sound over the past 20 years has shown no recruitment of nuisance species capable of harming human health or the marine ecosystem and no such adverse effects are expected to occur at the CLIS and WLIS sites in the future. EPA and the USACE will continue to monitor the sites under the SMMPs, which include a "management

focus" on "changes in composition in numbers of pelagic, demersal, or benthic biota at or near the disposal sites" (see section 6.1.5 of the SMMPs, Appendix J of the FEIS).

#### 11. Existence at or in Close Proximity to the Sites of Any Significant Natural or Cultural Feature of Historical Importance (40 CFR 228.6(a)(11))

Due to the location of the two sites in the waters of central and western Long Island Sound, the cultural resources that have the greatest potential for being impacted are shipwrecks. A review of the current NOAA and Warren C. Reiss Marine Shipwrecks databases revealed a total of 39 shipwrecks throughout the Sound, but none are located within the disposal site boundaries, a fact confirmed by the Connecticut State Historic Preservation Office. While none of the known shipwrecks of historic significance are located within the sites, the central and western regions of Long Island Sound are known to have at least 12 and four shipwrecks, respectively. It is possible that there are other as yet undiscovered shipwrecks in the area. As additional side-scan sonar surveys are conducted at the disposal sites in the future under the SMMPs, and if potential shipwrecks are identified, EPA will take appropriate action in cooperation with federal and state historic preservation officials in response to any significant cultural resources.

The Connecticut State Historic Preservation Office also determined that there are no known aboriginal artifacts at the CLIS and WLIS disposal sites. Two of the region's Indian tribes (the Eastern Pequot Indians of Connecticut and Narragansett Indian Tribe) participated as cooperating agencies during the development of the EIS, and neither of them identified any natural nor cultural features of historical significance at either site.

#### c. Disposal Site Management (40 CFR 228.3, 228.7, 228.8 and 228.9)

The CLIS and WLIS disposal sites will be subject to specific management requirements to ensure that unacceptable adverse environmental impacts do not occur. Examples of these requirements include: Restricting the use of the sites to the disposal of dredged material that has been determined to be suitable for ocean disposal following MPRSA and/or CWA requirements in accordance with the provisions of MPRSA section 106(f); monitoring the disposal sites and their associated reference sites, which are not used for dredged material disposal, to assess potential impacts to the marine

environment by providing a point of comparison to an area unaffected by dredged material disposal; and retaining the right to limit or close these sites to further disposal activity if monitoring or other information reveals evidence of unacceptable adverse impacts to the marine environment. In addition, although not technically a site management requirement, disposal activity at the sites will generally be limited to the period between October 1 and April 30, but often less depending on dredging windows to protect certain species, as described above. EPA and the Corps have managed and monitored dredged material disposal activities at the CLIS and WLIS sites since the early 1980s. Site monitoring has been conducted under the Corps' DAMOS disposal site monitoring program.

In accordance with the requirements of MPRSA section 102(c) and 40 CFR 228.3, EPA and the Corps developed Site Management and Monitoring Plans (SMMPs) for both the CLIS and WLIS sites. Draft SMMPs for both sites were issued for public review and comment in conjunction with the DEIS and incorporated in the DEIS as Appendix J. After considering public comment, the agencies issued the Final SMMPs in conjunction with the FEIS and incorporated them in the FEIS as Appendix J. The SMMPs describe in detail the specific management and monitoring requirements for both sites. With respect to site monitoring, the SMMPs build on the Corps' existing DAMOS monitoring program, which will continue to provide the backbone of the site monitoring effort.

## 2. National Environmental Policy Act (NEPA)

### Public Involvement

Consistent with its voluntary NEPA policy, as described and referenced above, EPA has followed the NEPA process and undertaken NEPA analyses as part of its decision-making process for the disposal site designations. EPA published a Notice of Intent to prepare an EIS, held public meetings regarding the scope of issues to be addressed by the EIS, published a Draft EIS for public review and comment in September 2003, and published a Final EIS in March 2004, including responses to public comments on the Draft EIS. The FEIS, entitled, "Final Environmental Impact Statement for the Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, Connecticut and New York," assesses and compares the effects, including the environmental effects, of designating dredged material disposal sites in

central and western Long Island Sound, and of various alternative approaches to managing dredging needs, including the "no action" alternative (*i.e.*, the alternative of not designating any open-water disposal sites). See 40 CFR 1502.14.

EPA is the agency authorized by the MPRSA to designate dredged material disposal sites and was responsible for the EIS. The U.S. Army Corps of Engineers (USACE, or Corps) was a cooperating agency in the development of the EIS, see 40 CFR. 1508.5, because of its knowledge concerning the region's dredging needs, its technical expertise in monitoring and assessing the environmental effects of dredging and dredged material disposal, its history in the regulation of dredged material disposal in Long Island Sound and elsewhere, and its legal role in regulating dredged material disposal and managing and monitoring disposal sites. See MPRSA sections 102(c) and 103 and 40 CFR part 225 and 40 CFR 228.4(e). The Corps also brought significant financial and human resources to bear on this large and complex project. To take advantage of expertise held by other entities, and to ensure compliance with all applicable legal requirements, EPA also worked in close coordination with other federal agencies, including NMFS and USFWS, state environmental and coastal zone management agencies, local governments, and Indian Tribal governments. The NMFS, Connecticut Department of Environmental Protection (CT DEP), New York Department of Environmental Conservation (NY DEC), Eastern Pequot Indians of Connecticut, and Narragansett Indian Tribe participated as "cooperating agencies" in preparation of the EIS.

Consistent with the public participation provisions of the NEPA regulations, EPA and the Corps conducted an extensive public involvement program throughout the development of the FEIS. The agencies formed a "working group" comprising stakeholders from the Long Island Sound region and held numerous public meetings and workshops to provide the public with information on the EIS process and the results of studies conducted in support of the EIS, and to give the public ample opportunity to provide input to the NEPA review effort. The following discussion summarizes the extensive public participation program conducted by EPA and the Corps; detailed descriptions are provided in Chapter 7 and Appendix A of the FEIS.

On June 3, 1999, EPA published a Notice of Intent in the **Federal Register**

(64 FR 29865) and mailed the notice to approximately 7000 interested individuals and organizations registered in the Long Island Sound EIS mailing list. The notice stated EPA's intent to prepare an EIS to, "consider the potential designation of one or more dredged material disposal sites in Long Island Sound," pursuant to MPRSA and CWA requirements. It further stated that the EIS would evaluate the four existing dredged material disposal sites that were active at the time (CLIS, WLIS, Cornfield Shoals, and New London), "as well as additional alternatives including other open-water disposal sites, other types of dredged material disposal and management, and the no-action alternative." It also announced three public scoping meetings to be held later that month to explain the EIS process and solicit public input.

Accordingly, in June 1999, EPA and the USACE held three public scoping meetings in Connecticut and New York to: (1) To inform the public about the project; (2) explain the respective roles of EPA and the Corps and the other cooperating or coordinating federal, state and tribal agencies, and the public, and (3) request comments on the draft scope of work for the EIS and related studies (detailed in Appendix A of the FEIS). The scoping meetings also served to identify and record public views regarding issues and environmental considerations for potential examination and analysis in the EIS. A total of approximately 130 people attended the three public scoping meetings.

EPA and the Corps also conducted two series of public workshops in October 1999 and April 2000 in Connecticut and New York to discuss, and seek public input concerning, the development of the EIS. Topics covered at the workshops included: Identification of dredged material management alternatives; the process for screening and evaluating all the alternatives; and a review of existing data and data collection needs. A total of approximately 200 people attended the four public workshops.

In 2000, EPA and the Corps established a volunteer public "working group" comprising individuals representing marine industries, boaters, environmental groups, fishing interests, and local governments to provide guidance in the development of the EIS. Five working group meetings were held between July 2000 and November 2002; attendance at these meetings ranged from 27 to 44 individuals, including agency staff and contractors. Topics addressed by the working group sessions included: Potential environmental impacts to be assessed in

the EIS; the results of field studies for lobster, fish, and benthic resources; fishing activities; upland disposal alternatives; dredging needs; economic analyses; and Geographic Information System (GIS) meta-databases.

Throughout the EIS development process, EPA and the Corps also met with other federal and state agencies to keep them apprized of progress on the project and to solicit input. Other agencies that participated regularly throughout the process include the NMFS, USFWS, CT DEP, NY DEC, and the New York Department of State (NY DOS). Ten interagency meetings and teleconferences were held between March 1999 and January 2003 to review progress and get feedback, and EPA and the Corps were in regular contact with representatives of these agencies throughout the EIS process.

As one of the first steps in the EIS process, EPA and the Corps, in cooperation with other federal and state agencies delineated a "Zone of Siting Feasibility" (ZSF). The ZSF is the geographic area from which reasonable and practicable open-water dredged material disposal site alternatives should be selected for evaluation. EPA's 1986 site designation guidance manual describes the factors that should be considered in delineating the ZSF, and recommends locating open-water disposal sites within an economically and operationally feasible radius from areas where dredging occurs. Other factors to be considered include navigational restrictions, political or other jurisdictional boundaries, distance to the edge of the continental shelf, the feasibility of surveillance and monitoring, and operation and transportation costs. Consistent with the guidance, in 1999, EPA, in cooperation with the other agencies, established the ZSF to include the entire Long Island Sound, from Throgs Neck at the western end to a line from Montauk Point to Block Island and a line from Block Island due north to the Rhode Island shoreline on the eastern end.

In March 2002, however, EPA published an Environmental News Notice announcing its intent to modify the ZSF and the scope of the EIS in order to assess the need for open-water disposal sites in Long Island Sound in two phases, with the first EIS to address the central and western regions of the Sound and a later Supplemental EIS to address the eastern region of the Sound. The ZSF boundaries were then modified to address only the central and western regions of Long Island Sound, with boundaries on the western end that extend from the confluence of the East and Harlem rivers at Hell's Gate and

boundaries on the eastern end that extend from Mulberry Point in Guilford, CT, to Mattituck Point in Mattituck, NY.

The primary reasons for this modification in the scope of the EIS were: (1) The need to assess in a timely manner the appropriateness of maintaining continued use of a site in the central Long Island Sound region, given the February 2004 termination date for use of the CLIS disposal site pursuant to the Corps' site selection authority; (2) the geographical and environmental independence of the dredging and disposal needs, and alternatives for meeting those needs, of the central and western regions of Long Island Sound; and (3) the fact that the change in scope would not preclude consideration of a comprehensive range of disposal alternatives, or otherwise predetermine the conclusions, for either the current EIS or for a future supplemental EIS to address eastern Long Island Sound.

EPA completed the "Draft Environmental Impact Statement for the Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, Connecticut and New York" (DEIS) in early September 2003. The DEIS identified the designation of CLIS and WLIS as long-term dredged material disposal sites under the MPRSA as EPA's preferred alternative. On September 12, 2003, EPA published in the **Federal Register** the proposed rule to designate the CLIS and WLIS disposal sites (68 FR 53687), together with a notice of availability of the DEIS and Draft SMMPs (68 FR 53730).

EPA provided for a 45-day public review and comment period, until October 27, 2003. EPA also posted these documents on the EPA New England web site, and mailed notices and copies of the DEIS and supporting material to a large mailing list of agencies, tribes, organizations, members of Congress, and individual members of the public. The **Federal Register** notice also announced that EPA would hold four public hearings—afternoon and evening sessions on September 30, 2003 in Stony Brook, NY, and on October 1, 2003 in Stamford, CT—to present information on the DEIS and solicit oral and written comments.

On October 9, 2003, in response to several requests from the public to extend the comment period and hold another public hearing, EPA published a notice extending the public comment period by 21 days, to November 17, 2003 (68 FR 58296), and held another public hearing on November 13, 2003 in Stamford, CT. On November 28, 2003 in

response to requests from two members of Congress to extend the comment period and hold additional public hearings, EPA published a notice extending the public comment period by another 28 days, to December 15, 2003 (68 FR 66825). EPA also held another public hearing on December 10, 2003 in Stony Brook, NY.

The comment period closed on December 15, 2003. In addition to the oral testimony transcribed at the public hearings, EPA received written comments concerning the DEIS from approximately 350 individuals and organizations. EPA carefully considered the comments concerning the DEIS and responded to them in Appendix L of the FEIS. EPA also made certain revisions to its NEPA analysis, including improvements to the explanations of the purpose and need for the site designations and the alternatives analysis, based on the comments and information provided during the public comment period.

On April 9, 2004, EPA published a notice of availability of the FEIS in the **Federal Register** for a 30-day public review and comment period, ending on May 10, 2004 (69 FR 18898). EPA then published an amended notice extending the comment period to May 17, 2004 (69 FR 26818). EPA also issued a press release announcing the availability of the FEIS for public comment, posted the FEIS on the EPA New England web site, and mailed notices and/or copies of the FEIS and supporting material to a large mailing list of agencies, tribes, organizations, elected officials, and individual members of the public. EPA and the Corps also held two public information meetings, on May 4, 2004, in Islandia, NY, and May 5, 2004, in Stamford, CT, to explain how comments on the DEIS were addressed in the FEIS, and to answer questions about the decision. Although federal agencies are not required to solicit comment on a FEIS, EPA nonetheless did so to provide the public with further opportunity to comment on the decision and to ensure that the agency had every opportunity to consider the views of the public.

In response to requests from the public, EPA announced at the two public information meetings, and through a press release issued on May 4, 2004, that it was extending the comment period by 15 days, to June 1, 2004. EPA also sent letters to members of the New York and Connecticut congressional delegations informing them of the extension because of the interest in the timing of the comment period expressed by certain members of those delegations.

The comment period for the FEIS closed on June 1, 2004. EPA received written comments from approximately 2900 individuals and organizations. EPA has given careful consideration to these comments, as well as to concerns raised by the NY DOS and other agencies, in reaching a final decision to designate the proposed CLIS and WLIS dredged material disposal sites. EPA responded to comments it received concerning the FEIS in a publicly available "Response to Comments" document, as described below in the Public Comments section.

#### Environmental Impact Statement

The FEIS evaluates whether—and, if so, which—open-water dredged material disposal sites should be designated in the central and western regions of Long Island Sound. The FEIS describes the purpose and need for any such designations, evaluates several alternatives to this action, including the option of "no action" (*i.e.*, no designation), and concludes that EPA designation of the CLIS and WLIS disposal sites under the MPRSA is the preferred alternative. The purpose of these designations is to provide long-term, open-water dredged material disposal sites as potential options for the future disposal of such material. The action is necessary because periodic dredging and dredged material disposal is unavoidably necessary to maintain safe navigation and marine commerce in Long Island Sound.

As previously noted, dredging in the central and western regions of Long Island Sound is projected to generate approximately 20 million cubic yards of dredged material over the next 20 years. EPA evaluated potential alternatives to open-water disposal in Long Island Sound but determined that they were insufficient to meet the regional dredging needs. In accordance with EPA regulations, *see* 40 CFR 227.16, use of alternatives to open-water disposal will be required when they provide a practicable, environmentally preferable option for the dredged material from any particular disposal project. EPA's designation of the CLIS and WLIS disposal sites, however, will provide open-water disposal sites as potential options for dredged material regulated under the MPRSA that has been tested and determined to be environmentally suitable for open-water disposal. Sediments found to be unsuitable for open-water disposal will be required to seek alternatives other than the CLIS and WLIS disposal sites.

EPA's initial screening of alternatives, which involved input from other federal and state agencies, local governments,

and the public, led to the determination that the open-water disposal sites were the most environmentally sound, cost-effective, and operationally feasible options for the large amount of dredged material expected to be found suitable for open-water disposal over the 20-year planning horizon. EPA's analysis of alternatives for disposing of dredged material from navigation channels and harbors in central and western Long Island Sound evaluated several different potential alternatives, including open-water disposal sites, upland disposal, beneficial uses, sediment treatment, and the no-action alternative. From this analysis, EPA determined that open-water disposal sites, such as CLIS and WLIS, were the only alternatives that would provide sufficient practicable disposal capacity to meet long-term regional dredged material disposal needs. Again, this analysis also acknowledged that options for dredged material management other than open-water disposal might be identified and required for specific dredged material disposal projects in the future.

EPA also evaluated several open-water disposal site alternatives other than the CLIS and WLIS sites. This evaluation considered multiple factors, such as reasonable distances to transport dredged material, the potential for adverse effects on important natural resources, and other measures indicating incompatibility for use as a disposal site. Specific factors evaluated included the sensitivity and value of natural resources, geographically limited habitats, fisheries and shellfisheries, shipping and navigation lanes, physical and environmental parameters, and economic and operational feasibility. The analysis was carried out in a tiered process. The final tier involved a detailed analysis of the no-action alternative and the following four open-water alternative sites: CLIS, Milford, Bridgeport, and WLIS. Based on this analysis, the CLIS and WLIS sites were identified as the preferred alternatives for designation as open-water dredged material disposal sites. Management and monitoring strategies were developed for each site and are described in the SMMPs.

As stated above, for this action, this final rule and preamble also serve as EPA's record of decision under NEPA.

#### 3. Coastal Zone Management Act (CZMA)

Based on the evaluations presented in the FEIS and supporting documents, and a review of the federally approved Connecticut and New York coastal zone programs and policies, EPA has determined that designation of the CLIS

and WLIS sites for open-water dredged material disposal under the MPRSA is consistent with the enforceable policies of the coastal zone management programs of Connecticut and New York. EPA provided a written determination to this effect to each state. Thus, EPA has satisfied the CZMA's requirement that federal agencies provide relevant state(s) with a determination that each federal agency activity affecting the uses or natural resources of a state's coastal zone is consistent to the maximum extent practicable with the enforceable policies of the state's coastal zone management program.

In the EPA's view, there are several broad reasons why the disposal site designations are consistent with the applicable, enforceable policies of both states' coastal zone programs. First, the designations are not expected to cause any significant adverse impacts to the marine environment, coastal resources, or uses of the coastal zone. Indeed, EPA expects the designations to benefit uses involving navigation and berthing of vessels by facilitating needed dredging, and to benefit the environment by concentrating any open-water dredged material disposal at a small number of environmentally appropriate sites designated by EPA and subject to the previously described SMMPs. Second, designation of the sites does not actually authorize the disposal of any dredged material at the sites, since any proposal to dispose dredged material from a particular project at a designated site will only be allowed if: (a) The material satisfies the sediment quality requirements of the MPRSA and the CWA; (b) no practicable alternative method of management with less adverse environmental impact can be identified; and (c) the disposal complies with the site restrictions set forth in today's final rule. Third, the designated disposal sites will be managed and monitored pursuant to an SMMP and, if adverse impacts are identified, use of the sites will be modified to reduce or eliminate those impacts. Such modification could further restrict, or even terminate, use of the sites, if appropriate. *See* 40 CFR 228.3, 228.11.

On January 22, 2004, EPA submitted its coastal zone consistency determination to the CT DEP Office of Long Island Sound Programs, which administers the state's coastal zone management program. CT DEP concurred with EPA's determination in a letter dated April 5, 2004.

On March 8, 2004, EPA submitted a coastal zone consistency determination to the Division of Coastal Resources in the New York Department of State (NY DOS). On June 3, 2004, EPA received a

letter from the NY DOS objecting to EPA's designation of the CLIS and WLIS disposal sites on the basis of its view that either EPA had provided insufficient information to support a CZMA consistency determination or, based on the information provided, the action was inconsistent with the enforceable policies of New York's Coastal Management Program (CMP).

EPA gave careful consideration to the issues raised by NY DOS and, after consultation with NY DOS and CT DEP, agreed to include certain additional Restrictions on the use of the sites that respond to the NY DOS's objections under the CZMA. These additional restrictions have enabled NY DOS to withdraw its CZMA objection to the disposal site designations, by letter dated May 13, 2005. EPA continues to hold the view that the site designations without the additional restrictions would still be consistent with the enforceable policies of New York's CMP. Nevertheless, EPA agrees that the additional site Restrictions place reasonable conditions on when the disposal sites may be used that provide enhanced assurance that the requirements of the CZMA, the MPRSA, and NEPA are met.

Moreover, adding these site use Restrictions represents a reasonable course of action lying between the alternatives of not designating any disposal sites at all, and designating sites for an indefinite term without the Restrictions. Both these alternatives, and others, were evaluated in the EIS supporting this action. Furthermore, the added site use Restrictions arise out of comments submitted by NY DOS and other parties and are consistent with EPA's environmental analysis and proposed action.

#### Summary of Restrictions

There is a total of fourteen paragraphs of Restrictions in the final rule. These Restrictions apply to all disposal subject to the MPRSA at the designated sites pursuant to this final rule. Thus, the Restrictions apply to all federal projects, and non-federal projects generating more than 25,000 cubic yards of dredged material. They do not apply to smaller non-federal projects since, as a matter of law, such projects are not subject to MPRSA requirements. Rather, any such disposal will be subject to whatever restrictions are imposed on a case by case basis through permits issued under Clean Water Act section 404.

The Restrictions apply both to all MPRSA permittees (*i.e.*, private parties and governmental agencies other than the USACE), and to the USACE itself

which disposes of dredged material pursuant to authorizations rather than permits. The USACE is "deemed" to be a permittee by today's rule so as to make it subject to the site Restrictions. The intention of the final rule is to apply the Restrictions to all persons who may seek to dispose of dredged material at the sites under MPRSA.

The Restrictions in paragraph 1 are the same as in the proposed rule. They limit disposal to dredged material from Long Island Sound and vicinity. Dredged material will be considered to have come from Long Island Sound and vicinity so long as it come from harbors and navigation channels either on or near Long Island Sound.

The Restrictions in paragraph 2 require compliance with the Site Management and Monitoring Plans (SMMPs) that have been developed for the two sites. These SMMPs are set out as Appendix J to the FEIS—they have not changed since the time that the FEIS was published. These SMMPs may be changed in the future, as provided in MPRSA section 102(c)(3). Proposed changes will be subject to public comment consistent with MPRSA section 102(c)(3). The EPA will utilize the section 102(c)(3) procedures, rather than proposing changes to this designation rule every time there is a change to an SMMP.

The Restrictions in paragraphs 3–14 were added by the EPA (in response to comments) in order to enhance compliance with the MPRSA, and to address the issues raised by New York under the CZMA. The EPA consulted with both affected states, and the conditions have been agreed to by both the NY DOS and the CT DEP. They are designed to support the common goal of New York and Connecticut to reduce or eliminate the disposal of dredged material in Long Island Sound. To support this goal, the Restrictions contemplate that there will be a regional dredged material management plan (DMMP) for Long Island Sound that will guide the use of dredged material for projects which occur after the DMMP is completed. DMMPs are comprehensive studies carried out by the USACE, in consultation with the EPA and the affected states, to help manage dredged material in a cost-effective and environmentally acceptable manner. The Governors of New York and Connecticut have jointly requested the USACE to develop a DMMP for Long Island Sound. Consistent with the two states' requests, today's rule contemplates that the DMMP for Long Island Sound will include the identification of alternatives to open-water disposal and the development of

procedures and standards for the use of practicable alternatives to open-water disposal, so as to reduce wherever practicable the open-water disposal of dredged material. The DMMP also may contain recommendations regarding the use of the sites themselves. In addition, the final rule contemplates that a Regional Dredging Team will be established to identify practicable alternatives to open-water disposal and recommend their use to the extent practicable, for projects proposed while the DMMP is being prepared (other than three already permitted and authorized projects).

In order to ensure that long-term disposal does not occur at the sites pursuant to today's designation absent restrictions to be developed by the DMMP, the final rule specifies that the use of the sites must be suspended or terminated under certain circumstances. First, paragraph 3 provides that, except as provided in paragraphs 4 and 5, the disposal of dredged material may not occur at the sites beginning eight years after the effective date of today's designations, unless a DMMP has been completed by the USACE. This eight-year deadline is subject to extension under paragraph 4 by agreement of various parties expected to participate in the development of the DMMP, namely the USACE, the EPA, the state of Connecticut and the state of New York. This deadline also is subject to extension by the EPA under paragraph 5, without agreement from other parties, if the EPA determines that the parties participating in the development of the DMMP have attempted in good faith to meet the deadline, but that the deadline has not been met due to factors beyond the parties' control (including funding). Such an extension may occur in addition to any extensions granted under paragraph 4, but may be only for one additional year. For example, if all parties agree to a one year extension, and the EPA later grants a one year extension, then the DMMP process could take a total of ten years (without the use of the sites being suspended or terminated).

If the final deadline set pursuant to paragraphs 3, 4 and 5 is missed, use of the sites will be prohibited for a year. If at the end of that year, a DMMP still has not been completed, use of the sites pursuant to today's designation will terminate.

Paragraph 3 of the final rule also specifies that use of the sites will be suspended or terminated if following the completion of the DMMP within the eight-year (plus extensions) time frame, the EPA does not thereafter amend today's rule to incorporate procedures

and standards that are consistent with those recommended in the DMMP. Paragraph 7 gives the EPA 120 days from the completion of the DMMP to adopt such procedures and standards. If the EPA misses the deadline specified in paragraph 7, use of the sites will be suspended until the EPA issues a final amended rule. If the EPA makes a final determination and adopts procedures and standards consistent with the DMMP's recommendations, then use of the sites will continue (but will be restricted in accordance with the adopted DMMP recommendations). If the EPA makes a final determination not to adopt procedures and standards consistent with the DMMP recommendations, then use of the sites pursuant to today's rule will be terminated. The EPA notes that it hopes to be able to support the DMMP recommendations. However, the EPA cannot commit in advance to do so, but rather must preserve its discretion, in response to public comments, not to adopt the DMMP recommendations.

The amended EPA rule need not be identical to the DMMP recommendations. If the amended EPA rule is not identical to the DMMP recommendations, but the EPA has adopted substantially all of the procedures and standards for the use of the sites and the use of practicable alternatives to open-water disposal recommended in the DMMP, the use of the sites will not terminate. In addition, the amended EPA rule will be considered "consistent" even if the EPA has not adopted a recommendation (or recommendations) of the DMMP that are not consistent with applicable law. Of course, the amended EPA rule will be considered "consistent" even if the EPA goes beyond the recommendations of the DMMP and adopts stricter standards.

In addition, it is not the intention of today's final rule to have use of the sites terminate simply because of a good faith error by the EPA. Thus, if a party believes that EPA's final amended rule does not contain substantially all procedures and standards recommended in the DMMP, that party will have the obligation to first petition the EPA prior to filing any court action, so as to give the EPA the opportunity to correct any inadvertent omission or to reaffirm its determination that it has adopted substantially all procedures and standards in the DMMP. A party will be able to go directly to court to seek termination of the use of the sites only if it can show that the EPA, in amending the rule, did not make a good faith attempt to adopt procedures and

standards that were consistent with those recommended in the DMMP.

The final rule contemplates that the USACE will develop through the DMMP process procedures and standards to reduce or eliminate disposal of dredged material in Long Island Sound to the greatest extent practicable. If any party is not satisfied that the final DMMP recommends such procedures and standards, then paragraph 7 of the Restrictions in today's rule specifies that any person may petition the EPA to do a rulemaking to amend these designations to establish different or additional standards.<sup>1</sup> The EPA also may initiate such a rulemaking on its own initiative. While the use of the sites will not automatically terminate if it is the view of NY DOS or others that the DMMP does not recommend sufficient measures, the EPA recognizes that such a conclusion by the NY DOS or others could lead to a revival of the past objections by the NY DOS and others to the continued use of these sites. At minimum, any failure to recommend sufficient measures could have the unfortunate effect of creating the need to revisit issues in a petition process. Thus, the EPA will work with the USACE, and the states of New York and Connecticut, to try to ensure that this does not occur.

While any DMMP will be carried out by the USACE, active support and cooperation will be needed from other parties, including the states of Connecticut and New York. EPA believes that there has been such support and cooperation and fully expects that this will continue. However, to help ensure that any DMMP process moves forward expeditiously, paragraph 6 of the Restrictions specifies that the EPA will conduct an annual review of progress in developing the DMMP. If the EPA finds that the DMMP is being unreasonably delayed by one or more parties, paragraph 6 specifies that the EPA may as appropriate: (i) Suspend use of the sites (through a rulemaking amending today's site designations) even prior to the deadlines established in paragraphs 3–5 of the Restrictions, or (ii) exercise (again through rulemaking) its statutory and regulatory authorities regarding designation of ocean disposal sites (which could include new site

<sup>1</sup> The EPA must act on any petition within 120 days, by either granting the petition (and proposing a rule change) or denying the petition. Disposal may continue while a petition is pending, but any disposal occurring after a rule change adopted in response to a petition will be subject to any additional requirements imposed pursuant to the granting of the petition and any resulting rule change.

designations without including the requirement that there be a DMMP). Of course, EPA expects all parties to continue to cooperate in fostering a DMMP, so that use of the above measures by the EPA may never be necessary.

The final rule contemplates that there will be a three staged process for supporting the goal of reducing or eliminating the disposal of dredged material in Long Island Sound. At all times, site use will be limited by the need to comply with all applicable statutory and regulatory requirements, including the prohibition on open-water disposal if there is a "practicable alternative" under 40 CFR 227.16. However, over time, compliance with 40 CFR 227.16 and today's final rule will be achieved in three different ways. First, pursuant to paragraph 8 of the Restrictions, disposal from three enumerated projects that already have been authorized or permitted will be allowed without having to follow any additional particular procedures or standards. Such disposal must meet all applicable statutory and regulatory requirements.<sup>2</sup> Second, for projects initiated other than those projects but before completion of the DMMP, the requirements of paragraph 9 will apply. In particular, each project will be subject to review by a Regional Dredging Team, which will work to identify practicable land-based alternatives and to ensure their use to the maximum extent practicable. Third, for projects initiated after completion of the DMMP, the requirements of paragraph 7 will apply. As discussed above, the final rule contemplates that the DMMP will develop and the EPA will adopt (subject to consideration of public comments) procedures and standards for the use of practicable alternatives to open-water disposal. The EPA hopes that the combined efforts of the Regional Dredging Team and the parties participating in the DMMP will lead to a continual reduction in the use of the sites over time.

It should be noted that even after the EPA adopts procedures and standards consistent with the DMMP recommendations, the decision regarding whether there is a "practicable alternative" will continue to be made on a case by case basis, in connection with the permitting process. However, any case-by-case determinations will at a minimum need

<sup>2</sup> All phases of these projects are to be initiated within four years of today's designations. For the Norwalk project, dredged material management measures required by the Connecticut state certification are not considered to be a separate phase but rather will be part of the second phase.



to comply with any procedures and standards included in the site designations restrictions.

Paragraph 9 also emphasizes two points, consistently with the way in which the EPA interprets 40 CFR 227.16. First, "practicable alternatives" (as defined in 40 CFR 227.16) must be used for the maximum volume of dredged material practicable. That is, even if a practicable alternative is not available for all of the dredged material from a project, if a practicable alternative is available for a portion of the dredged material, it must be used for disposal of that portion of the material in order to at least reduce the use of the sites being designated today.

Second, the final rule recognizes that use of practicable alternatives may mean that there will be additional costs (in comparison to open-water disposal). Paragraph 9 incorporates by reference 40 CFR 227.16(b) of the EPA's ocean disposal regulations, which defines "practicable alternative" as an alternative which is, "available at reasonable incremental cost and energy expenditures, which need not be competitive with the costs of ocean dumping, taking into account the environmental benefits derived from such activity, including the relative adverse environmental impacts associated with the use of alternatives to ocean dumping." Thus the final rule emphasizes that the designated sites may not be used whenever a "practicable alternative" is available even when this means added reasonable incremental costs. Under paragraph 9 and the general ocean dumping regulations, the USACE (the permitting agency) must make the initial determination of whether this test has been met, but the USACE decision is subject to review and possible objection by the EPA. Also, paragraph 9 is a restriction in an EPA site designation. Therefore, if the EPA objects to any USACE determination, use of the designated sites will be prohibited unless and until the EPA objection is resolved. This EPA oversight established by today's rule is in addition to the EPA's statutory and regulatory authority to review and object to USACE permits.

By definition, the requirement that projects use "practicable alternatives" will not impose unreasonably higher costs. Also, if an alternative does not have less adverse environmental impact or potential risk to other parts of the environment than use of the Sound, today's rule will not require that it be used. However, the EPA recognizes that even where use of Long Island Sound has been determined to be

environmentally acceptable, there may be alternatives (e.g., those involving beneficial use) that are environmentally preferable to use of the Sound. When such preferable alternatives are identified, they will need to be used if they are available at "reasonable incremental cost."

Today's final rule does not attempt to specify in advance how the "reasonable incremental cost" standard will be applied in any particular case. The regulation contemplates a balancing test, and the EPA believes that the determination is best made on a case-by-case basis. The final rule also does not attempt to specify who will need to pay for any reasonable incremental costs. Rather, the share of such costs (if any) to be borne by private parties, state government, local government, or the federal government also will need to be worked out in response to actual situations. It should be understood, however, that if the use of a practicable alternative is required in the future pursuant to today's rule (and 40 CFR 227.16), and no entity is willing to pay the reasonable incremental costs, then use of the sites will be prohibited for such projects even when this means that planned projects must be stopped.

Paragraph 10 of the Restrictions simply repeats the statutory and regulatory requirement that disposal at these sites will be limited to dredged sediments that comply with the Ocean Dumping Regulations. Under 33 U.S.C. 1413(d), the USACE may request and the EPA may grant a waiver allowing otherwise unsuitable materials to be disposed at open-water disposal sites. The EPA notes that no dredged material has ever been disposed under such a waiver at any open-water disposal site. However, paragraph 11 of the Restrictions provides for advance notice to the Governors of Connecticut and New York, in the unlikely event that there is a future request for such a waiver at these sites.

Paragraph 12 restricts use of the sites during severe weather conditions, in order to reduce the risk of spillage.

Paragraphs 13 and 14 of the Restrictions list various legal restrictions on what the EPA may agree to in a rule. These legal restrictions would apply even if they were not stated in today's final rule. First, as noted in paragraph 13, the parties participating in the DMMP will need to seek additional federal and state funding in order to develop the DMMP. The EPA cannot guarantee that federal funds will be made available to the USACE. Paragraph 13 also specifies that the sole remedy for any failure to meet the conditions specified in today's final

rule shall be restriction of the authority to dispose of dredged material at these sites pursuant to today's designations. Thus, for example, if funding is not provided, neither the EPA nor the USACE nor any other party may be sued for failing to carry out the DMMP. Rather, the remedy if a DMMP is not developed is that the use of the sites pursuant to today's final rule will be terminated.

Paragraph 14 specifies that nothing in today's final rule precludes the EPA from designating other ocean disposal sites, not subject to the restrictions in this final rule, or taking any subsequent action to modify today's site designations, provided that the EPA makes any such designations or takes such subsequent action through a separate rulemaking in accordance with all applicable legal requirements. Under the MPRSA, the EPA cannot agree in advance that it will never (under any circumstances) designate other ocean disposal sites or that it will never change today's final rule.

Notwithstanding this statement of legal rights, the EPA emphasizes that it is fully committed to development of a DMMP for Long Island Sound, and believes that the best environmental result will be to have the DMMP develop recommendations for the management of dredged material subject to the MPRSA throughout Long Island Sound. The EPA also recognizes that if it takes a subsequent action to designate an ocean disposal site in Long Island Sound not subject to the Restrictions set forth in today's final rule, the NY DOS (or others) could renew their past objections and challenge such an action.

Paragraph 14 also provides that this final rule shall not be interpreted to restrict the EPA's authorities under the MPRSA or the implementing regulations, or to amend the implementing regulations. The statute and regulations establish minimum requirements with which the EPA and others must comply. While this final rule contains additional provisions designed to address issues raised under the CZMA, and enhance compliance with the MPRSA, these provisions do not excuse any non-compliance with the general ongoing requirements of the MPRSA. In addition, while the final rule contains provisions designed to better implement regulatory requirements (such as the "practicable alternatives" requirement), it does not amend any existing regulatory requirement.

#### 4. Endangered Species Act (ESA)

During the EIS development process, EPA consulted under the federal Endangered Species Act (ESA) with the

NMFS and the USFWS regarding the potential for the designation and use of any of the alternative open-water disposal sites to jeopardize the continued existence of any federally listed threatened or endangered species, or result in the adverse modification of any critical habitat of such species. EPA initiated consultations regarding the proposed CLIS and WLIS disposal sites with both the NMFS and the USFWS on February 13, 2003. This consultation process is fully documented in the FEIS. EPA provided the NMFS and the USFWS with EPA's conclusion that the proposed disposal site designations for the CLIS and WLIS sites were not likely to adversely affect any federally listed endangered or threatened species or designated critical habitat of any such species.

On February 5, 2004, NMFS sent a letter concurring with EPA's proposed action, stating that the designation of CLIS and WLIS, "is not likely to adversely affect listed species under the jurisdiction of NOAA Fisheries." NMFS also noted that, "no further consultation pursuant to section 7 of the ESA is required."

On February 12, 2004, USFWS also concurred with the findings of the EIS that designation of the disposal sites was not likely to adversely affect any federally listed species under its jurisdiction. The letter further stated that "no habitat in the project impact areas is currently designated or proposed critical habitat under provisions of the [ESA]" (87 Stat. 884 as amended; 16 U.S.C. 1531 *et seq.*). Copies of these letters are provided in Appendices K and L of the FEIS.

#### 5. Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA)

On February 13, 2003, EPA initiated consultation with the NMFS under the Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act. This consultation addressed the potential for the designation of any of the alternative ocean disposal sites being evaluated to adversely affect EFH. In a letter dated January 28, 2004, NMFS concurred with EPA's determination that the designation of the CLIS and WLIS disposal sites would not adversely affect EFH. This consultation process is fully documented in the FEIS.

#### F. Public Comments

Dredging and dredged material disposal in Long Island Sound has long presented controversial and complex issues. Considering that fact, it is not surprising that EPA received many

comments both supporting and opposing the designation of long-term, open-water dredged material disposal sites in the Sound.

As discussed above, EPA issued a Draft EIS and a Proposed Rule for the disposal site designations in September 2003. *See* 68 FR 53687 (Sept. 12, 2003) (Proposed Rule); 68 FR 53730 (Sept. 12, 2003) (Notice of Availability of the Draft EIS and Draft SMMPs for Public Review). EPA received numerous comments addressing the DEIS, but none specifically directed at the proposed rule. These public comments were submitted both in writing and in oral testimony at the six public hearings held by EPA and the Corps concerning the DEIS and the proposed disposal site designations. EPA considered all these comments, as required by NEPA, responded to them in Appendix L to the Final EIS issued by the Agency in April 2004. *See* 69 FR 18898 (April 9, 2004) (Notice of Availability of the FEIS for public review). EPA will not repeat those comments and responses here and, instead, urge interested readers to review Appendix L of the FEIS.

Although not required to do so by NEPA, *see* 40 CFR 1503.1(b), EPA opened a comment period on the FEIS and requested any comments from the public. Numerous public comments were submitted regarding the FEIS. In reaching its final decisions regarding the present action, as presented in this final rule, which also constitutes the record of decision (ROD) for NEPA purposes, EPA reviewed and considered all the written comments as well as the oral comments received at various public meetings held concerning the FEIS. Although NEPA does not require that federal agencies provide responses to public comments concerning a Final EIS, EPA has in this instance produced a separate Response to Comments document addressing the public comments on the FEIS. These responses to comments will not be repeated here, but the Response to Comments document is available on EPA's Web site at <http://www.epa.gov/region1/eco/lisdreg/> and EPA mailed copies of the document to elected officials, federal and state agencies, libraries, and other repositories in Connecticut and New York. EPA also mailed a "letter of availability" with instructions on how to access the Response to Comments document to a mailing list of approximately 2800 addresses. As explained in the Responses to Comments, EPA believes that its final action, as presented in this final rule, properly addresses the issues raised in the public comments.

#### G. Action

EPA is publishing this final rule designating the Central Long Island Sound (CLIS) and Western Long Island Sound (WLIS) open-water dredged material disposal sites for the purpose of providing environmentally sound open-water disposal options for possible use in managing dredged material from harbors and navigation channels in Long Island Sound and its vicinity in the states of Connecticut and New York. Without these dredged material disposal site designations, there is presently no open-water disposal site available in the central region of Long Island Sound, while the existing disposal site in the western region of the Sound would only be available for five more years of use pursuant to the Corps' site selection authority under MPRSA section 103(b).

The site designation process has been conducted consistent with the requirements of the MPRSA, CWA, NEPA, CZMA, and other applicable federal and state statutes and regulations. The basis for this federal action is further described in an FEIS published by EPA in April 2004 that identifies EPA designation of the CLIS and WLIS disposal sites as the preferred alternatives. This rule also serves as EPA's ROD in the NEPA review supporting the designation of these sites. The sites are subject to management and monitoring protocols to prevent the occurrence of unacceptable adverse environmental impacts. These protocols are spelled out in Site Management and Monitoring Plans (SMMPs) for each site. The two SMMPs are included as Appendix J to the FEIS. Under 40 CFR 228.3(b), the Regional Administrator of EPA Region 1 is responsible for the overall management of these sites.

As previously explained, the designation of these disposal sites does not constitute or imply EPA's approval of open-water disposal at either site of dredged material from any specific project. Any proposal to dispose of dredged material at one of the sites must first receive proper authorization from the USACE under MPRSA section 103. In addition, any such authorization by the Corps is subject to EPA review under MPRSA section 103(c), and EPA may condition or "veto" the authorization as a result of such review in accordance with MPRSA section 103(c). In order to properly obtain authorization to dispose of dredged material at either the CLIS or WLIS disposal sites under the MPRSA, the dredged material proposed for disposal must first satisfy the applicable criteria for testing and evaluating dredged

material specified in EPA regulations at 40 CFR part 227, and it must be determined in accordance with EPA regulations at 40 CFR part 227, subpart C, that there is no practicable alternative to open-water disposal with less adverse environmental impact. In addition, any proposal to dispose of dredged material under the MPRSA at the designated sites will need to satisfy all the site Restrictions included in this final rule as part of the site designations. *See* 40 CFR 228.8 and 228.15(b)(3) and (4).

## H. Supporting Documents

1. CT DEP. 1998. Long Island Sound Dredged Material Management Approach. A study report prepared by SAIC for the State of Connecticut, Department of Environmental Protection, Office of Long Island Sound Programs, Hartford, CT. August 1998.

2. EPA Region 1/USACE NAE. 2005. Response to Comments on the Final Environmental Impact Statement for the Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, Connecticut and New York. U.S. Environmental Protection Agency, Region 1, Boston, MA. and U.S. Army Corps of Engineers, New England District, Concord, MA. April 2005.

3. EPA Region 1. 2005. Memorandum to the File Responding to the Letter from the New York Department of State Objecting to EPA's Federal Consistency Determination for the Dredged Material Disposal Site Designations. U.S. Environmental Protection Agency, Region 1, Boston, MA. May 2005.

4. EPA Region 1/USACE NAE. 2004. Final Environmental Impact Statement for the Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, Connecticut and New York. U.S. Environmental Protection Agency, Region 1, Boston, MA and U.S. Army Corps of Engineers, New England District, Concord, MA. March 2004.

5. EPA Region 1/USACE NAE. 2004. Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters. U.S. Environmental Protection Agency, Region 1, Boston, MA. and U.S. Army Corps of Engineers, New England District, Concord, MA. April 2004.

6. EPA Region 2/USACE NAE. 1992. Guidance for Performing Tests on Dredged Material Proposed for Ocean Disposal. U.S. Environmental Protection Agency, Region 2, New York, NY and U.S. Army Corps of Engineers, New York District, New York, NY. Draft Release. December 1992.

7. EPA/USACE. 1991. Evaluation of Dredged Material Proposed for Ocean

Disposal-Testing Manual. U.S. Environmental Protection Agency, Washington, DC, and U.S. Army Corps of Engineers, Washington, DC. EPA-503/8-91/001. February 1991.

8. EPA Region 1/USACE NAE. 1991. Guidance for Performing Tests on Dredged Material Proposed for Ocean Disposal. U.S. Army Corps of Engineers, New England District and U.S. Environmental Protection Agency, Region 1, Boston, MA. Draft Release. December 1991.

9. Long Island Sound Study. 1994. Comprehensive Conservation and Management Plan for Long Island Sound. Long Island Sound Management Conference. September 1994.

10. NY DEC and CT DEP. 2000. A total maximum daily load analysis to achieve water quality standards for dissolved oxygen in Long Island Sound. Prepared in conformance with section 303(d) of the Clean Water Act and the Long Island Sound Study. New York State Department of Environmental Conservation, Albany, NY and Connecticut Department of Environmental Protection, Hartford, CT. December 2000.

## J. Statutory and Executive Order Reviews

### 1. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, 58 FR 51735 (October 4, 1993), the Agency must determine whether its regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(A) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;

(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed action is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

### 2. Paperwork Reduction Act (PRA)

Revised in 1995, the PRA is managed by the Office of Management and Budget through its approval of Information Collection Requests (ICRs) submitted by federal agencies. The statute was written and revised to reduce the information collection burden on the public.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a request for the collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a request for the collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) because it would not require persons to obtain, maintain, retain, report, or publicly disclose information to or for a federal agency.

### 3. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA), 5 U.S.C. 601 *et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. For the purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business based on the Small Business Administration's (SBA) size standards; (2) a small governmental jurisdiction that is the government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any

not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Examples of the types of small entities that could be subject to today's rule include small marinas and small municipal governments that might be responsible for conducting dredging and dredged material disposal (see section B, Potentially Affected Entities, above).

EPA has determined that this action will not have a significant impact on a substantial number of small entities. These dredged material disposal site designations under the MPRSA are only relevant for dredged material disposal projects subject to the MPRSA. Non-federal projects involving 25,000 cubic yards or less of material are not subject to the MPRSA and, instead, are regulated under CWA section 404. This action will, therefore, have no effect on such projects, other than perhaps to reduce expenses for such entities by providing a wealth of environmental data for use in determining whether disposing of dredged material from particular small, non-federal projects would be appropriate at the CLIS or WLIS disposal sites. "Small entities" under the RFA, as amended by SBREFA, are most likely to be involved with smaller projects not covered by the MPRSA. Therefore, EPA does not believe a substantial number of small entities will be affected by today's rule.

EPA also does not expect this action to have a significant effect on any small entities that are affected by the rule (*i.e.*, small, non-federal entities that propose to dispose of more than 25,000 cubic yards of material). These disposal site designations have the effect of providing long-term, environmentally acceptable open-water disposal options for dredged material subject to the MPRSA. These disposal options can only be utilized, however, by projects whose material meets the MPRSA sediment testing criteria and for which there is no practicable alternative means of management with less adverse environmental effects. See 40 CFR part 227, subparts A, B and C.

While dredged material disposal has been carried out under these requirements in the past in Long Island Sound, it has occurred at sites selected for short-term use by the Corps under its MPRSA section 103(b) site selection authority, rather than at sites designated for long-term use by EPA. Use of the Corps-selected site in the central region of the Sound has presently expired, and use of the site in western region of the Sound may only continue for five more years. In other words, without these designations, there would be no presently authorized open-water

disposal site in the central region of the Sound and the sole site in the western region would only be available for five more years of use. Thus, if anything, designating these sites is likely to reduce expenses for small entities by providing cost-effective dredged material disposal options for appropriate projects, as well as by reducing expenses by providing current environmental information that can contribute to the environmental evaluation of future projects.

EPA recognizes that the Corps, the states, and EPA have agreed to try to develop a dredged material management plan (DMMP) for Long Island Sound and that EPA has placed restrictions on the use of the disposal sites for MPRSA projects, including termination of site use, if the DMMP is not completed in a timely way. EPA also recognizes that a goal of the DMMP will be to try to identify practicable alternatives to open-water disposal that may have less adverse environmental impacts, provided that they do not add an unreasonable amount of cost. EPA also recognizes that there will be interim procedures for identifying and utilizing practicable alternatives to ocean disposal, which will apply while the DMMP is being developed. Taking the site restrictions into account, EPA still does not believe this action will have a significant effect on a substantial number of small entities for four reasons. First, as explained above, EPA has concluded that this rule will not have a significant impact on a substantial number of small entities. Second, without these site designations there are no open-water sites at all authorized for long-term use under the MPRSA. Therefore, the designations do not impose adverse impact to the situation without the designation, but rather provide additional dredged material management options. Third, EPA expects that the DMMP will take into account reasonable incremental costs for small entities in developing any procedures and standards related to the assessment and use of alternative management methods and will not, therefore, result in significant economic effects to them. In this regard, it must also be remembered that the existing MPRSA regulations already require that alternatives to open-water disposal be utilized if there are practicable alternatives with less adverse environmental effects. Alternatives are defined to be practicable when they involve "reasonable incremental cost and energy expenditures, which need not be competitive with the costs of ocean dumping, taking into account the

environmental benefits derived from such activity \* \* \* (40 CFR 227.16(b)). Fourth, before amending the site restrictions to reflect the DMMP, EPA will consider any public comments, including on whether there is continuing compliance with the RFA at that time.

Therefore, EPA certifies that this action will not have a significant economic impact on a substantial number of small entities.

#### *4. The Unfunded Mandates Reform Act and Executive Order 12875*

Title II of the Unfunded Mandates Reform Act (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the financial burden of complying with their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal Mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this action contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local and tribal governments or the private sector. It imposes no new enforceable duty on

any state, local or tribal governments or the private sector. Moreover, it will not result in expenditures by state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Rather, this action makes presently unavailable long-term disposal sites available as potential options for future use if certain conditions are met. Similarly, EPA also has determined that this action contains no regulatory requirements that might significantly or uniquely affect small government entities. Thus, the requirements of sections 203 and 205 of the UMRA do not apply to this rule.

#### 5. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

The final rule does not have federalism implications within the meaning of the Executive Order. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule designates open-water sites in Long Island Sound for the potential disposal of dredged material and sets certain conditions on such use. This proposed action neither creates new obligations for, nor alters existing authorizations of, any state, local, or other governmental entities. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of the Executive Order 13132 does not apply to this final rule, EPA did extensively consult with representatives of state and local governments in developing this rule. In addition, and consistent with Executive Order 13132 and EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comments on the proposed rule from state and local officials and met with such officials on many occasions. The nature of these communications is discussed elsewhere in this preamble and in EPA's FEIS and supporting administrative record.

#### 6. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." "Policies that have Tribal implications" are defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian Tribes, on the relationship between the federal government and the Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes."

The final rule does not have Tribal implications, as specified in Executive Order 13175. The designation of these disposal sites will not have substantial direct effects on Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes, as specified in Executive Order 13175. This final rule designates open-water dredged material disposal sites and does not establish any regulatory policy with tribal implications. Thus, Executive Order 13175 does not apply to this rule.

Although Executive Order 13175 does not apply to this rule, EPA consulted with tribal officials in developing this rule, particularly as it relates to potential impacts to historic or cultural resources. EPA specifically solicited additional comment on the proposed rule from tribal officials and invited tribes in the area around Long Island Sound to consider participating as "cooperating agencies" in development of the EIS. The Eastern Pequots and Narragansetts decided to participate in that role.

#### 7. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe might have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health and safety effects of the planned rule on children, and explain why the planned regulation is

preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866, and because EPA does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate effect on children. The designation of open-water, dredged material disposal sites in Long Island Sound does not authorize the disposal of any such material. Such authorizations are granted on a project-specific basis, and material that is determined to be unsuitable for ocean disposal—that is, it may cause unacceptable, adverse environmental impacts—would not be allowed to be disposed at these sites. Long-term monitoring of these sites, which have been used under short-term site selections since the early 1980s, has documented minimal adverse impacts to the marine environment, and by extension, public health. Therefore, it is not subject to Executive Order 13045.

#### 8. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Although Executive Order 13211 does not apply to this rule, the designation of dredged material disposal sites will facilitate shipping of energy-related products by providing an environmentally acceptable, cost-effective option for the disposal of material dredged from navigation channels and harbors in the central and western regions of Long Island Sound. Furthermore, by providing a potential dredged material management option in the central and western regions of the Sound, energy expenditures for hauling dredged material for disposal or reuse over water or land will be minimized.

#### 9. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g.,

materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rule does not involve the development of technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards and the Executive Order does not apply to this action.

#### 10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

No action from this final rule will have a disproportionately high and adverse human health and environmental effect on any particular segment of the population. In addition, this rule does not impose substantial direct compliance costs on those communities. Accordingly, the requirements of Executive Order 12898 do not apply.

#### 11. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A "major rule" cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a major rule as defined by 5 U.S.C. 804(2). This rule will be effective July 5, 2005.

#### 12. Plain Language Directive

Executive Order 12866 requires each agency to write all rules in plain language. EPA has written this final rule in plain language to make this final rule easier to understand.

#### 13. Executive Order 13158: Marine Protected Areas

Executive Order 13158 (65 FR 34909, May 31, 2000) requires EPA to "expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment." EPA may take action to enhance or expand protection of existing marine protected areas and to establish or recommend, as appropriate, new marine protected areas. The purpose of the Executive Order is to protect the significant natural and cultural resources within the marine environment, which means, "those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law."

EPA expects that this final rule will afford additional protection of aquatic organisms at individual, population, community, or ecosystem levels of ecological structures. Only suitable material under MPRSA requirements, and for which there is no other practicable alternative with less adverse environmental effects, will be allowed to be disposed at the designated sites. Also, these sites will be monitored and managed according to the SMMPs (Appendix J of the FEIS) and, as discussed in the FEIS, use of the sites should not impact any marine protected areas. In addition, EPA, the Corps, and other relevant federal and state resource management agencies will meet annually to discuss the management of these sites. Therefore, EPA expects today's final rule will advance the objective of the Executive Order to protect marine areas.

#### List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: May 19, 2005.

**Robert W. Varney,**  
Regional Administrator, EPA New England.

■ In consideration of the foregoing, EPA is amending part 228, chapter I of title 40 of the Code of Federal Regulations as follows:

### PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by adding paragraphs (b)(4) and (b)(5) to read as follows:

#### § 228.15 Dumping sites designated on a final basis.

\* \* \* \* \*

(b) \* \* \*

(4) Central Long Island Sound Dredged Material Disposal Site (CLIS).

(i) *Location:* Corner Coordinates (NAD 1983) 41°9.5' N., 72°54.4' W.; 41°9.5' N., 72°51.5' W.; 41°08.4' N., 72°54.4' W.; 41°08.4' N., 72°51.5' W.

(ii) *Size:* A 1.1 by 2.2 nautical mile rectangular area, about 2.42 square nautical miles in size.

(iii) *Depth:* Ranges from 56 to 77 feet (17 to 23.5 meters).

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use, except as provided in paragraph (b)(4)(vi) of this section.

(vi) *Restrictions:* The designation in this paragraph (b)(4) sets forth conditions for the use of Central Long Island Sound (CLIS) and Western Long Island Sound (WLIS) Dredged Material Disposal Sites. These conditions apply to all disposal subject to the MPRSA, namely all federal projects and non-federal projects greater than 25,000 cubic yards. All references to "permittees" shall be deemed to include the Army Corps of Engineers (USACE) when it is authorizing its own dredged material disposal from a USACE dredging project. The conditions for this designation are as follows:

(A) Disposal shall be limited to dredged material from Long Island Sound and vicinity.

(B) Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(C) Except as provided in paragraphs (b)(4)(vi)(D) and (E) of this section, the disposal of dredged material at the CLIS and WLIS sites pursuant to this designation shall not be allowed beginning eight (8) years after July 5, 2005 unless a regional dredged material management plan (DMMP) for Long Island Sound has been completed by the North Atlantic Division of the USACE, in consultation with the State of New York, State of Connecticut and EPA, with a goal of reducing or eliminating the disposal of dredged material in Long

Island Sound, and the EPA thereafter amends this site designation to incorporate procedures and standards that are consistent with those recommended in the DMMP.<sup>1</sup> Completion of the DMMP means finishing the items listed in the work plan (except for any ongoing long-term studies), including the identification of alternatives to open-water disposal, and the development of procedures and standards for the use of practicable alternatives to open-water disposal. If the completion of the DMMP does not occur within eight years of July 5, 2005 (plus any extensions under paragraphs (b)(4)(vi)(D) and (E) of this section), use of the sites shall be prohibited. However, if the DMMP is thereafter completed within one year, disposal of dredged material at the sites may resume.

(D) The EPA may extend the eight-year deadline in paragraph (b)(4)(vi)(C) of this section for any reasonable period (on one or more occasions) if it obtains the written agreement of the USACE, the State of Connecticut (Department of Environmental Protection) and the State of New York (Department of State).

(E) The EPA may extend the eight-year deadline in paragraph (b)(4)(vi)(C) of this section by up to one year (on one occasion only) if it determines in writing that the parties participating in the development of the DMMP have attempted in good faith to meet the deadline, but that the deadline has not been met due to factors beyond the parties' control (including funding). Such an extension may be in addition to any extension(s) granted under paragraph (b)(4)(vi)(D) of this section.

<sup>1</sup> If the EPA has acted in good faith to adopt substantially all procedures and standards for the use of the sites and the use of practicable alternatives to open-water disposal recommended in the DMMP, termination of the use of the sites based on the EPA not adopting all procedures and standards shall not occur unless a party first files a petition with the EPA pursuant to item 7 setting forth in detail each procedure or standard that the party believes the EPA must adopt in order to be consistent with the DMMP, and the EPA has an opportunity to act on the petition. Termination of the use of the sites shall not occur if in response to a petition the EPA determines that it has adopted substantially all procedures and standards for the use of the sites and the use of practicable alternatives to open-water disposal recommended in the DMMP, unless and until otherwise directed by a court. Termination of the use of the sites shall not occur based on not adopting a DMMP provision if the DMMP provision is not consistent with applicable law. Termination of the use of the sites shall not occur based on the EPA not meeting the 60 and 120 day rulemaking deadlines set forth in item 7, but use of the sites shall be suspended if the EPA misses either deadline, until the EPA issues a final rule. Termination of the use of the sites shall not occur based on the EPA adopting procedures and standards which are stricter than the recommendations of the DMMP.

(F) The EPA will conduct an annual review of progress in developing the DMMP. If the EPA finds that the DMMP is being unreasonably delayed by one or more parties, the EPA reserves the right to take the following actions as appropriate: (1) Suspend use of the sites even prior to the deadlines established in paragraphs (b)(4)(vi)(C) through (E) of this section through an amended rulemaking or (2) Exercise through rulemaking its statutory and regulatory authorities regarding designation of ocean disposal sites.

(G) Upon completion of the DMMP, disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall be allowed only from permittees that comply with procedures and standards consistent with the recommendations of the DMMP, and consistent with applicable law, for the use of the sites and for the use of practicable alternatives to open-water disposal, so as to reduce or eliminate the disposal of dredged material in Long Island Sound. Upon the completion of the DMMP, the EPA will within 60 days propose and within 120 days (subject to consideration of public comments) issue a legally binding amendment to the designation in this paragraph (b)(4) describing all such procedures and standards and specifying that they must be complied with as part of this designation.<sup>2</sup> If any party (or the EPA on its own initiative) is not satisfied that the final DMMP recommends sufficient procedures and standards to reduce or eliminate disposal of dredged material in Long Island Sound to the greatest extent practicable, or if any party is not satisfied with the EPA's amendment adopting such procedures and standards, the party may petition the EPA to do a rulemaking to amend the designation to establish different or additional standards. The EPA will act on any such petition within 120 days.

(H) Disposal not subject to the restrictions in paragraphs (b)(4)(vi)(C) through (G) or (b)(4)(vi)(I) of this section shall be permitted only for materials resulting from currently authorized or permitted dredging projects at Norwalk, Rye and New Rochelle. Such disposal must meet all applicable statutory and regulatory requirements. All phases of any of these project must be initiated within four (4) years from the date of the designation, or the project will become

<sup>2</sup> The EPA must preserve its discretion, in response to public comments, not to adopt such an amendment to this designation. The EPA understands that the State of New York has reserved its rights to revive its objection to this designation if the DMMP procedures and standards are not adopted.

subject to paragraph (b)(4)(vi)(I) of this section.

(I) Except for the projects covered by paragraph (b)(4)(vi)(H) of this section and until completion of the DMMP, disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall be allowed only if, after full consideration of recommendations provided by an established Regional Dredging Team<sup>3</sup> (RDT), the USACE finds (and the EPA does not object to such finding), based on a fully documented analysis, that for a given dredging project:

(1) There are no practicable alternatives (as defined in 40 CFR 227.16(b)) to open-water disposal in Long Island Sound and that any available practicable alternative to open-water disposal will be fully utilized for the maximum volume of dredged material practicable;

(2) Determinations relating to paragraph (b)(4)(vi)(I)(1) of this section will recognize that any alternative to open-water disposal may add additional costs. Disposal of dredged material at the designated sites pursuant to this paragraph (b)(4) shall not be allowed if a practicable alternative is available. Any project subject to this restriction must be permitted or authorized prior to the completion of the DMMP and completed within two years after the completion of the DMMP.

(J) Disposal shall be limited to dredged sediments that comply with the Ocean Dumping Regulations.

(K) Disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall not be allowed for any materials subject to a waiver under 33 U.S.C. 1413(d) unless, for any project where a waiver is sought, the New England or New York District of the USACE provides notification, by certified mail at least thirty (30) days before making the waiver request, to the Governors of the states of Connecticut and New York and the North Atlantic Division of the USACE that it will be requesting a waiver.

(L) Transportation of dredged material to the sites shall only be allowed when weather and sea conditions will not interfere with safe transportation and will not create risk of spillage, leak or other loss of dredged material in transit. No disposal trips shall be initiated when the National Weather Service has issued a gale warning for local waters during

<sup>3</sup> A Regional Dredging Team (RDT) comprised of regulatory and coastal policy specialists from state and federal agencies will be formed.



the time period necessary to complete dumping operations.

(M) The parties participating in the DMMP will need to seek additional funding in order to develop the DMMP. Nothing in the designation in this paragraph (b)(4) or elsewhere guarantees that any agency will be able to obtain funding for the DMMP. This designation shall not be interpreted as or constitute a commitment that the United States will obligate or expend funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341. Rather, the sole remedy for any failure to meet the conditions specified in this paragraph (b)(4)(vi) shall be the restriction of the authority to dispose of dredged material, as provided in this paragraph (b)(4).

(N) Nothing in the designation in this paragraph (b)(4) or elsewhere precludes the EPA from exercising its statutory authority to designate other ocean disposal sites, not subject to the restrictions in paragraph (b)(4)(vi), or taking any subsequent action to modify the site designation in paragraph (b)(4), provided that the EPA makes any such designation or takes such subsequent action through a separate rulemaking in accordance with all applicable legal requirements. Nothing in this designation shall be interpreted to restrict the EPA's authorities under the MPRSA or the implementing regulations or to amend the implementing regulations.

(5) Western Long Island Sound Dredged Material Disposal Site (WLIS).

(i) *Location*: Corner Coordinates (NAD 1983) 41°00.1' N., 73°29.8' W.; 41°00.1' N., 73°28.1' W.; 40°58.9' N., 73°29.8' W.; 40°58.9' N., 73°28.1' W.

(ii) *Size*: A 1.2 by 1.3 nautical mile rectangular area, about 1.56 square nautical miles in size.

(iii) *Depth*: Ranges from 79 to 118 feet (24 to 36 meters).

(iv) *Primary use*: Dredged material disposal.

(v) *Period of use*: Continuing use except as provided in paragraph (b)(5)(vi) of this section.

(vi) *Restrictions*: See 40 CFR 228.15(b)(4)(vi).

\* \* \* \* \*

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 64

[Docket No. FEMA-7879]

#### Suspension of Community Eligibility

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

**DATES:** *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

**ADDRESSES:** If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

**FOR FURTHER INFORMATION CONTACT:** Michael M. Grimm, Mitigation Division, 500 C Street, SW.; Room 412, Washington, DC 20472, (202) 646-2878.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in

this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification letter addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications have been made, this final rule may take effect within less than 30 days.

**National Environmental Policy Act.** This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act.** The Administrator has determined that this