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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 228

[EPA-R01-OW-2016-0068; FRL-9948-61-Region 1]

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

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

**ACTION:** Final rule.

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**SUMMARY:** The Environmental Protection Agency (EPA) today is amending 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 regulations incorporate standards and procedures for the use of those sites consistent with those 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 the open-water disposal of dredged material.

**DATES:** This final regulation is effective on [Insert date 30 days after date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R01-OW-2016-0068. All documents in the docket are listed on the <http://www.regulations.gov> website. Publicly available docket materials are also available from EPA's website <https://www.epa.gov/ocean-dumping/dredged-material-management-long-island-sound>

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

- I. Background
- II. Response to Comments
- III. Changes from the Proposed Rule
- IV. Compliance with Statutory and Regulatory Requirements
- V. Final Action
- VI. Statutory and Executive Order Reviews

## **I. Background**

On February 10, 2016, EPA published in the **Federal Register** (81 FR 7055) a proposed rule (the Proposed Rule) amending federal regulations that designated, and placed restrictions on the use of, the Central Long Island Sound (CLDS) and Western Long Island Sound (WLDS) dredged material disposal sites, located offshore from New Haven and Stamford, Connecticut, respectively. The existing restrictions on the sites were imposed when EPA designated CLDS and WLDS (70 FR 32498) (the 2005 Rule), 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 the disposal of dredged material in Long Island Sound.

To support this goal, the restrictions in the 2005 Rule 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. The amended restrictions in this Final Rule incorporate standards and procedures for the use of those sites consistent with those recommended in the Long Island Sound DMMP, which was completed by the U.S. Army Corps of Engineers (USACE) on January 11, 2016.

The restrictions imposed on the sites in the 2005 Rule also included conditions that specified that use of the sites would be suspended if, within 120 days of completion of the DMMP, and subject to EPA's consideration of public comments, 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 issues the required final rule.

## **II. Response to Comments**

EPA received comments on the Proposed Rule from 119 individuals, groups or entities. Comments were received from the Connecticut Congressional Delegation, USACE, the states of Connecticut and New York, a number of municipalities, environmental groups, harbor and marine trade groups, and many private citizens. Approximately eighty percent of the commenters supported the Proposed Rule, with some offering suggested improvements. The remainder expressed opposition in part or in whole to the Proposed Rule. A document containing copies of all of the public comments received by EPA and a document containing EPA's response to each of the comments have been placed in the public docket and on the website identified in the **ADDRESSES** section of this document. There was significant overlap among the comments received. Below, EPA summarizes the main points of the commenters and provides responses.

*Comment #1.* A number of commenters, including the states of Connecticut and New York, asked that EPA be explicit in retaining the common goal of the 2005 Rule – to reduce or eliminate open-water disposal of dredged material in Long Island Sound.

*Response #1.* EPA did not intend to signal any change to the goal of the 2005 Rule. In fact, the goal was so stated in the first paragraph of the Background section of the Proposed Rule. EPA did not include the goal statement in the proposed regulations because it was previously included in a provision addressing development of the DMMP and EPA deleted that provision

because the DMMP had been completed. Again, EPA did not by this deletion intend to signal a change in the goal. Therefore, to address this comment, EPA has added a sentence, restating the common goal, in the introductory paragraph (b)(4)(vi) in the Final Rule.

*Comment #2.* The states of Connecticut and New York proposed similar ideas for revisions to the Proposed Rule intended to spur increased beneficial use and result in staged reductions in open water disposal of dredge material over time. The suggested revisions include creation of a Steering Committee, consisting of high level representatives from the states, EPA and USACE. The comments propose that the charge to the Steering Committee would be to develop a baseline for the amount of dredged material being placed in open water and the amount being beneficially used, and to establish a reasonable and practicable series of stepped objectives (with timeframes) for reducing the amount of open-water placement and increasing the amount of beneficially used material, while also recognizing that there will be fluctuations in annual volumes of dredged material generated due to the very nature of the dredging program. The comments also call for the stepped objectives to incorporate an adaptive management approach toward continuous improvement, and for the charge to the Steering Committee also to include developing accurate methods to track reductions, with due consideration for annual fluctuations in the amount of dredging, and reporting on progress. The comments suggest that when tracking progress, it would be recognized that exceptional circumstances may result in delays in meeting an objective. Exceptional circumstances should be infrequent, irregular and unforeseeable. Certain other commenters also supported the inclusion of a staged reduction in open-water disposal.

*Response #2.* EPA agrees with Connecticut and New York that it would be useful to formally establish the Long Island Sound Steering Committee (Steering Committee), consisting of high level representatives from the two states, EPA, USACE, and, as appropriate, other federal and state agencies. A Steering Committee, consisting of the same parties, was established previously to guide the development of the DMMP and has provided a useful forum for interagency collaboration on dredged material management in the Long Island Sound region. Other participants could include the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS), which had a seat on the previous Steering Committee, and the state of Rhode Island, which had a seat on the previous Long Island Sound Regional Dredging Team (LIS RDT), and may have more interest now that the LIS RDT's geographic scope includes eastern Long Island Sound. Consistent with the comments, the Final Rule includes a provision establishing a Steering Committee to provide policy-level direction to the LIS RDT and facilitate high-level collaboration among the agencies critical to accelerating the development and use of beneficial alternatives for dredged material.

The charge to the Steering Committee includes: developing a baseline for the volume and percentage of dredged material being placed in open water and the volume and percentage being beneficially used; establishing a reasonable and practicable series of stepped objectives (with timeframes) for reducing the amount of dredged material placed in open-water sites and increasing the amount of material that is beneficially used, while also recognizing that there will be fluctuations in annual volumes of dredged material generated due to the very nature of the dredging program; and developing methods for accurately tracking reductions with due consideration for annual fluctuations. EPA agrees, and has provided, that the stepped objectives

should incorporate an adaptive management approach toward continuous improvement. The Final Rule also provides that, when tracking progress, the Steering Committee will recognize that exceptional circumstances may result in delays in meeting an objective, and that exceptional circumstances should be infrequent, irregular and unpredictable. In carrying out its tasks, the Steering Committee will guide and utilize the LIS RDT, as appropriate.

To be clear, neither the 2005 Rule nor the new amendments to the Rule *require* or *command* either Connecticut or New York (or Rhode Island) to participate on the Steering Committee or the LIS RDT. Participation by the states is voluntary. That said, EPA expects that the states will choose to participate on the Steering Committee and the LIS RDT. This expectation is based on several factors: (1) Connecticut and New York both commented in favor of constituting a Steering Committee and LIS RDT as discussed above; (2) the Steering Committee and LIS RDT will provide a dedicated venue for federal/state inter-agency communication and collaboration on dredging and dredged material disposal projects of interest and these sorts of discussions already take place and are often necessary due to the legal and programmatic responsibilities of the various agencies; and (3) New York, Connecticut, and Rhode Island participated on the LIS RDT created under the 2005 Rule and New York and Connecticut participated on the Steering Committee associated with development of the DMMP. Given that EPA anticipates that Connecticut and New York, and possibly Rhode Island, will voluntarily participate on the Steering Committee and the LIS RDT, EPA also expects that each of the agencies will commit the necessary resources to make that participation on the Steering Committee and LIS RDT meaningful, including resources needed to support collection of data for establishing the baseline and tracking and reporting on the future disposition of dredged materials.

*Comment #3.* Some commenters encouraged giving increased attention to implementation, as distinguished from simply identification, of feasible alternatives, and encouraged funding demonstration/pilot programs for alternative methods of beneficial use. They noted the importance of the states and all stakeholders working together to find and promote alternative uses for dredged material and encouraged the states to amend regulations to facilitate beneficial, environmentally sound use of suitable materials upland. The states of Connecticut and New York expressed their commitment to working with federal and state partners to develop and promote the use of innovative and practicable alternatives to open water disposal. Activities that may facilitate and establish a path forward include committing to jointly implement two pilot projects, identifying possible resources, and removing regulatory hurdles.

*Response #3.* EPA agrees with the commenters that a concerted, collaborative effort among state and federal partners will be needed to spur greater use of beneficial alternatives, including piloting alternatives, identifying possible resources, and eliminating regulatory barriers, when appropriate. EPA believes the Steering Committee should guide these efforts, with the support of the LIS RDT, and has included this among the responsibilities of the Steering Committee and LIS RDT in the Final Rule.

*Comment #4.* The states of Connecticut and New York expressed support for EPA's proposal to charge the LIS RDT to review each project and require beneficial use of dredged material, where practicable, utilizing the EPA definition of practicable. They felt it was important to note

that the LIS RDT should be consulted starting in the early stages of project planning for consideration of beneficial use opportunities.

*Response #4.* EPA agrees that the LIS RDT will be most effective in its role reviewing dredging projects if it is actively encouraging beneficial use alternatives and if there is an expectation that dredging project proponents should consult with the LIS RDT early in the process of planning a project to have a full view of possible alternatives for their project. The Final Rule contains language clarifying this aspect of the LIS RDT review process. It also should be noted that the LIS RDT makes recommendations to the USACE; the LIS RDT does not directly “require” that dredged material be managed in any particular way.

In response to this comment and Comment #5 below, the Final Rule clarifies certain of the roles and expectations of the LIS RDT. It establishes the relationship between the Steering Committee, which provides policy-level direction to the LIS RDT, and the LIS RDT, which has the responsibility for execution. It also provides additional detail on the organization and procedures for the LIS RDT. EPA views the charter under which the LIS RDT has operated during the development of the DMMP as a useful starting point for a new charter that encompasses the new roles, responsibilities, and makeup of the LIS RDT. The current LIS RDT charter will serve as the interim guide for the LIS RDT’s process until a new charter is developed.

*Comment #5.* USACE believes the role of the LIS RDT should be one of an informational resource and collaborator rather than a body charged with providing “recommendations” to the

Corps. They raised concerns regarding whether the role of the LIS RDT is in compliance with the Federal Advisory Committee Act (FACA) since it is required to provide “recommendations” to the USACE.

*Response #5.* EPA notes that the 2005 Rule established the LIS RDT and charged it with making “recommendations” until the completion of the DMMP. The Proposed Rule incorporated the same language in providing for the LIS RDT to continue into the future. The “recommendations” of the LIS RDT are not formal decisions subject to appeal, but, rather, are advice to the USACE as to how the LIS RDT thinks particular dredged material should be managed. The LIS RDT will attempt to make consensus recommendations to the USACE, but if consensus cannot be achieved, individual LIS RDT member agencies may offer their own comments through the standard regulatory process. Presumably, recommendations will be based upon whether or not the LIS RDT (or an individual agency) believes it has identified one or more practicable alternatives to open-water disposal for a particular project.

Recommendations from the LIS RDT or its members are not binding upon the USACE, EPA or any other state or federal agency. While the USACE must fully consider the recommendations, EPA does not intend for the LIS RDT to in any way usurp the USACE’s authority to make independent decisions regarding the placement of dredged material. At the same time, the USACE’s decisions regarding whether to authorize dredged material disposal under the MPRSA continue to be subject to EPA review and concurrence under Section 103(c) of the MPRSA, 33 USC 1413(c), and 40 CFR 225.2. While EPA will also consider recommendations of the LIS RDT or its members, EPA also does not intend for the LIS RDT to

in any way usurp EPA's authority to make independent decisions in its review of USACE decisions regarding whether to authorize the open-water disposal of dredged material.

EPA does not intend for the LIS RDT, in the exercise of its responsibility to review projects, to unduly delay the USACE's decision-making. EPA expects that the LIS RDT will report to the USACE on its review of specific projects within 30 days of receipt of project information. If the LIS RDT fails to report to the USACE in this timeframe, the USACE may proceed with its permit decision process. The Final Rule contains language clarifying this point.

Regarding USACE's concerns about the FACA, EPA has carefully reviewed the roles of the LIS RDT and Steering Committee as contained in the Final Rule and finds that the LIS RDT and Steering Committee are exempt from the FACA under 2 USC 1534(b). *See also* Memorandum by the Office of Management and Budget (OMB) entitled, "SUBJECT: Guidelines and Instructions for Implementing Section 204, 'State, Local, and Tribal Government Input,' of Title II of P.L. 104-4" (Sept. 21, 1995). At the same time, creating federal/state committees such as the LIS RDT and Steering Committee to share information and advice and recommendations is also consistent with the FACA and relevant implementing guidance from OMB.

*Comment #6.* New York State requested that, to provide additional "surety" that the goal of reducing or eliminating open water disposal is met, an additional provision be included in the rule to provide that if there is an initial failure to maintain or reduce the amount of disposal over the next ten years, as measured at year 10, then the rule can be re-opened upon a petition to EPA.

*Response #6.* EPA is confident that the restrictions contained in today's Final Rule will be sufficient to make progress toward the goal of reducing or eliminating open-water disposal. However, if the volume of dredged material disposed of at the sites, as measured ten years from now, has increased, it may be an indication that the standards and procedures contained in the Final Rule have not succeeded as intended. Alternatively, it may indicate that despite successful efforts to maximize dredged material management by methods other than open-water disposal, it is even more difficult to identify or develop such alternative methods of dredged material management than is currently anticipated. In either case, EPA agrees that it is reasonable to include an explicit provision in the Final Rule that provides any party with the opportunity under these circumstances to petition EPA to amend the regulations. EPA has added paragraph (b)(4)(vi)(H) to the Final Rule, to provide for this. EPA has not, however, prejudged whether it will find any regulatory amendments to be appropriate. EPA will assess and decide upon any such petition based on the facts and law prevailing at the time of the petition.

*Comment #7.* Several commenters noted that cost should not be the overwhelming factor in the decision-making process. In their view, cost seems only assigned to beneficial use. They believe cost and potential funding mechanisms for greater use of alternatives should be included.

*Response #7.* Cost is a very important component of the decision-making process. USACE is constrained by statute, regulation, and policies that govern what they can use federal funds for. The Federal Base Plan for any particular project is defined as the least cost, environmentally acceptable alternative for constructing the project that is consistent with sound engineering practices. Thus, projects are planned, designed and constructed in a manner that efficiently uses very limited federal fiscal resources and that meets applicable environmental standards. The term

Federal Standard is often used synonymously with Federal Base Plan, and is defined in USACE regulations as the least costly dredged material placement alternative identified by the USACE that is consistent with sound engineering practices and meets the environmental standards established by EPA's Clean Water Act (CWA) § 404(b)(1) guidelines evaluation process or EPA's ocean dumping criteria under the MPRSA. [33 CFR 335.7] *See also* 33 CFR 336.1(c)(1).

If a beneficial use is selected for a project and that beneficial use happens to be (or be part of) the Federal Base Plan option for the project, the costs of that beneficial use are assigned to the navigational purpose of the project. Beneficial use project costs exceeding the cost of the Federal Base Plan (Federal Standard) option become either a shared federal and non-federal responsibility, or entirely a non-federal responsibility, depending on the type of beneficial use and the applicability of federal funding authority.

The DMMP makes clear the USACE's willingness to use the authorities available to it to pay for what it lawfully can. The authorities that allow USACE to pursue alternatives beyond the Base Plan all require some prescribed percentage of non-federal cost-sharing. Identifying future sources of non-federal cost sharing is one of the important challenges for the Steering Committee and LIS RDT.

Beyond trying to find funding sources for costs above the Federal Standard, another important role for the LIS RDT is to identify incentives and remove barriers to beneficial use such that the cost of alternatives becomes more competitive with open-water disposal. It has become clear in recent years that sandy dredged material is a valuable commodity, especially along New England's beachfronts. Thus there are economic as well as environmental factors that

result in most suitable sandy dredge material being used beneficially, principally for beach and nearshore bar nourishment. The next challenge is to find economic and beneficial environmental uses for suitable silty material. As coastal resiliency becomes an increasingly important priority, EPA is hopeful that, and thinks that there is a good chance that, opportunities for beneficial uses of silty material will emerge and expand.

*Comment #8.* USACE expressed concern that the Proposed Rule could have a significant adverse impact on federal navigation by potentially adding significant costs to USACE projects. Specifically, the USACE is concerned that a scenario could arise where a practicable alternative is identified that exceeds the Federal Standard and therefore would require a non-federal sponsor to fund the difference in cost. If a non-federal sponsor could not do so or refused to do so, disposal at the CLDS or WLDS would then be prohibited and the project could not go forward because of the existence of a practicable alternative to open-water disposal. As such, this provision of the Proposed Rule would impact the USACE's application of the Federal Standard and negatively impact maintenance of Federal Navigation Projects in Long Island Sound. The USACE also expressed a related concern that the requirement that any practicable alternative be fully utilized for the maximum volume of material practicable could require USACE to dispose of material at more than one location, potentially adding significant cost.

The concern about the possibility that a project might not go forward was echoed by the Connecticut Congressional Delegation. In order to effectively maintain the balance between environmental and economic benefits of Long Island Sound, they urged that some certainty regarding the potential cost of maintenance projects must be included in the final language. Knowing the makeup of dredged material from each navigation project is different, they

understand that placement alternatives need to be examined on a case-by-case basis. They noted that EPA itself recognizes in the Proposed Rule that the lack of clarity on future project costs “could result in deferral of maintenance or improvement projects that could impact navigation.” The delegation expressed hope that the Final Rule will more clearly address this issue.

*Response #8.* The term “practicable alternative” is defined in 40 CFR 227.16(b) of EPA’s MPRSA regulations as an alternative that 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.” The definition has been part of the restrictions on the CLDS and WLDS since the 2005 Rule (compare (b)(4)(vi)(I)(1) and (2) in the 2005 Rule with (b)(4)(vi)(C)(1) and (2) in the Proposed Rule). The accompanying discussions in the preamble of the 2005 Rule and the Proposed Rule are essentially the same. In the nearly eleven years that the restrictions have been in place there have been no instances where a dredging project could not go forward on this basis. Furthermore, neither the 2005 Rule nor the current amendments create a new definition of practicable; they simply cross-reference and rely upon the pre-existing definition in EPA’s regulations at 40 CFR 227.16(b), which was promulgated in 1977. 42 FR 2476, 2479 (Jan. 11, 1977). Meanwhile, the USACE defines “practicable” as follows: “*Practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 33 CFR 335.7.

The possibility that EPA and USACE might disagree whether or not an alternative is “practicable” is rooted, in part, in the fact that the two agencies have different regulatory definitions

of the term “practicable.” That difference has existed since at least 1988, when the USACE’s current regulatory definition was promulgated. At the same time, although the two definitions are different, they are similar and have important commonalities. Under both definitions, a practicable alternative must be *available* taking cost and other factors into consideration. As a result, EPA expects that it would be an unusual case in which the two definitions would lead to different conclusions about an alternative’s practicability. Indeed, EPA is unaware of any project in New England that has been stopped due to the difference in definitions.

In any event, EPA’s definition of “practicable” and its application do not directly affect the USACE’s definition of the Federal Standard. If EPA determines that an alternative is “practicable,” then non-federal sponsors will need to be found to pay for the incremental cost above what the USACE can legally participate in. One of the important roles of the Steering Committee and LIS RDT described earlier, is the identification and piloting of beneficial use alternatives, identifying possible resources, and eliminating regulatory barriers. EPA expects that the Steering Committee and LIS RDT will, generally and on a project specific basis, facilitate the process of matching projects, beneficial use alternatives, and the resources necessary to implement them, thus mitigating the risk that a project cannot proceed.

EPA’s definition of “practicable” requires that the alternative be “available at reasonable incremental cost.” Said differently, by definition, a “practicable alternative” will not impose *unreasonable* incremental cost. This would apply as well to the consideration of multiple potential management alternatives for dredged material from a single project, a scenario that the USACE in concerned might add significant costs. Again, incremental costs could not be unreasonable without also rendering the alternative impracticable. As noted in the preamble to

the Proposed Rule, 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 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.

EPA cannot eliminate in advance the possibility that no entity will have the means to pay the non-federal share of an alternative EPA has determined is practicable, whether in Long Island Sound or anywhere else in the country. However, in Long Island Sound, with the states and federal agencies working in partnership to implement beneficial use alternatives, EPA believes that the likelihood of a project not going forward because of a lack of funding for the reasonable incremental cost of a practicable alternative has been made as remote as possible.

*Comment #9.* Many commenters noted that dredging is necessary to ensure recreational and commercial access to Long Island Sound. Marinas, boatyards, and boat clubs are the main access for the public to get out onto the Sound and they need to dredge periodically to maintain sufficient depth for safe navigation. Dredging is necessary to ensure the existence of commercial and recreational industries that generate billions of dollars and support thousands of jobs around the Sound. An important element of state coastal zone management programs – to retain, promote, and enhance access to waterways - will be harmed if the public and marine industry cannot access the Sound.

*Response #9.* EPA agrees that dredging to provide for safe navigation to and from Long Island Sound is a necessary activity and acknowledges that the marine trade industry is an important contributor to the economy of both states in the Long Island Sound region. The policy goals of the Coastal Zone Management Act are to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone.” This includes achieving wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development. EPA agrees that providing public access to the coasts for recreation purposes is an important goal of coastal zone management programs. EPA notes that the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone is also an important goal. EPA, USACE, NOAA, and the state coastal zone management programs seek to harmonize these goals.

*Comment #10.* Numerous commenters believe there needs to be an open-water placement option for dredged material. They express concern that without an open-water option, dredging will become prohibitively expensive.

*Response #10.* EPA agrees that there is a need for open-water disposal sites in Central and Western Long Island Sound as was demonstrated when EPA designated the sites in 2005 and has been reaffirmed by the DMMP. EPA is retaining these sites as open-water placement options for the long term. However, the Final Rule also reaffirms that the overarching goal is to reduce or eliminate wherever practicable the open-water disposal of dredged material. The amendments

make clear that unsuitable material shall not be disposed of at the sites, that sandy material should be used beneficially in almost all cases, and that alternatives to open-water placement of silty material should be thoroughly considered, and used whenever practicable, before open-water placement is allowed.

*Comment #11.* Commenters had mixed views concerning the Long Island Sound DMMP. Some feel the DMMP provides useful information on what should be done with dredged material and how these projects should be managed. Others feel the DMMP is insufficient and will perpetuate the status quo and EPA cannot rely solely on the DMMP in amending the rule. Rather they assert that EPA must amend the rule to establish additional procedures and standards that will result in clear, staged reductions in open-water disposal of dredged material over time.

*Response #11.* EPA believes the DMMP provides very useful information for managing toward the goal of reducing or eliminating the open-water disposal of dredged materials in the Sound. The DMMP provides recommended standards and procedures as well as identifying potential alternatives to open water disposal for each of the 52 federal navigation projects in Long Island Sound. The Final Rule builds on the procedures recommended in the DMMP and provides a strong management framework for achieving the goal of reducing or eliminating open-water disposal with the addition of the Steering Committee and its responsibilities, as described in *Response #2*.

*Comment #12.* Some commenters believe disposal of any dredged material in the Sound should not be allowed to continue. They believe open water disposal does not make

environmental sense, will have a negative impact on the ecosystem of Long Island Sound, and that toxic or contaminated sediment should not be dumped in the Sound.

*Response #12.* As noted above, EPA thinks, many commenters acknowledge, and the DMMP helps to document, that dredging is and will continue to be needed to allow for safe navigation in the harbors, marinas and channels of Long Island Sound. This is important for public safety, marine commerce and recreation, and national security. In order to handle this dredged material, EPA believes it is neither possible nor practical to simply end open water disposal at this time. The goal set in 2005 and retained in the Final Rule is to reduce or eliminate open-water disposal. The Final Rule establishes standards and procedures toward that end.

EPA strongly disagrees with the suggestion that toxic sediments might be disposed of at the sites. EPA's MPRSA regulations require rigorous physical, chemical, and biological testing and analysis of sediments is conducted prior to issuance of any permit to place material at the sites.

*See 40 CFR Part 227.* As the Proposed and Final Rule make clear, sediments that do not pass these tests are considered "unsuitable" and shall not be disposed of at the sites.

The USACE's Disposal Area Monitoring System (DAMOS) has gathered information on dredged material placement sites in the Sound since the late 1970s. The program has generated over 200 detailed reports addressing questions and concerns related to placement of dredged material in the Sound. Sequential surveys of biological conditions at sites following the placement of dredged material consistently show a rapid recovery of the benthic community to that of the surrounding habitat outside the disposal sites and within the sites. The USACE and

EPA monitor benthic health and recovery and the results support the conclusion that there is no evidence of long-term effects on the marine environment.

With the nearly 40-year record of surveys, there have been multiple opportunities to evaluate the effects of large storms (both hurricanes and nor'easters) on the dredged material mounds on the seafloor. These investigations have demonstrated long-term stability of the mounds even at the most exposed sites.

*Comment #13.* Other commenters believe dredged material can be placed in open-water sites without significant harm and that the Proposed Rule provides adequate safeguards for open-water placement. They note that permitting for dredging and relocation of dredged material is rigorous, thorough, and costly, with multiple agency reviews. They point to years of studies and documentation demonstrating the lack of harm and stability of the dredged materials placed at these sites. They believe scientific evidence does not support the claim that toxic material is dumped into the Sound. They also note that without dredging, the sediments remain in the relative shallows of the bays and harbors, where more fish live and where more people swim, fish, and enjoy the water. Storms in the relative shallows of the bays and harbors create more siltation, turbidity, and disturbance than dredging.

*Response #13.* EPA agrees that the permitting process for dredging projects is rigorous and thorough and involves coordination with multiple agencies. As discussed in *Response #12*, EPA agrees that there is a substantial body of scientific evidence that indicates that suitable dredged material can be disposed of at the sites with minimal harm to the marine environment. To the

extent the commenters are addressing possible concerns about exposure to materials that might be dredged in the future, it is possible that they are dispersed across a greater surface area and at depths more readily re-suspended by the natural forces of winds, waves, and tides compared to the more compact placement at the CLDS and WLDS at depths much less influenced by winds and waves.

*Comment #14.* Some commenters said that EPA's analysis should consider the nitrogen loading associated with open-water disposal and reconcile it with EPA's nitrogen strategy for Long Island Sound.

*Response #14.* As discussed in the DMMP, the annual placement of dredged material at the open-water sites is estimated to add less than one-tenth of one percent of the overall annual nitrogen loading to Long Island Sound. The dredging process scrapes a relatively thin layer of surficial sediment from a wide area, and aquatic placement consolidates that volume of sediment into a much smaller footprint. Hence, much of the nitrogen that was available for potential future release from surficial sediment (due to biological reworking or physical disturbance in the shallower environment) is sequestered out of contact with the water column in deposits that have been shown to be stable features on the seafloor.

*Comment #15.* Some commenters believe dredged material should be used beneficially. Others note that moving away from open-water disposal is feasible in the long run, but the costs associated with these alternatives are far greater than funding available today.

*Response #15.* EPA agrees that suitable dredged material should be used beneficially whenever and wherever practicable. The standards and procedures contained in the Final Rule and the menu of alternatives contained in the DMMP provide the structure and means to follow a path that should result in reducing open-water disposal while increasing beneficial use of dredged materials. EPA and the USACE believe that sandy materials can be beneficially used in many cases currently and with even greater frequency in the future. The next challenge is to find economic and beneficial environmental uses for suitable silty material. As coastal resiliency becomes an increasingly important priority, EPA is hopeful and expects that opportunities for beneficial uses of silty material will emerge and expand.

*Comment #16.* The USACE noted that the Proposed Rule maintains the current language of 40 CFR 228.15(b)(4)(vi) which provides, “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 USACE explains that it does not permit its own projects and is therefore not a permittee. USACE requested the language be stricken.

*Response #16.* As noted by USACE, the language in question was included in the restrictions in the 2005 Rule. The intention of the 2005 Rule was to apply the restrictions to all persons who may seek to dispose of dredged material at the sites under MPRSA. As discussed in the preamble to the 2005 Rule, the restrictions were intended to 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 the “authorizations” that it grants to itself rather than permits. *See* 70 FR 32511 (June 3, 2005). *See also* 33 USC 1413(e); 40 CFR

220.2(h); 33 CFR 336.1(a). The USACE was “deemed” to be a permittee in the 2005 Rule only to make it clear that it was subject to the site Restrictions where the term “permittee” was used, but not to mean that the Corps was actually a permittee. Thus, the USACE was not considered to be a permittee but would be treated like one in this context.

EPA understands the USACE’s comment as objecting to being considered a “permittee,” rather than an indication that the USACE is not subject to the restrictions. Since the other proposed revisions to the 2005 Rule eliminated the use of the word “permittee,” there is no longer a need to specifically qualify what “permittee” refers to. Consistent with the USACE’s comment and EPA’s intention that the restrictions apply to all persons who may dispose of dredged material at the sites, but not that the USACE would be an actual permittee, EPA has revised the sentence in question in 40 CFR 228.15(b)(4)(vi) to read (in pertinent part): “The restrictions apply to the U.S. Army Corps of Engineers (USACE) when it is authorizing its own dredged material disposal from a USACE dredging project ....”

*Comment #17.* The U.S. Department of the Interior’s Bureau of Indian Affairs (BIA) requested that EPA consult with the Shinnecock Indian Nation concerning the amendments to the 2005 Rule.

*Response #17.* EPA coordinated with Tribal nations in Connecticut, Rhode Island, and New York, including the Shinnecock Indian Nation, throughout the site designation process. None of the tribes that were contacted expressed interest in EPA consulting with them. Upon receipt of the letter from BIA, EPA contacted the Shinnecock Indian Nation to gauge its interest in

participating in the formal consultation process, but the tribe did not express an interest in participating. EPA will continue to coordinate with the Shinnecock Indian Nation, as appropriate, in the future.

*Comment #18.* One commenter asserted that the eastern boundary of Long Island Sound should run from Little Gull Island, through Bartlett's Reef to the Connecticut mainland. They assert that Block Island Sound, Gardiners Bay, the Race, Fishers Island Sound and the New London Disposal Site are not part of Long Island Sound.

*Response #18.* In 2009, after due consideration of the issue, EPA advised the USACE that the boundary suggested by the commenter should not be used as the eastern boundary of the Sound under MPRSA Section 106(f). EPA's analysis concluded that the boundary, instead, runs northeasterly from Orient Point, through Plum Island, Great Gull and Little Gull Islands, Fishers Island, and Napatree Point, RI, which is sometimes referred to as the "Old Base Line." This boundary has been used consistently by EPA and USACE in all discussions and documents concerning dredged material disposal sites in Long Island Sound.

*Comment #19:* One commenter claimed that EPA has incorrectly concluded that the proposed action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act.

*Response #19:* EPA disagrees with the commenter regarding the conclusion that the proposed action will not have a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act. As EPA noted in the Proposed Rule, the restrictions apply only to projects subject to MPRSA (i.e., all federal projects and non-federal projects greater than 25,000 cubic yards). Small entities are most likely to be involved with projects below the 25,000 cubic yard threshold. Therefore, they are not subject to these restrictions and are subject to Clean Water Act requirements instead. If anything, EPA's action to amend the regulations and maintain the CLDS and WLDS designations will assist small entities by maintaining the CLDS and WLDS as clear options for open-water disposal of dredged material, when appropriate.

### **III. Changes from the Proposed Rule**

The Final Rule incorporates the standards and procedures contained in the Proposed Rule and, pursuant to the comments discussed above, revises them as follows.

A sentence, restating the common goal to reduce or eliminate open water disposal of dredged material in Long Island Sound, has been added to the introductory paragraph (b)(4)(vi) in the Final Rule. Another sentence in the same paragraph has been revised to clarify that although the USACE is not a permittee, the restrictions also apply to the USACE when it is authorizing its own dredged material disposal from a USACE dredging project.

The Final Rule establishes a Long Island Sound Dredging Steering Committee consisting of high level representatives from the states, EPA, the USACE, and, as appropriate, other federal and state agencies. The Steering Committee will provide policy-level direction to the LIS RDT and facilitate high-level collaboration among the agencies critical to accelerating the

development and use of alternatives to open-water disposal of dredged material. The charge to the Steering Committee includes: developing a baseline for the volume and percentage of dredged material being placed in open water and the amount and percentage being beneficially used; establishing a reasonable and practicable series of stepped objectives (with timeframes) for reducing the amount of open water placement and increasing the amount of beneficially used material, while also recognizing that there will be fluctuations in annual volumes of dredged material generated due to the very nature of the dredging program; and developing accurate methods for tracking reductions with due consideration for annual fluctuations. The Final Rule specifies that the stepped objectives should incorporate an adaptive management approach toward continuous improvement. When tracking progress, the Steering Committee will recognize that exceptional circumstances may result in delays meeting an objective. Exceptional circumstances should be infrequent, irregular, and unpredictable. In carrying out its tasks, the Steering Committee shall guide and utilize the LIS RDT, as appropriate.

Participation of Connecticut, New York, and Rhode Island on the Steering Committee and LIS RDT is voluntary; it is not legally mandated by the new regulations. That said, EPA expects, as discussed earlier, that Connecticut and New York (and possibly Rhode Island) will participate and that each of the member agencies will commit the necessary resources to support the work of the Steering Committee and the LIS RDT, including collecting the data necessary to support the establishment of the baseline and tracking and reporting the future disposition of dredged materials. EPA expects the Steering Committee, with the support of the LIS RDT, to guide a concerted effort to spur greater use of beneficial use alternatives, including piloting alternatives, identifying possible resources, and eliminating regulatory barriers. The Final Rule contains

provisions establishing the Steering Committee and setting out the responsibilities described above. [(b)(4)(vi)(E)]

The Final Rule clarifies certain of the roles and responsibilities of the LIS RDT. Again, participation by the states on the LIS RDT is voluntary, but EPA expects the states to participate and to provide the resources necessary for meaningful participation. The Final Rule establishes the relationship between the Steering Committee, which provides policy-level direction for the LIS RDT, and the LIS RDT, which has the responsibility for execution. It more explicitly calls for project proponents to consult with the LIS RDT at the earliest possible stage to expand consideration of beneficial use alternatives. The Final Rule sets a clear expectation that the LIS RDT will report to USACE on its review of final projects within 30 days of receipt of project information. It also provides additional detail on the organization and procedures for the LIS RDT. EPA views the charter under which the LIS RDT has operated during the development of the DMMP as a useful starting point for a new charter that encompasses the revised roles, responsibilities and makeup of the LIS RDT. The current LIS RDT charter should serve as the interim guide for the LIS RDT's process until a new charter is developed. [(b)(4)(vi)(F)]

Lastly, the Final Rule provides the potential for reconsidering the rule, upon petition, if in ten years the amount of dredged material disposed of at the sites has not been maintained or reduced. [(b)(4)(vi)(H)]

#### **IV. Compliance with Statutory and Regulatory Requirements**

The preamble to the 2005 Rule described how the dredged material disposal site designation process that culminated in the designation of the CLDS and WLDS was consistent with the requirements of the MPRSA, the 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 32502-32508 (June 3, 2005). While the CWA does not apply specifically to an EPA designation of a long-term dredged material disposal site under the MPRSA, future federal and non-federal projects involving dredged material disposal in Long Island Sound will require both a section 404 permit as well as a State Water Quality Certification pursuant to section 401 of the CWA.

In the preamble to the Proposed Rule, EPA determined that the proposed amendments to the 2005 Rule, and the process by which they were developed, also are consistent with the laws noted above. 81 FR 7060-7061. One of the important factors in this determination was that the amended Rule would provide the same or greater protection of water quality and the marine environment as the 2005 Rule. 81 FR 7060. EPA's conclusions regarding compliance with those laws has not changed following consideration of public comments.

As the preamble to the Proposed Rule explained, the proposed amendments to the 2005 Rule do not make decisions about the suitability of any particular dredged material for open-water disposal or about any other type of management of the material. Such decisions will be made for specific dredging projects on the basis of project-specific permitting evaluations. The amendments to the regulations, instead, provide specific standards and procedures designed to further the goal of reducing or eliminating open-water disposal of dredged material at the CLDS

and WLDS. These amendments are consistent with provisions of the 2005 Rule that called for possible revisions to the Rule based on the standards and procedures recommended in the Long Island Sound Dredged Material Management Plan (DMMP). The preamble to the Proposed Rule also provided additional statute-specific discussion. 81 FR 7060-7061.

At the time of the Proposed Rule, consultation and coordination with state and federal agencies regarding the CZMA, ESA, MSFCMA, respectively, were underway. Those consultations have been completed, as discussed below.

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

In the preamble to the 2005 Rule, EPA explained in detail how its designation of the CLDS and WLDS complied with the MPRSA. 70 FR 32502-32508. In the preamble for the Proposed Rule, EPA explained how the proposed amendments to the 2005 Rule also complied with the MPRSA. As part of such compliance, EPA has finalized updates to the Site Management and Monitoring Plan (SMMP) for both the CLDS and the WLDS.

*2. 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 determined that the amendments to the 2005 Rule are consistent with the enforceable policies of the coastal zone management programs of both Connecticut and New York and provided each state with a written

determination to that effect. EPA consulted with each state's coastal zone management program prior to this final rulemaking. In a letter dated April 8, 2016, the Connecticut Department of Energy and Environmental Protection concurred with EPA's determination with regard to Connecticut's coastal zone management program. The New York State Department of State (NY DOS) provided its concurrence on April 25, 2016. NY DOS's concurrence was conditioned on the Final Rule including provisions that address NY DOS's comments on the Proposed Rule. EPA believes the changes to the Proposed Rule described above are consistent with NY DOS's condition(s) and, thus, considers NY DOS to have concurred with the Final Rule.<sup>1</sup>

### *3. Endangered Species Act*

Since the 2005 Rule, NOAA's National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service 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 NMFS in 2012. EPA's analysis considered the Atlantic sturgeon as well as sea turtles and listed marine mammals. Consistent with the ESA, EPA consulted with NMFS and USFWS on this rulemaking action and the updating of the SMMPs for the two disposal sites. NMFS has concurred with EPA's determination that any adverse effects on listed species from this action would be insignificant or discountable, and that this action is not likely to adversely affect any listed species or critical habitat of such species under NMFS jurisdiction. EPA sent a "no effects"

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<sup>1</sup> NY DOS's conditional concurrence stated its conclusion that EPA's rule would not comply with the enforceable provisions of New York's coastal zone management program unless EPA adopted provisions consistent with the conditions proposed by NY DOS. While EPA has, indeed, adopted such provisions that assure NY DOS's concurrence, EPA does not agree with NY DOS's assessment of proposed regulatory amendments. EPA, instead, determined that the terms of its Proposed and Final Rules fully comply or, in the alternative, comply to the maximum extent practicable with the enforceable provisions of New York's coastal zone management program. EPA's assessment is documented in the record, including, but not limited to, its CZMA consistency determination.

determination for species under USFWS jurisdiction to the USFWS and did not receive any response, so EPA assumed concurrence. No additional consultation or coordination is required.

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

EPA coordinated with NMFS on this rulemaking action and the updating of SMMPs for the two disposal sites, consistent with the Essential Fish Habitat provisions of the MSFCMA. NMFS has concurred with our determination that it is unlikely that this action will result in adverse effects to any essential fish habitat. Therefore, no additional coordination is required.

### **V. Final Action**

EPA is publishing this Final Rule to amend the restrictions on the use of the CLDS and WLDS. This action is consistent with, and retains a number of, the restrictions contained in the original designation of these sites in 2005. Certain of those restrictions required completion of a DMMP 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's Final Rule removes the restrictions related to its development. The 2005 restrictions further require EPA, within 120 days of completion of the DMMP, to issue final 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. While the Final Rule was not issued within 120 days of completion of the DMMP (which would have been May 10), and use of the CLDS and WLDS was temporarily suspended, issuance of today's Final Rule

satisfies that requirement such that the suspension of the sites has been lifted and they are now available for use. *See* 40 C.F.R. §§ 228.15(b)(4)(vi)(C)(footnote 1) and (G).

The Final Rule incorporates the standards and procedures recommended in the DMMP and augments them by establishing a Steering Committee to provide policy guidance and direction to the LIS RDT and to: develop a baseline for the volume and percentage of dredged material being placed in open water and the amount and percentage being beneficially used; establish a reasonable and practicable series of stepped objectives (with timeframes) for reducing the amount of open water placement and increasing the amount of beneficially used material, while also recognizing that there will be fluctuations in annual volumes of dredged material generated due to the very nature of the dredging program; and develop accurate methods for tracking reductions with due consideration for annual fluctuations. The stepped objectives will incorporate an adaptive management approach toward continuous improvement. The Rule provides that when tracking progress, the Steering Committee will recognize that exceptional circumstances may result in delays meeting an objective. Exceptional circumstances should be infrequent, irregular, and unpredictable. The Final Rule also provides that in carrying out its tasks, the Steering Committee shall guide and utilize the LIS RDT, as appropriate.

The Final Rule also expressly allows any person to submit a petition seeking changes to the rule if, in ten years, the amount of dredged material disposed of at the sites has not been maintained or reduced.

## **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 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 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 satisfaction of the existing regulatory requirement that practicable alternatives to the ocean dumping of dredged material be utilized (*see* 40 CFR 227.16).

*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 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.

*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 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 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*

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."

EPA expects that this 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, the ocean dumping regulations, the 2005 Rule, the CWA, and other relevant statutes and regulations, the final regulatory amendments are designed to promote and support reductions in 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 ... 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.

EPA expects that this Final 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, the ocean dumping regulations, the 2005 Rule, the CWA and other relevant statutes and regulations, the regulatory amendments are designed to promote the reduction or elimination of open-water disposal of dredged material in Long Island Sound.

*13. 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 August 8, 2016.

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

Environmental protection, Water pollution control.

Dated: June 24, 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 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 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 paragraphs (b)(4)(vi)(D) through (F);
- d. Revising paragraph (b)(4)(vi)(G);
- e. Removing paragraph (b)(4)(vi)(H);
- f. Redesignating paragraph (b)(4)(vi)(I) as (b)(4)(vi)(C) and revising it;
- g. Redesignating paragraph (b)(4)(vi)(J) through (L) as (b)(4)(vi)(H) through (J), respectively;
- h. Removing paragraph (b)(4)(vi)(M);
- i. Redesignating paragraph (b)(4)(vi)(N) as (b)(4)(vi)(K); and
- j. 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.

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(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 and Western Long Island Sound Dredged Material Disposal Sites (CLDS and WLDS, respectively). These conditions apply to all disposal subject to the MPRSA, namely, non-federal projects greater than 25,000 cubic yards and all federal projects. With regard to federal projects, the restrictions apply to the U.S. Army Corps of Engineers (USACE) when it is authorizing its own dredged material disposal from a USACE dredging project, as well as to federal dredged material disposal projects that require authorization from a permit issued by the USACE. The goal of these conditions is to reduce or eliminate open-water disposal of dredged material in Long Island Sound. The conditions for this designation are as follows:

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(C) Disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall be allowed if, after full consideration of recommendations provided by the Long Island Sound Regional Dredging Team (LIS RDT) if the members of the LIS RDT reach consensus, or provided by the LIS RDT's member agencies if no consensus is achieved, the USACE finds (and 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, consistent with 40 CFR 227.16(b), a practicable alternative to open-water disposal may add reasonable incremental 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.* Disposal shall be limited to dredged sediments that comply with the Ocean Dumping Regulations.

(ii) *Suitable sandy material.* Suitable 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. If no other alternative is determined to be practicable, suitable course-grained material may be placed at the designated sites.

(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 should, whenever possible, 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) There is established a Long Island Sound Dredging Steering Committee (Steering Committee), consisting of high-level representatives from the states of Connecticut and New York, EPA, USACE, and, as appropriate, other federal and state agencies. The Steering Committee will provide policy-level direction to the Long Island Sound Regional Dredging Team (LIS RDT) and facilitate high-level collaboration among the agencies critical to promoting the development and use of beneficial alternatives for dredged material. State participation on the LIS RDT and Steering Committee is voluntary. The Steering Committee is charged with: establishing a baseline for the volume and percentage of dredged material being beneficially used and placed at the open-water sites; establishing a reasonable and practicable series of stepped objectives, including timeframes, to increase the percentage of beneficially used material while reducing the percentage and amount being disposed in open water, and while recognizing that the amounts of dredged material generated by the dredging program will naturally fluctuate from year to year; and developing accurate methods to track the placement of dredged material, with due consideration for annual fluctuations. The stepped objectives should incorporate an adaptive management approach while aiming for continuous improvement. When tracking progress the Steering Committee should recognize that exceptional circumstances may result in delays in meeting an objective. Exceptional circumstances should be infrequent, irregular, and unpredictable. It is expected that each of the member agencies will commit the necessary

resources to support the LIS RDT and Steering Committee's work, including the collection of data necessary to support establishing the baseline and tracking and reporting on the future disposition of dredged material. The Steering Committee may utilize the LIS RDT, as appropriate, to carry out the tasks assigned to it. The Steering Committee, with the support of the LIS RDT, will guide a concerted effort to encourage greater use of beneficial use alternatives, including piloting alternatives, identifying possible resources, and eliminating regulatory barriers, as appropriate.

(F) The goal of the Long Island Sound Regional Dredging Team (LIS RDT), working in cooperation with, and support of, the Steering Committee, 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:

*(I) Purpose.* The LIS RDT will:

*(i)* Review dredging projects and make recommendations as described in paragraph (vi)(C) above. The LIS RDT will report to the USACE on its review of dredging projects within 30 days of receipt of project information. Project proponents should consult with the LIS RDT early in the development of those projects to ensure that alternatives to open-water placement are fully considered.

*(ii)* Assist the Steering Committee in: establishing a baseline for the volume and percentage of dredged material being beneficially used and placed at the open water sites; establishing a reasonable and practicable series of stepped objectives, including timeframes, to increase the percentage of beneficially used material while reducing the percentage and amount being disposed in open water, recognizing that the volume of dredged material generated by the dredging program will naturally fluctuate from year to year; and developing accurate methods to

track and report on the placement of dredged material, with due consideration for annual fluctuations.

(iii) In coordination with the Steering Committee, serve as a forum for: continuing exploration of new beneficial use alternatives to open-water disposal; matching the availability of beneficial use alternatives with dredging projects; exploring cost-sharing opportunities; and promoting opportunities for beneficial use of clean, parent marine sediments often generated in the development of CAD cells.

(iv) Assist the USACE and EPA in continuing long-term efforts to monitor dredging impacts in Long Island Sound, including supporting the USACE's DAMOS (Disposal Area Monitoring System) program and related efforts to study the long-term effects of open-water placement of dredged material.

(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 the states of Connecticut and New York, EPA, USACE, and, as appropriate, other federal and state agencies. As previously noted, state participation on the LIS RDT is voluntary.

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

(G) If the volume of open-water disposal of dredged material, as measured in 2026, has not declined or been maintained over the prior ten years, then any party may petition EPA to conduct a rulemaking to amend the restrictions on the use of the sites.

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

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

\* \* \* \* \*

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