



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[FRL-9942-08-Region 1]

Ocean Disposal; Proposed Amendments to Restrictions on Use of Dredged Material Disposal Sites in the Central and Western Portions of Long Island Sound; Connecticut

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) today proposes to amend federal regulations that designated, and placed restrictions on the use of, the Central Long Island Sound and Western Long Island Sound dredged material disposal sites, located offshore from New Haven and Stamford, Connecticut, respectively. The amended regulation incorporates standards and procedures for the use of those sites as recommended in the Long Island Sound Dredged Material Management Plan, which was completed by the U.S. Army Corps of Engineers on January 11, 2016. The Dredged Material Management Plan identifies a wide range of alternatives to open-water disposal and recommends standards and procedures for determining

which alternatives to pursue for different dredging projects, so as to reduce or eliminate wherever practicable the open-water disposal of dredged material.

DATES: Comments must be received on or before March 25, 2016. EPA will hold two public meetings to receive comment on the proposed rule. The first will be held on March 1, 2016, from 5 p.m. to 7 p.m. at the Port Jefferson Free Library, 100 Thompson Street, Port Jefferson, New York. The second will be held on March 2, 2016, from 3:30 p.m. to 5:30 p.m. at the University of Connecticut-Stamford, Auditorium 2, 1 University Place, Stamford, Connecticut.

ADDRESSES: Written comments should be sent to: Stephen Perkins, U.S. Environmental Protection Agency, New England Regional Office, 5 Post Office Square, Suite 100, Mail Code: OEP06-3, Boston, MA 02109-3912 or electronically to CLDS@epa.gov.

FOR FURTHER INFORMATION CONTACT: Stephen Perkins, U.S. Environmental Protection Agency, New England Regional Office, 5 Post Office Square, Suite 100, Mail Code: OEP06-3, Boston, MA 02109-3912, telephone (617) 918-1501, electronic mail: perkins.stephen@epa.gov.

Public Review of Documents: The file supporting these proposed revisions is available for inspection as follows:

In person. The Proposed Rule and the U.S. Army Corps of Engineers' Dredged Material Management Plan (DMMP) and Programmatic Environmental Impact Statement (PEIS) for Long Island Sound are available for inspection at the U.S. Environmental Protection Agency,

New England Regional Office, 5 Post Office Square, Boston, MA. Persons interested in inspecting materials in person should contact Stephen Perkins by telephone (617) 918-1501 or electronic mail: perkins.stephen@epa.gov to arrange a time to view them.

Electronically. You also may review and/or obtain electronic copies of the Proposed Rule from EPA's website <http://www3.epa.gov/region1/eco/lisdreg/eis.html>. The DMMP and PEIS are available from the U.S. Army Corps of Engineers' Long Island Sound DMMP website at: <http://www.nae.usace.army.mil/Missions/ProjectsTopics/LongIslandSoundDMMP.aspx>

SUPPLEMENTARY INFORMATION: Organization of this document. The following outline is provided to aid in locating information in this preamble.

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I. Background

On June 3, 2005, EPA published in the **Federal Register** (70 FR 32498) a final rule (the 2005 Rule) designating two open-water dredged material disposal sites, the Central Long Island Sound site (CLDS, previously referred to as CLIS) and the Western Long Island Sound site (WLDS, previously referred to as WLIS), for the disposal of dredged material from harbors and navigation channels in Long Island Sound (LIS) in the states of Connecticut and New York. These disposal site designations were subject to various restrictions designed both to ensure appropriate use of the sites and to support the goal of reducing or eliminating the disposal of dredged material into Long Island Sound. In support of this action, EPA also prepared a Final Environmental Impact Statement (FEIS) under the National Environmental Policy Act (NEPA) pursuant to the Agency's voluntary NEPA compliance policy.

Pursuant to the Coastal Zone Management Act (CZMA), EPA consulted with the New York Department of State (NY DOS) and the Connecticut Department of Environmental Protection (CT DEP)¹ on the designation of these two sites. NY DOS raised objections as to the consistency of the designations with the enforceable policies of New York's Coastal Management Program. After consulting with both states, as well as with the U.S. Army Corps of Engineers (USACE) and the National Oceanic and Atmospheric Administration (NOAA), EPA negotiated an interim resolution with NY DOS regarding its concerns. Specifically, EPA agreed to include restrictions on the use of the sites in order to meet NY DOS's concerns and provide enhanced assurance that

¹ CT DEP has since been renamed and reconfigured as the Connecticut Department of Energy & Environmental Protection (CT DEEP).

the requirements of the CZMA, the Marine Protection, Research, and Sanctuaries Act (MPRSA), and NEPA are met.² These restrictions were agreed to by both the NY DOS and the CT DEP.

The restrictions were designed to ensure appropriate use and management of the designated disposal sites and to support the common goal of New York and Connecticut to reduce or eliminate wherever practicable the disposal of dredged material in Long Island Sound. To support this goal, the restrictions contemplated that there would be a regional dredged material management plan (DMMP) for Long Island Sound that would help to guide the management of dredged material from projects which occur after completion of the DMMP. 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 jointly requested the USACE to develop a regional DMMP for Long Island Sound. Consistent with the two states' requests, the 2005 designations contemplated that the DMMP for Long Island Sound would include the identification of alternatives to open-water disposal and the development of procedures and standards for the use of the disposal sites and any practicable alternatives to open-water disposal, so as to reduce or eliminate wherever practicable the open-water disposal of dredged material.

² EPA held, and continues to hold, the view that the site designations without the additional restrictions would have been consistent with the enforceable policies of New York's CMP. Nevertheless, EPA agreed that the additional site restrictions placed reasonable conditions on when the disposal sites could be used that provided enhanced assurance that the requirements of the CZMA, the MPRSA, and NEPA are met. Moreover, adding these site use restrictions represented 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. Furthermore, EPA noted that the added site use restrictions arose out of comments submitted by NY DOS and other parties and would be consistent with EPA's environmental analysis and proposed action.

The restrictions also included transitional conditions to govern dredged material management during the development of the DMMP, including sunset provisions for the sites if the DMMP was not completed.

The restrictions also included conditions that specified that use of the sites would be suspended if, (a) within 60 days of the completion of the DMMP, the EPA does not propose legally binding amendments to the regulations for the two disposal sites to incorporate lawful procedures and standards consistent with those recommended in the DMMP for the use of the disposal sites and the use of practicable alternatives to open-water disposal, and (b) within 120 days of completion of the DMMP, and subject to the EPA's consideration of public comments, the EPA does not issue legally binding final amendments adopting such procedures and standards. Any such suspension in the use of the sites would be lifted if and when EPA issued the required final rule.

II. The Dredged Material Management Plan for Long Island Sound

On January 11, 2016, the USACE completed the Dredged Material Management Plan for Long Island Sound – Connecticut, New York, Rhode Island. EPA, NOAA, and the states of Connecticut and New York were active participants in the development of the DMMP. These agencies participated on a Steering Committee and other sub-groups to assist the USACE throughout the process. EPA provided feedback to USACE on individual sections of the DMMP as they were developed and on the draft of the complete DMMP.

The DMMP examines the need for dredging over a 30-year horizon, past dredging history and dredged material placement, and current beneficial use practices. The DMMP covers adjacent waters from which dredged material was likely to originate within the draw area of any proposed regional disposal solution, including Block Island Sound, Little Narragansett Bay, Fishers Island Sound, Peconic Bay and Gardiners Bay. A total of nearly 240 harbors, coves, bays and rivers supporting various levels of navigational access are located along these shores.

The Long Island Sound DMMP estimates a dredging need of 52.9 cubic yards over its 30-year planning horizon. Of this total, about 29 percent is expected to be sand, about 65 percent is expected to be fine-grained materials suitable for open-water placement, and about 6 percent is expected to be unsuitable for open-water placement. The distribution of this material among the three states is as follows: about 74 percent is from Connecticut, 25 percent is from New York and 1 percent from Rhode Island. Of the total volume, about 63 percent is from the USACE Federal Navigation Projects (FNP), 2 percent is from other federal agency projects, and 35 percent is from non-federal dredging activities under permit. The USACE has indicated that budgetary constraints are likely to reduce the dredging volumes from FNPs.

The DMMP identifies and assesses alternatives for future dredged material placement and beneficial use for each federal project and separable component, and identifies the likely Federal Base Plans (the least cost environmentally acceptable alternative) for future FNP dredging activities. Finally, the DMMP recommends procedures to be followed and standards to be applied in evaluating and recommending dredged material placement options, tracking dredged material placement, pursuing opportunities for alternative and beneficial uses of dredged material

in Long Island Sound, and researching and monitoring the impacts of past and future placement activities.

The DMMP is not a decision document, in that it does not determine the specific dredged material placement solution for any specific Federal Navigation Project activity. It also does not authorize disposal or any other form of management of any particular dredged material. Instead, the DMMP will serve as a framework to help guide future investigations and inform decision-making for federal actions with respect to dredging and dredged material placement. As individual projects come up for their next maintenance cycle, or as feasibility studies for proposed improvement dredging projects are prepared, those studies should reference the evaluations and recommendations in the DMMP in examining placement alternatives and making a final determination as to the Federal Base Plan and appropriate beneficial use opportunities beyond the base plan.

The DMMP identifies the likely Federal Base Plans for each of the 52 FNPs and sub-projects in the Long Island Sound region that will or may require maintenance dredging of project features during the 30-year planning horizon. Opportunities for federal participation in beneficial use options are also identified along with non-federal responsibilities for study and implementation of the various placement alternatives.

Identification of the likely Federal Base Plan for a particular federal dredging project is not the same as selecting a placement option for that project, nor does it limit potential federal participation in the project. For each federal project, as it is considered for funding for dredging, the Corps must analyze the available alternatives, other eligible authorities, and the willingness

and capability of non-federal cost-sharing partners to participate before recommending any final plan for dredged material placement or beneficial use. Other factors beyond cost can also contribute to decisions on placement options for dredging projects. Ecosystem restoration is recognized as one of the primary missions of the USACE under its planning guidance, and the placement option that is selected for a project should maximize the sum of net economic development and environmental restoration benefits. A beneficial use option may be selected for a project even if it is not the Federal Base Plan for that project.

In response to the 2005 Rule, and in accordance with the DMMP Project Management Plan (work plan), Section 7 of the DMMP recommends procedures to be followed and standards to be applied in evaluating and recommending dredged material placement options, tracking dredged material placement, pursuing opportunities for alternative and beneficial uses of dredged material in Long Island Sound, and researching and monitoring impacts of past and future placement activities. These recommendations form the basis for EPA's proposed amendments to the 2005 restrictions, as described below.

III. Standards and Procedures

Consistent with the 2005 Rule and with the recommendations of the DMMP, EPA is proposing to amend the current restrictions to include standards and procedures for the use of practicable alternatives to open-water disposal, so as to reduce or eliminate wherever practicable the open-water disposal of dredged material.

A. Standards

EPA proposes to retain the current restriction at 40 CFR 228.15(b)(4)(vi)(I)(1) which provides that disposal at the sites shall be allowed only if there is no practicable alternative to open-water disposal and that any practicable alternative will be fully utilized for the maximum volume of dredged material practicable. EPA also proposes to retain the first sentence of § 228.15(b)(4)(vi)(I)(2) which recognizes that any alternative to open-water disposal may add additional costs.

As discussed in the preamble to the 2005 Rule, 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. The term "practicable alternative" is defined in 40 CFR 227.16(b) of the EPA's ocean disposal regulations as an alternative which is, "available at reasonable incremental cost and energy expenditures, [and] 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." This definition is incorporated by reference in 40 CFR 228.15(b)(4)(vi)(I)(1).

In addition, 40 CFR 228.15(b)(4)(vi)(I)(2) in the 2005 Rule emphasizes that the designated sites may not be used whenever a "practicable alternative" is available even when this means reasonable added incremental costs. Under this paragraph 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. Given that these regulations entail restrictions on an EPA site designation, if the EPA

objects to any USACE determination that practicable alternatives are not available, use of the designated sites will be prohibited unless and until the EPA objection is resolved.

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 open-water disposal at the designated disposal sites in the Sound. When such preferable alternatives are identified, they will need to be used if they are available at “reasonable incremental cost.”

The language retained from the 2005 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 language of the 2005 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 proposed 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 cannot go

forward. EPA recognizes that this could result in deferral of maintenance or improvement projects that could impact navigation.

EPA proposes to add the following standards, derived from the DMMP, for the disposal of dredged material, by type of material, in the amended restrictions for both disposal sites. These proposed amendments do not make decisions about the suitability of any particular dredged material for open-water disposal or any other type of management. Each dredging project will have to go through project-specific permitting evaluations.

1. Unsuitable Material

“Unsuitable fine-grained materials” are those determined by physical, chemical and biological testing to be unsuitable for unconfined open-water placement. Accordingly, EPA’s proposed rule specifies that unsuitable fine-grained materials shall not be disposed of at the designated sites.

2. Sandy Material

“Sandy material” in Long Island Sound is coarse-grained material of generally up to 20 percent fines when used for direct beach placement, or up to 40 percent fines when used for nearshore bar/berm nourishment. Clean sandy material should be used for beach or nearshore bar/berm nourishment whenever practicable. Sandy material has a high value as nourishment or in other coastal resiliency applications, and recent experience is that state and local governments, as well as property owner groups, are willing to fund the additional cost for such material even

where there is no other federal project authority to assist in that cost. This is primarily because using dredged sand is typically far less costly than acquiring sand from an upland source. As long as beach or nearshore placement is a practicable alternative, project proponents will need to identify and secure funding for any needed non-federal cost-sharing. Accordingly, the proposed rule specifies that coarse-grained material should be used for beach or nearshore bar/berm nourishment, or other beneficial use whenever practicable.

3. Suitable Fine-Grained Material

“Suitable fine-grained material” in Long Island Sound is typically clay and silty material of more than 20 to 40 percent fines that is not suitable for beach or nearshore placement, yet is determined through testing and analysis to be suitable for open-water placement. Although the most likely cost-effective and environmentally acceptable method of placement of this material is at open-water disposal sites, EPA proposes that every proposed project exhaust the possibility for a practicable alternative to open-water disposal. More specifically, for materials dredged from upper river channels in the Connecticut, Housatonic and Thames Rivers, whenever practicable, the one existing Confined Open Water site, and on-shore or in-river placement, should be used for such projects.

Other beneficial uses, such as marsh creation, should be examined and used whenever practicable. Project proponents should determine if environmental and/or other benefits may offset the incremental project cost sufficiently to warrant federal participation under one or more of the other authorities discussed in Section 6 of the DMMP. EPA anticipates that the opportunities for beneficial use of fine grained materials may increase in the future as sea level rise and related resiliency concerns generate demand for materials to conserve and protect

shorelines. As such, the alternatives for fine-grained materials described in the DMMP should be viewed as a current assessment of possible beneficial uses rather than the limit of such possibilities in the future.

The proposed rule specifies that beneficial uses such as marsh creation, should be examined and used whenever practicable. If no other alternative is determined to be practicable, suitable fine-grained material may be placed at the designated sites.

4. Source Reduction

Efforts to control sediment entering waterways can reduce the need for maintenance dredging of harbor features and facilities by reducing shoaling rates. Reducing sediment loads could help reduce the volumes dredged in each maintenance operation as well as reduce the frequency of maintenance. In addition, efforts to prevent introduction of contaminants into the watershed (e.g., multi-sector and municipal stormwater permits, measures to control nonpoint agricultural runoff) can result in reduced contaminant levels in sediments that can increase the range of options available to beneficially use those sediments. Continued source reduction efforts for both sediment and contaminants will assist in further reducing the need for open-water placement of dredged material in Long Island Sound. The EPA expects that federal, state and local agencies tasked with regulating those discharges into the watersheds tributary to Long Island Sound will exercise their authority under various statutes and regulations in a continuing effort to reduce the flow of sediments and contaminants into state waterways and harbors.

B. Procedures

The restrictions in the 2005 Rule established a Regional Dredging Team (RDT) to identify practicable alternatives to open-water disposal and recommend their use for projects proposed while the DMMP was being prepared. The RDT was effectively used to review six projects while the DMMP was being prepared and the experience of the RDT resulted in some of the recommendations in the DMMP. Consistent with the recommendations in the DMMP, EPA proposes to extend and redefine the role of the RDT to ensure that the Standards described above are utilized in evaluating proposed dredging projects in Long Island Sound.

EPA proposes to retain the core linkage between the RDT and the USACE project approval process as described in the 2005 Rule (40 CFR 228.15(b)(4)(vi)(I) and (I)(1)). Disposal of dredged material at the designated sites shall be allowed only if, after full consideration of recommendations provided by the 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 there are no practicable alternatives (as defined in 40 CFR 227.16(b)) to open-water disposal in Long Island Sound, or that any available alternative to open-water disposal will be fully utilized for the maximum volume of dredged material practicable.

EPA proposes to amend the 2005 Rule to make more explicit the RDT's purpose, geographic scope, membership, structure and general process as described below.

1. Purpose of the Long Island Sound Regional Dredging Team (LIS RDT)

The primary purpose of the LIS RDT is to reduce or eliminate wherever practicable the open-water disposal of dredged material in Long Island Sound. The LIS RDT will accomplish this by reviewing all proposed dredging projects subject to MPRSA (namely all federal projects and non-federal projects that generate greater than 25,000 cubic yards) to assess whether there are practicable alternatives to open-water disposal, by recommending that any available alternative(s) to open-water disposal be utilized for the maximum volume of dredged material practicable, and to provide documented findings and recommendations to USACE on these points so that the USACE and the EPA can consider the LIS RDT's recommendations. The LIS RDT should review the alternatives analysis for all projects submitted to help ensure that available alternatives as described in the DMMP for each harbor and dredging center have been thoroughly evaluated and are implemented where practicable. While the LIS RDT will conduct project reviews and make submissions and recommendations to the USACE, the LIS RDT will not supplant the regulatory obligations or authorities of participant agencies under the MPRSA, CWA, CZMA or other applicable laws.

Other purposes of the LIS RDT include: serving as a forum for continuing exploration of new beneficial use alternatives to open-water disposal; promoting the use of such alternatives; and suggesting approaches for cost-sharing opportunities. For example, the LIS RDT could further investigate and develop opportunities for approving and funding long-term regional Confined Disposal Facilities which could accommodate suitable and unsuitable dredged material and provide environmental and social benefits such as parkland and habitat once filled and closed.

The LIS RDT and its member agencies should also assist USACE and EPA in continuing a number of long term activities to continue the environmentally sound implementation of dredging

and dredged material management in Long Island Sound. These activities include supporting USACE's dredged material tracking system, supporting USACE's DAMOS (Disposal Area Monitoring System) program and related efforts to study the long-term impacts of open-water placement, and promoting opportunities for beneficial use of clean, parent marine sediments often generated in the development of CAD cells.

2. Geographic Scope

The geographic range of the LIS RDT would be expanded to include all of Long Island Sound and adjacent waters landward of the seaward edge of the territorial sea (three mile limit) or, in other words, from Throgs Neck to a line three miles east of the baseline across western Block Island Sound. These boundaries would encompass all harbors and areas included in the DMMP except Block Island. If any other disposal sites are designated within these boundaries, review of projects proposed to be disposed of at those sites would also be within the RDT's purview.

3. Membership

The LIS RDT should include representatives from affected federal and state government organizations. EPA anticipates that federal participation would include EPA Regions 1 & 2; the New England and New York Districts and the North Atlantic Division of the USACE and the National Oceanic and Atmospheric Administration. EPA encourages the participation of the U.S. Navy, the U.S. Coast Guard and the U.S. Fish & Wildlife Service. EPA expects that the states of Connecticut, New York and Rhode Island would be participants through their environmental agencies, coastal zone management programs and relevant port authorities. EPA requests that, to

the extent possible, member organizations will provide sufficient funding to enable their active participation in the LIS RDT.

4. Structure and Process

EPA proposes that the specific details for structure (e.g., chair, committees, working groups) and process (e.g., how projects come before the LIS RDT, coordination with other entities) be left for the LIS RDT to determine and allowed to evolve as best accomplishes the team's purpose.

The LIS RDT is encouraged to establish and maintain cooperative working relationships with other Long Island Sound-based organizations (e.g., the Long Island Sound Study's Science and Technical Advisory Committee, non-governmental organizations, relevant university-based programs) so that relevant scientific, program and policy information is effectively shared and resources are leveraged to the maximum extent. The LIS RDT is also encouraged to consider retaining the Technical Working Group as a means of apprising stakeholder groups of the progress being made on beneficial use alternatives and aiding in soliciting public views on new alternatives that may arise.

Finally, EPA is proposing to revise 40 CFR 228.15(b)(4)(vi)(G) to retain only the provision that provides for a party to petition EPA if the party is not satisfied that EPA's 2016 amendments to the rule adopt procedures and standards to reduce or eliminate wherever practicable disposal of dredged material in Long Island Sound to the greatest extent practicable, 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 by either, granting the petition (and proposing a rule change) or denying the petition. Consistent with the 2005 Rule, a party will have the obligation to first petition the EPA prior to filing any court action.

IV. Compliance with Statutory and Regulatory Requirements

The dredged material disposal site designation process that culminated in the 2005 Rule was 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), and the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). *See* 70 FR 32502 (June 3, 2005).

EPA has determined that the proposed amendments to the 2005 Rule provide the same or greater protection of water quality and the marine environment and thus are also consistent with the laws noted above, as evaluated for the 2005 Rule. These proposed amendments do not make decisions about the suitability of any particular dredged material for open-water disposal or any other type of management of the material. Specific dredging projects will have to go through project-specific permitting evaluations to make those decisions. The proposed amendments, instead, provide specific standards and procedures that will further the goal of reducing or eliminating open-water disposal of dredged material at the CLDS and WLDS. Furthermore, EPA is not aware of any new information that would alter our prior conclusions that the disposal site

designations, as restricted, comply with the MSFCMA, and will continue to do so with the proposed amendments to the 2005 Rule. To the extent that there are recurring requirements or new conditions under some of the applicable laws, the evaluation of the compliance of the proposed amendments with applicable requirements is described below.

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

Consistent with MPRSA, EPA, in cooperation with the USACE, published final Site Management and Monitoring Plans for the two disposal sites in 2004, and they went into effect when the sites were designated by the 2005 Rule. Section 102(c)(3)(F) of MPRSA requires that plans be updated no less frequently than every ten years. EPA and USACE initiated revisions in 2015 to the two SMMPs and EPA expects to separately release the updated plans for public comment by March 1, 2016. The draft revised SMMPs will be available at <http://www3.epa.gov/region1/eco/lisdrag/eis.html>.

2. National Environmental Policy Act (NEPA)

As stated above, EPA prepared a Final Environmental Impact Statement in 2004 (the 2004 FEIS) to support designation of the CLDS and WLDS, which ultimately included the applicable use restrictions set forth in the 2005 Rule. EPA has determined that a Supplemental EIS is not needed for the proposed amendments to the 2005 Rule because the new information that EPA has considered is sufficient to show that proposed amendments will not affect the environment in a significant manner or to a significant extent not already considered.³ The proposed

³ Recognizing that, as discussed previously, EPA is not legally required to prepare an EIS for a dredged material disposal site designation, but has exercised its discretion to do so under EPA's Voluntary NEPA Policy. (*See* 63 FR 58045 (Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents), October 29, 1998).

amendments retain and build on key substantive aspects of the original site use restrictions (see, e.g., 40 CFR 228.15(b)(4)(vi)(A), (B), (G), (J) and (K)). In addition, key aspects of these site use restrictions were themselves built upon various preexisting requirements from EPA's MPRSA regulations (see, e.g., 40 CFR 227.16(b) and 228.15(b)(4)(vi)(J)). While EPA expects the proposed amendments to help foster reductions in the disposal of dredged material at the CLDS and WLDS by clarifying and retaining the application of existing site use restrictions, the environment will not be affected by the amendments in a significant manner, or to a significant extent, that has not already considered.

For example, unsuitable dredged material (i.e., material that does not satisfy the sediment quality criteria in EPA's MPRSA regulations) could not be disposed of in Long Island Sound even before the 2005 Rule. This was specified in the 2005 Rule (see 40 CFR 228.15(b)(4)(vi)(J)), and this specification would be retained in the new amendments. As another example, under the regulations prior to the 2005 Rule, dredged material consisting of clean (i.e., suitable) sand should not have been disposed of in Long Island Sound when a practicable upland management alternative, such as a beach nourishment site or near shore placement, was available for the material. This remained the case under the 2005 Rule and will continue to be the case under the proposed amendments. Moreover, the likelihood of identifying practicable alternatives for dredged material should be greater given (1) the enhanced procedures involving the RDT that were created for the 2005 Rule and will be retained and strengthened in the proposed amendments, and (2) the additional information concerning beneficial use options and management methods presented in the DMMP. At the same time, of course, the proposed amendments do not address any specific dredging projects, and the regulatory review of such projects will occur on a project-specific basis.

In addition, the DMMP and the standards and procedures it recommends have been evaluated under NEPA. The USACE prepared a Programmatic Environmental Impact Statement (PEIS) for the LIS DMMP that also was completed on January 11, 2016. Throughout the NEPA process, EPA served as a cooperating agency. (See 40 CFR 1501.6 and 1508.5.) For the Final PEIS, the USACE made adjustments to the Draft PEIS in response to comments provided by EPA. The Final PEIS, among other things, evaluates available or potentially developable dredged material management alternatives in the LIS DMMP, including those contemplated by the proposed amendment for the CLDS and WLDS, such as, open-water placement, confined aquatic disposal; coastal, nearshore, and upland beneficial use; and landfill placement. Accordingly, EPA hereby adopts the Final PEIS as part of the record for this proposed rule amendment pursuant to 40 CFR 1506.3. As stated previously, because the proposed amendment does not, by itself, authorize the disposal of dredged material from a particular project at either site, appropriate additional NEPA analysis will be performed during the permitting process for individual projects.

3. Coastal Zone Management Act (CZMA)

Under the CZMA, EPA, like any other federal agency, is required to provide relevant states with a determination that any activity it proposes that could affect 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. EPA has determined that the proposed amendments to the 2005 Rule are consistent with the enforceable policies of the coastal zone management programs of Connecticut and New York. EPA has provided each state with a written determination to this effect. EPA be will consulting with each state's coastal zone

management program prior to final rulemaking, and the final determinations will be included in the record.

4. Endangered Species Act

Since the 2005 Rule, the National Marine Fishery Service has listed the Atlantic sturgeon as an endangered species under the ESA. Parts of Long Island Sound are among the distinct population segments listed as endangered by NOAA, National Marine Fisheries Service (NMFS) in 2012. Consistent with ESA, EPA has initiated consultation with NMFS on this rulemaking action. The consultation includes EPA's review of the Site Management and Monitoring Plans (SMMPs) for the two disposal sites as described below.

V. Proposed Action

EPA is publishing this Proposed Rule to amend the restrictions on the use of the CLDS and WLDS. This action is consistent with a number of the restrictions contained in the original designation of these sites in 2005. Some of those restrictions required the completion of a Dredged Materials Management Plan that would identify procedures and standards for reducing or eliminating the disposal of dredged material in Long Island Sound. Since the DMMP has been completed, EPA is proposing to remove the restrictions related to its development. The original restrictions further require EPA to propose, within 60 days of completion of the DMMP, amendments to the restrictions to incorporate procedures and standards consistent with those recommended in the DMMP for reducing or eliminating the disposal of dredged material in Long Island Sound. Today's proposal is intended to satisfy that requirement.

VI. Statutory and Executive Order Reviews

1. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:

Improving Regulation and Regulatory Review

This action is not a significant regulatory action, as defined in the Executive Order, and was therefore not submitted to the Office of Management and Budget (OMB) for review.

2. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA 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)

This action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). The amended restrictions in this proposed rule 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. “Small entities” under the RFA 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. Furthermore, the proposed amendments to the restrictions also will not have significant economic impacts on a substantial number of small entities because they primarily will create requirements to be followed by regulatory agencies rather than small

entities, and will create requirements (i.e., the standards and procedures) intended to help ensure that the existing regulatory requirement (*see* 40 CFR 227.16) that practicable alternatives to the ocean dumping of dredged material be utilized.

4. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

5. Executive Order 13132: Federalism

This action does not have federalism implications. 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.

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

This action does not have tribal implications as specified in Executive Order 13175 because the proposed restrictions will not have substantial direct effects on Indian tribes, on the relationship between the federal government and Indian Tribes, or the distribution of power and responsibilities between the federal government and Indian Tribes. EPA consulted with the affected Indian tribes in making this determination.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

9. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have a disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

11. 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."

The EPA expects that this proposed rule will afford additional protection to the waters of Long Island Sound and organisms that inhabit them. Building on the existing protections of the MPRSA and the ocean dumping regulations, the proposed regulatory amendments are designed to promote the reduction of open-water disposal of dredged material in Long Island Sound.

12. Executive Order 13547: Stewardship of the Ocean, Our Coasts, and the Great Lakes

Section 6(a)(i) of Executive Order 13547, (75 FR 43023, July 19, 2010) requires, among other things, that EPA and certain other agencies "... to the fullest extent consistent with applicable law [to] ... take such action as necessary to implement the policy set forth in section 2 of this order and the stewardship principles and national priority objectives as set forth in the Final Recommendations and subsequent guidance from the Council." The policies in section 2 of Executive Order 13547 include, among other things, the following: "... it is the policy of the United States to: (i) protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources; (ii) improve the resiliency of ocean, coastal, and Great Lakes ecosystems, communities, and economies" As with Executive Order 13158 (Marine Protected Areas), the overall purpose of the Executive Order is to promote protection of ocean and coastal environmental resources.

The EPA expects that this proposed rule will afford additional protection to the waters of Long Island Sound and organisms that inhabit them. Building on the existing protections of the MPRSA and the ocean dumping regulations, the proposed regulatory amendments are designed to promote the reduction or elimination of open-water disposal of dredged material in Long Island Sound.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: February 1, 2016.

H. Curtis Spalding,

Regional Administrator, EPA Region 1-New England.

For the reasons stated in the preamble, title 40, Chapter I, of the *Code of Federal Regulations* is proposed to be amended as set forth below.

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(b) is amended by:

a. Revising paragraphs (b)(4) introductory text and (b)(4)(i) and (v) and (b)(4)(vi)

introductory text;

b. Removing paragraphs (b)(4)(vi)(C) through (F);

c. Adding new paragraph (b)(4)(vi)(D);

d. Adding new paragraph (b)(4)(vi)(E);

e. Redesignating paragraph (b)(4)(vi)(G) as (b)(4)(vi)(F) and revising it;

f. Removing paragraph (b)(4)(vi)(H);

g. Redesignating paragraph (b)(4)(vi)(I) as (b)(4)(vi)(C) and revising it;

h. Redesignating paragraph (b)(4)(vi)(J) through (L) as (b)(4)(vi)(G) through (I),

respectively;

i. Removing paragraph (b)(4)(vi)(M);

j. Redesignating paragraph (b)(4)(vi)(N) as (b)(4)(vi)(J); and

k. Revising paragraphs (b)(5) introductory text and (b)(5)(v).

The revisions and additions read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(b) * * *

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

(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.

(v) *Period of use*: Continuing use.

(vi) *Restrictions*: The designation in this paragraph (b)(4) sets forth conditions for the use of Central Long Island Sound (CLDS) and Western Long Island Sound (WLDS) Dredged Material Disposal Sites. These conditions apply to all disposal subject to the MPRSA, namely, all federal projects and nonfederal projects greater than 25,000 cubic yards. All references to "permittees" shall be deemed to include the U. S. 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:

(C) 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 the Long Island Sound Regional Dredging Team (LIS 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. 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)(C)(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 to the extent that a practicable alternative is available.

(3) The following standards for different dredged material types have been appropriately considered:

(i) *Unsuitable material*. Any materials proposed for dredging that have been determined by physical, chemical and biological testing to be unsuitable for open-water placement shall not be disposed of at the designated sites.

(ii) *Suitable sandy material*. Coarse-grained material, which generally may include up to 20 percent fines when used for direct beach placement, or up to 40 percent fines when used for nearshore bar/berm nourishment, should be used for beach or nearshore bar/berm nourishment or other beneficial use whenever practicable.

(iii) *Suitable fine-grained material*. This material has typically greater than 20 to 40 percent fine content and, therefore, is not typically considered appropriate for beach or nearshore placement, but has been determined to be suitable for open-water placement by testing and analysis.

Materials dredged from upper river channels in the Connecticut, Housatonic and Thames Rivers, whenever possible, should be disposed of at existing Confined Open Water sites, on-shore or through in-river placement. Other beneficial uses such as marsh creation, should be examined and used whenever practicable. If no other alternative is determined to be practicable, suitable fine-grained material may be placed at the designated sites.

(D) *Source reduction*. Efforts to control sediment entering waterways can reduce the need for maintenance dredging of harbor features and facilities by reducing shoaling rates. Federal, state and local agencies tasked with regulating discharges into the watershed should continue to exercise their authorities under various statutes and regulations in a continuing effort to reduce the flow of sediments into state waterways and harbors.

(E) The goal of the Long Island Sound Regional Dredging Team (LIS RDT) is to reduce or eliminate wherever practicable the open-water disposal of dredged material. The LIS RDT's purpose, geographic scope, membership, organization and procedures are provided as follows:

(1) *Purpose.* The LIS RDT's primary purpose is to conduct the review of dredging projects and make recommendations as described in paragraph (vi)(C) above. The LIS RDT shall also: serve as a forum for continuing exploration of new beneficial use alternatives to open-water disposal; promote the use of such alternatives; and suggest approaches for cost-sharing opportunities. The LIS RDT and its member agencies should also assist USACE and EPA in continuing long term activities intended to track disposal of dredged material and monitor dredging impacts in Long Island Sound. These activities include supporting USACE's dredged material tracking system, supporting USACE's DAMOS (Disposal Area Monitoring System) program and related efforts to study the long-term impacts of open-water placement, and promoting opportunities for beneficial use of clean, parent marine sediments often generated in the development of CAD cells

(2) *Geographic scope.* The geographic scope of the LIS RDT includes all of Long Island Sound and adjacent waters landward of the seaward boundary of the territorial sea (three-mile limit) or, in other words, from Throgs Neck to a line three miles seaward of the baseline across western Block Island Sound.

(3) *Membership.* The LIS RDT shall be comprised of representatives from affected federal and state government organizations.

(4) *Organization and procedures.* Specific details regarding structure (e.g., chair, committees, working groups) and process shall be determined by the RDT and may be revised as necessary to best accomplish the team's purpose.

(F) If any party is not satisfied that EPA's 2016 amendments to this rule adopt procedures and standards to reduce or eliminate wherever practicable disposal of dredged material in Long

Island Sound to the greatest extent practicable, the party may petition the EPA to do a rulemaking to amend the designation to establish different or additional procedures and standards. The EPA will act on any such petition within 120 days by either, granting the petition (and proposing a rule change) or denying the petition.

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

(v) *Period of use*: Continuing use.

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