APPENDIX

Appendix A — Mandate Judgment with Order of the United States Court of Appeals for the Second Circuit, dated November 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of September, two thousand twenty-two,

Before: Debra Ann Livingston,
Chief Judge,
Susan L. Carney,
Joseph F. Bianco,
Circuit Judges.

Town of Southold,

Plaintiff-Intervenor-Appellant,

Rossana Rosado, in her official capacity as New York State Secretary of State, Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, State of New York,

Plaintiffs - Appellants,

JUDGMENT

Docket Nos.
20-3188(L),
20-3189(CON)

MANDATE ISSUED ON 11/28/2022

County of Suffolk,

Plaintiff - Intervenor,

v.

Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection of the United States Environmental Protection Agency, United States Environmental Protection Agency, Dennis Deziel, in his official capacity as Regional Administrator of United States Environmental Protection Agency Region 1,

Defendants - Appellees,

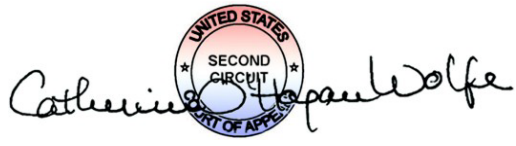
Connecticut Department of Energy and Environmental Protection,

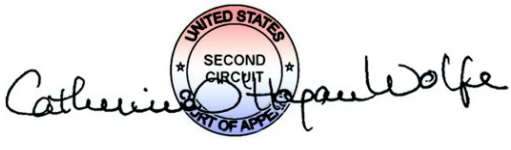
Defendant - Intervenor - Appellee.

The appeals in the above captioned case from a judgment of the United States District Court for the Eastern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court





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Catherine O'Hagan Wolfe Clerk
United States Court of Appeals, Second Circuit

20-3188 (L)
Town of Southold, et al. v. Wheeler, et al.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2021

(Argued: Friday, December 10, 2021
Decided: September 2, 2022)

Nos. 20-3188, 20-3189

TOWN OF SOUTHOLD,

Plaintiff-Intervenor-Appellant,

ROSSANA ROSADO, in her official capacity as New York State Secretary of State, BASIL SEGGOS, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, STATE OF NEW YORK,

Plaintiffs-Appellants,

COUNTY OF SUFFOLK,

Plaintiff-Intervenor,

-v.-

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental

Protection Agency,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DENNIS DEZIEL, in his official capacity as Regional Administrator of United States Environmental Protection Agency Region 1,

Defendants-Appellees,

CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,

Defendant-Intervenor-Appellee.[1]

Before: LIVINGSTON, *Chief Judge*, and CARNEY and BIANCO, *Circuit Judges*.

This dispute arises out of the efforts of the federal Environmental Protection Agency ("EPA") to designate a new waste disposal site on Long Island Sound for byproducts of local dredging activities. New York State and the Town of Southold, New York ("Southold," and together with New York, the "Plaintiffs-Appellants") challenged the EPA's designation of the site pursuant to the Administrative Procedure Act ("APA"), alleging, *inter alia*, violation of the Coastal Zone Management Act ("CZMA"). They now appeal from a July 20, 2020, judgment of the United States District Court for the Eastern District of New York (Korman, *J.*), granting Defendants-Appellees EPA and the Connecticut Department of

[1] The Clerk of Court is directed to amend the official caption as set forth above.

Energy and Environmental Protection's cross-motions for summary judgment.

For the reasons set forth below, we hold, contrary to Plaintiffs-Appellants' claim, that the APA's arbitrary-and-capricious standard of review applies and that under that standard, the EPA's designation of the new disposal site passes muster under the CZMA. We also hold that Southold's claim under the National Environmental Protection Act is not properly before us. Accordingly, the judgment of the district court is **AFFIRMED**.

For PLAINTIFF-INTERVENOR-APPELLANT:	SCOTT KREPPEIN, Devitt Spellman Barrett, LLP, Smithtown, NY.
For PLAINTIFFS-APPELLANTS:	ERIC DEL POZO, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, and Anisha S. Dasgupta, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, New York, NY.
For DEFENDANTS-APPELLEES:	SEAN P. GREENE-DELGADO,

	Assistant United States Attorney (Varuni Nelson and Matthew Silverman, Assistant United States Attorneys, *on the brief*), *for* Mark J. Lesko, Acting United States Attorney for the Eastern District of New York, New York, NY.
For DEFENDANT-INTERVENOR-APPELLEE:	ROBERT D. SNOOK, Assistant Attorney General (Clare Kindall, Solicitor General, *on the brief*), *for* William Tong, Attorney General of the State of Connecticut, Hartford, CT.
For AMICI CURIAE:	Linda L. Morkan, Robinson & Cole LLP, Hartford, CT, *for* The Connecticut Port Authority, Connecticut Marine Trades Association, Connecticut Maritime Coalition, Cross Sound Ferry Services, Inc., Electric Boat Corporation, Lower Connecticut River Valley Council of Governments, Connecticut

Metropolitan Council of Governments, New Haven Port Authority, Southeastern Connecticut Council of Governments, South Central Regional Council of Governments, Western Connecticut Council of Governments, as *amici curiae* in support of Defendants- Appellees.

DEBRA ANN LIVINGSTON, *Chief Judge*:

Along the northern edge of "that slender riotous island which extends itself due east of New York," the aptly named Long Island, lies "the most domesticated body of salt water in the Western hemisphere, the great wet barnyard of Long Island Sound." F. SCOTT FITZGERALD, THE GREAT GATSBY 4–5 (Scribner 2004) (1925). This appeal concerns the efforts of the federal Environmental Protection Agency ("EPA") to designate a new waste disposal site in the Sound—a site for the byproducts of dredging activities undertaken to maintain and improve the Sound's shipping channels and ports, as well as support coastal businesses and other private parties.

The Coastal Zone Management Act ("CZMA") encourages states to develop programs to manage their coastal areas and requires federal activities that affect these areas to be "consistent to the maximum extent practicable with the enforceable policies" of each state's program. 16 U.S.C. § 1456(c)(1)(A). Regulations implementing the CZMA, in turn, have

interpreted that phrase to require "full[] consisten[cy]" with state programs. 15 C.F.R. § 930.32(a)(1). Under these provisions, New York State formally objected to the EPA's proposed activity, asserting that the designation of the new dredging site would not be fully consistent with its coastal management program and an analogous program developed by the Town of Southold, New York ("Southold," and together with New York, the "Plaintiffs-Appellants"). Responding to the objections, the EPA reiterated its conclusion that the designation would, in fact, be fully consistent with Plaintiffs-Appellants' coastal management programs. After a lengthy dialogue in which New York refused to withdraw its objections, the EPA opted to proceed with the new site designation without New York's assent.

New York then sued in the United States District Court for the Eastern District of New York under the Administrative Procedure Act ("APA"), alleging that the agency's designation violates the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1411, ("MPRSA") and the CZMA. Southold and the Connecticut Department of Energy and Environmental Protection ("Connecticut," and together with EPA, "Defendants-Appellees") intervened on behalf of New York and the EPA, respectively, and the parties cross-moved for summary judgment. The district court (Korman, *J.*) granted Defendants-Appellees' motions. *See Rosado v. Wheeler*, 473 F. Supp. 3d 115 (E.D.N.Y. 2020). These appeals followed.

New York principally argues that the district

court erred in applying the APA's deferential arbitrary-and-capricious standard for judicial review to its CZMA claim.[2] For the reasons set forth below, we reject that argument. And applying the arbitrary-and-capricious standard, we conclude that the district court properly granted Defendants-Appellees' cross-motions for summary judgment on the CZMA claims because the EPA adequately justified its consistency determination. We also conclude that Southold waived its claim that the EPA's designation of the new site violates the National Environmental Protection Act ("NEPA"). We therefore affirm the judgment of the district court.

I. BACKGROUND

A. Legal Background

Congress enacted the CZMA in 1972 to further the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). The coastal zone is defined as "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands . . . in proximity to the shorelines of the several coastal states."[3] *Id.* § 1453(1). Recognizing that then-existing "state and local institutional arrangements for planning and regulating land and water uses" in the coastal zone were "inadequate," *id.* § 1451(h), the Act

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[2] New York does not challenge the district court's dismissal of its MPRSA claims on appeal and has thus abandoned them. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008).

[3] The term "coastal waters" includes "sounds," and the term "coastal states" includes any state bordering Long Island Sound. 16 U.S.C. § 1453(3)–(4).

sought "to encourage the states to exercise their full authority over the lands and waters in the coastal zone," *id.* § 1451(i).

To advance this objective, the CZMA gives states a key role in environmental regulation by allowing them to develop their own coastal zone management programs, which are subject to federal approval by the National Oceanic and Atmospheric Administration ("NOAA") in the Department of Commerce. *See id.* § 1455(d). Coastal zone management programs include "comprehensive statement[s] . . . prepared and adopted by the state in accordance with the provisions of [the CZMA], setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." *Id.* § 1453(12).

Once a state's program has been approved by NOAA, "[e]ach Federal agency activity . . . that affects . . . the coastal zone" is required to "be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." *Id.* § 1456(c)(1)(A); *see also* 15 C.F.R. § 930.36(e)(2). NOAA regulations define "consistent to the maximum extent practicable" to mean "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1). The policies enumerated in a state's coastal management program need not be particularly detailed. NOAA regulations explain:

> An enforceable policy [in a State's coastal management program] shall contain

> standards of sufficient specificity to guide public and private uses. Enforceable policies need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency. State agencies may identify management measures which are based on enforceable policies, and, if implemented, would allow the activity to be conducted consistent with the enforceable policies of the program.

Id. § 930.11(h).

A federal agency proposing to undertake an activity that affects a state's coastal zone must send the state a determination of whether the activity is consistent with the policies contained in the state's coastal management program "no . . . later than 90 days before final approval of the Federal activity." 16 U.S.C. § 1456(c)(1)(C); *see also* 15 C.F.R. § 930.36(b)(1). The state may then concur with or object to the federal agency's consistency determination. 16 U.S.C. § 1456(c)(3)(A).

Regulations issued by NOAA set forth a limited process for resolving a consistency dispute between a state and federal agency:

> In the event of an objection [to the Federal agency's consistency determination by a State agency], Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the

> dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless:
>
> > (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (*See* §§ 930.32(a) and 930.39(a)), or
> > (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, *though the State agency objects*.

C.F.R. § 930.43(d) (emphasis added). If the federal agency ultimately decides to proceed with the activity to which the state objects, the federal agency "shall notify the State agency of its decision to proceed before the project commences." *Id.*§ 930.43(e).

NOAA regulations "describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs." *Id.* § 930.110; *see also id.* §

930.44 ("In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed federal activity affecting any coastal use or resource, either party may request the . . . mediation services provided for in [15 C.F.R. § 930.110, *et seq*.]"). The regulations contemplate two avenues of mediation: informal mediation by NOAA's Office of Ocean and Coastal Resource Management, *see id.* § 930.111, and formal mediation by the Secretary of Commerce (the "Secretary"), *see id.* § 930.112. A state or federal agency can decline the Secretary's invitation to engage in mediation, *see id.* § 930.112(b), or unilaterally withdraw from mediation at any point, *see id.* § 930.115(b). And state and federal agencies need not exhaust the mediation process described above to seek judicial review. NOAA regulations provide:

> The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

Id. § 930.116.

Finally, the CZMA provides that the President of the United States may exempt a federal agency from the requirement that its actions be consistent with a state's coastal management program.

> After any final judgment, decree, or order of any Federal court that is appealable under

> section 1291 or 1292 of title 28, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, *exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program*, if the President determines that the activity is in the paramount interest of the United States.

15 U. S.C. § 1456(c)(1)(B) (emphasis added).

B. Factual Background

Dredging involves the excavation of materials that accumulate on the ocean floor over time. Periodic dredging is essential for the maintenance and improvement of coastal navigation infrastructure, including channels, navigable rivers, harbors, and marinas. Some dredged materials, considered "beneficial," can be used to replenish beach sand, construct wetlands, and cap landfills. Others, however, cannot be put to beneficial use and must be disposed of in open waters. Such open-water disposal is often controversial because dredged materials "may be contaminated by municipal or industrial wastes or by runoff from terrestrial sources such as agricultural lands." 40 C.F.R. § 227.13(a).

Long Island Sound is a 110-mile-long tidal estuary that lies between New York, Connecticut, and Rhode Island. The Sound is bounded by the Atlantic Ocean

to the east and the East River tidal strait to the west, and the border between Connecticut and New York runs from east to west through the center of the Sound. Over 200 harbors, coves, bays, and navigable rivers around the Sound require periodic dredging. The Army Corps of Engineers (the "Corps") is responsible for fifty-two maintenance and improvement projects in the Sound and adjacent waters, and many other federal and non-federal projects in the area maintain and improve marinas, boat yards, and coastal businesses.

New York submitted a coastal management program to NOAA in August 1982.[4] NOAA approved that program, thus "activat[ing] Federal agency responsibility for being consistent with" its policies. Approval of the New York Coastal Zone Management Program, 47 Fed. Reg. 47,056, 47,056 (Oct. 22, 1982). Two components of New York's coastal management program are relevant to this appeal: the Long Island Sound Coastal Management Program, which New York authored in 2002 (the "New York Program"), and the Town of Southold Local Waterfront Revitalization Program, which was adopted by the Town of Southold, New York, in 2005 (the "Southold Program") and was "formally approved and incorporated into [the New York Program]." Joint App'x 3107.

1. The Western and Central Sites

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[4] *See* NEW YORK STATE COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT 4, https://dos.ny.gov/system/files/documents/2021/04/ny_cmp_dec2020_w- bookmarks_working_topost.pdf.

While this dispute concerns the EPA's designation of a dredged material disposal site in the *eastern* portion of Long Island Sound, there are existing designated sites in the Sound's western and central portions that we refer to, respectively, as the "Western Site" and the "Central Site." The EPA first published a Notice of Intent to consider designating dredged material disposal sites in the Sound's waters in 1999. *See* Designation of Dredged Material Disposal Sites in Long Island Sound, Connecticut and New York, 64 Fed. Reg. 29,865, 29,865 (June 3, 1999). Four years later, the EPA published a proposed rule seeking to designate the Western and Central Sites. *See* Proposed Designation of Dredged Material Disposal Sites in the Central and Western Portions of Long Island Sound, CT, 68 Fed. Reg. 53,687, 53,687 (Sept. 12, 2003). New York initially objected to the EPA's determination that the Western and Central Site designations would be consistent with the New York Program, as required under the CZMA. After a period of negotiation, however, the state and the agency agreed to a set of site use restrictions that would "apply to all federal projects, and non-federal projects generating more than 25,000 cubic yards of dredged material" but would "not apply to smaller non-federal projects." Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound, CT, 70 Fed. Reg. 32,498, 32,511 (June 3, 2005).

As relevant here, the restrictions contemplated that the Corps would develop a Dredged Materials Management Plan ("DMMP") for the Sound, a "comprehensive stud[y] carried out by the [Corps], in consultation with the EPA and the affected states, to help manage dredged material in a cost-effective and

environmentally acceptable manner." *Id.* The EPA agreed that the DMMP for the Sound would address the Sound's future dredging needs and the "development of procedures and standards for the use of practicable alternatives to open-water disposal" of dredged material "to reduce [it] wherever practicable." *Id.* Once an agreement was in place as to the proposed restrictions, New York withdrew its objection and concurred with the EPA's conclusion that the agency's designation of the Central and Western Sites would be consistent with the New York Program. The EPA published a final rule in June 2005 that designated the Western and Central Sites and incorporated New York's restrictions. *Id.* at 32,498, 32,511.

Over a decade later, in December 2015, the Corps completed the DMMP. The DMMP "examine[s] possible alternatives to open water placement of dredged material in Long Island Sound and compare[s] the costs and benefits of such alternatives with . . . current practice." Joint App'x 4002. It aims "to provide a 30 year management strategy to add certainty to dredging and placement activities . . . within the Region in an environmentally acceptable and economically practicable manner." *Id.* at 4084. The DMMP estimates that federal, state, local, and private dredging activities in the Sound will generate roughly 53 million cubic yards of dredged material over the 30-year period from 2015 through 2045, approximately 34 million of which will be fine-grained materials suitable for open-water disposal. It notes, however, that "only a portion" of the dredged materials will "likely . . . be dredged in that period, as

future actions are contingent on Federal and non-Federal budget decisions." *Id.* at 3952.

2. The Eastern Site

Before the designation of the dredged material disposal site at issue here, no long-term disposal site existed in the eastern portion of the Sound. Two preexisting disposal sites in the eastern Sound—the New London Disposal Site (the "New London Site") and the Cornfield Shoals Disposal Site (the "Cornfield Shoals Site")—had been authorized only for temporary use and were scheduled to close in December 2016.[5] In 2012, the EPA began exploring whether a new long- term disposal site should be designated to service the eastern Sound.

After screening eleven potential sites and a "no action alternative," the EPA proposed designating a disposal site in the eastern Sound (the "Eastern Site"). Designation of a Dredged Material Disposal Site in Eastern Region of Long Island Sound; Connecticut, 81 Fed. Reg. 24,748, 24,761 (Apr. 27, 2016). The Eastern Site would comprise the western half of the existing New London Site and two new adjacent areas to its west. The agency proposed that the Eastern Site would be governed by the same site use restrictions that it had agreed to with respect to the Western and Central Sites. When New York expressed concern to the EPA about the Eastern Site, the agency asked the Corps to examine the dredged

[5] The New London and Cornfield Shoals Sites were initially set to close in December 2011, but Congress extended the deadline to December 2016 so that the EPA had additional time to evaluate whether to designate a long-term disposal site in the Sound's eastern portion.

material disposal needs of the eastern portion of the Sound in greater detail. In response, the Corps revised the DMMP, estimating the need for open-water disposal capacity in the eastern Sound over the next thirty years to be 20.2 million cubic yards.

In July 2016, the EPA submitted a consistency determination pursuant to the CZMA, asserting that the Eastern Site designation would be fully consistent with the enforceable policies of the New York and Southold Programs. New York disagreed and formally objected to the agency's consistency determination in October 2016. It argued that the Eastern Site designation would be inconsistent with the New York Program and with Policies 5 (water quality), 6 (ecosystem protection), 8 (hazardous waste management), 10 (water-dependent uses), and 11 (living marine resources) of the Southold Program.[6]

The EPA responded to New York's objection in November 2016, concluding that the State's arguments were "unfounded" and that the Eastern Site designation would, in fact, be fully consistent with both Programs. Joint App'x 3222. The agency explained that it "considered whether to seek mediation assistance from NOAA . . . to address this CZMA dispute . . . but . . . decided against" that course because the mediation process might be "lengthy." *Id.* at 3223–24. The EPA therefore concluded "that it is necessary to proceed with the site designation at this point" despite the ongoing

[6] New York asserted to the EPA that it was "bound by the terms of the CZMA" to object to the EPA's designation of the new disposal site on Southold's behalf because the Southold Program has been incorporated into the New York Program. Joint App'x 3107.

consistency dispute with New York. *Id.* at 3224. Later the same day, the EPA issued a final rule formally designating the Eastern Site as a permanent disposal site under the MPRSA. *See* Designation of a Dredged Material Disposal Site in Eastern Region of Long Island Sound; Connecticut, 81 Fed. Reg. 87,820, 87,820 (Dec. 6, 2016). The rule became effective on January 5, 2017. *See id.* at 87,821.

C. Procedural History

New York sued the EPA in August 2017 and filed the operative complaint in October 2017. New York raised five claims under the APA—four alleging violations of the MPRSA and the fifth alleging a CZMA violation. The State of Connecticut moved to intervene as a defendant, and Southold moved to intervene as a plaintiff. The district court granted both motions.[7]

The parties then cross-moved for summary judgment on the plaintiffs' claims alleging violation of the MPRSA and the CZMA. The plaintiffs advanced several arguments under the MPRSA: (1) that the EPA's determination that a new site was needed in the eastern Sound was arbitrary and capricious; (2) that the EPA failed to adequately consider whether the Eastern Site would interfere with shipping and navigation on the Sound; (3) that the EPA's decision to designate the new Eastern Site rather than relying on preexisting disposal sites was arbitrary and capricious; and (4) that the EPA had failed to consider the potential pollution arising from the disposal of non-federal projects of less than 25,000 cubic yards.

[7] Suffolk County also intervened below as a plaintiff but did not appeal.

The plaintiffs also asserted that the Eastern Site designation violated the CZMA because it was not consistent to the maximum extent practicable with the New York and Southold Programs.

The district court (Korman, *J.*) denied the plaintiffs' motions for summary judgment and granted Defendants-Appellees' cross-motions in July 2020. The bulk of the district court's opinion addressed whether the EPA's designation of the Eastern Site pursuant to the MPRSA was arbitrary and capricious under the APA. Applying that deferential standard of review, the district court upheld the agency's action.

The district court then turned to the plaintiffs' allegation that the CZMA had been violated. The district court rejected that claim, drawing on its analysis of the alleged MPRSA violations because "New York rest[ed] its CZMA claim largely on the 'same conduct and actions upon which [its MPRSA] claims for relief' are based." *Rosado*, 473 F. Supp. 3d at 146 (quoting N.Y. Summ. J. Br., District Court Dkt. No. 71-1, at 84). The district court concluded that "New York has not offered any additional viable explanations for how EPA's designation of the Eastern Site is inconsistent with [the New York or Southold] Programs." *Id.* The district court entered judgment for Defendants-Appellees on July 20, 2020, and Plaintiffs- Appellants timely appealed.

II. DISCUSSION

A. Standard of Review

"On appeal from a grant of summary judgment involving a claim brought under the [APA], we review the administrative record *de novo* without according deference to the decision of the district court."

Karpova v. Snow, 497 F.3d 262, 267 (2d Cir. 2007). "Under the APA, courts review agency action to determine if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Friends of Animals v. Romero*, 948 F.3d 579, 585 (2d Cir. 2020) (quoting 5 U.S.C. § 706(2)(A)). Under this "narrow" standard of review, a "court is not empowered to substitute its judgment for that of the agency." *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554 (2d Cir. 1992) (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Rather, a court will overturn an agency's determination only

> when the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Karpova, 497 F.3d at 267–68 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

> In other words, so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned.

Id. at 268.

New York contends on appeal that the district court erred in applying arbitrary-and-capricious review to the CZMA claim. We disagree. At the start, New York argued below that the EPA's consistency determination was "arbitrary and capricious." N.Y. Summ. J. Br. 84. New York's argument that the district court erred by applying that standard of review is thus arguably waived. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("[W]here a party has shifted his position on appeal and advances arguments available but not pressed below, waiver will bar raising the issue on appeal." (citation, internal quotation marks, and alteration omitted)).

In any event, we conclude that the district court correctly applied the arbitrary-and-capricious standard to Plaintiffs-Appellants' CZMA claim. New York advances several counterarguments on appeal, but none is persuasive. First, New York notes that the CZMA requires that federal agency action "be carried out in a manner which is consistent to the *maximum extent* practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A) (emphasis added); *see also* 15 C.F.R. §§ 930.32(a)(1), 930.36(e)(2). But this provision is not a standard of review. And New York does not argue that the CZMA or its accompanying regulations set forth a standard of review to displace the APA's arbitrary-and-capricious standard. *See N.Y. Pub. Int. Rsch. Grp., Inc. v. Johnson*, 427 F.3d 172, 179 (2d Cir. 2005) (explaining that when a statute "does not provide a standard of review," we typically "review

[the agency's] actions under the Administrative Procedure Act . . . , which contemplates setting aside only agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *see also Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 496–97 (2004).

Indeed, because the CZMA does not provide a standard of review, courts have routinely subjected CZMA claims to arbitrary-and-capricious review. *See, e.g.*, *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) ("The 'arbitrary or capricious' standard is appropriate for resolutions of factual disputes implicating substantial agency expertise." (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376–77 (1989))); *Del. Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 286–87 (3d Cir. 2012); *City of Riverview v. Surface Transp. Bd.*, 398 F.3d 434, 439–40 (6th Cir. 2005); *Am. Petroleum Inst. v. Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205, 1222 (9th Cir. 2004) (reasoning that a court should "not generally overturn a consistency determination [under the CZMA] just because we might have come to a different conclusion were the determination of 'consistency' before us in the first instance" (citing *Overton Park*, 401 U.S. at 416)). And we are unpersuaded that the CZMA's requirement that federal agency action be "consistent to the maximum extent practicable with the enforceable policies of approved State management programs" draws these decisions into question. 16 U.S.C. § 1456(c)(1)(A).

Next, New York contends that we must review the EPA's consistency determination *de novo* because the EPA does not "administer" the CZMA. N.Y. Br. 37. But this argument conflates arbitrary-and-capricious review with a different doctrine—*Chevron* deference—which does not apply here. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "We evaluate challenges to an agency's interpretation of a statute that it administers within the two-step *Chevron* deference framework," *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 507 (2d Cir. 2017), but review an agency's "interpretation of . . . a statute that it does not administer[] *de novo*," *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018). "When the question is not one of the agency's authority but of the reasonableness of its actions," however, "the 'arbitrary and capricious' standard of the APA governs." *N.Y. Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003); *see also Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (observing that when the challenged agency action "is not an interpretation of any statutory language," "the more apt analytic framework . . . is standard 'arbitrary or capricious' review under the APA" (brackets omitted)); *Hong v. U.S. Sec. & Exch. Comm'n*, 41 F.4th 83, 93 n.12 (2d Cir. 2022) ("us[ing] the *Chevron* framework to address the statutory interpretation questions presented" there but separately evaluating whether "the agency's *application* of the statute and regulations . . . was arbitrary or capricious").

This case does not implicate the *Chevron* doctrine because New York does not challenge the

EPA's "authority" to render a consistency determination or its interpretation of the CZMA. Instead, it challenges the "reasonableness" of the EPA's consistency determination under that statute. *N.Y. Pub. Int. Rsch. Grp.*, 321 F.3d at 324. Put another way, New York challenges the EPA's "application" of the CZMA in its consistency determination. *Hong*, 41 F.4th at 93 n.12 (emphasis omitted). And so "the 'arbitrary and capricious' standard of the APA governs." *N.Y. Pub. Int. Rsch. Grp.*, 321 F.3d at 324.

For similar reasons, we reject New York's argument that we must review the EPA's consistency determination *de novo* because it has alleged that this determination was "'not in accordance with' the CZMA." N.Y. Br. 33 (quoting 5 U.S.C. § 706(2)(A)). The Supreme Court rejected a materially identical argument in *Marsh*. In that case, the respondents argued that "strict review is appropriate under the 'in accordance with law' clause of § 706(2)(A)" because they "maintain[ed] that the question for review centers on the legal meaning of [a statutory] term" in NEPA "or, in the alternative, the predominantly legal question whether established and uncontested historical facts presented by the administrative record satisfy this standard." *Marsh*, 490 U.S. at 376. But the Court rejected that "[c]haracteriz[ation]" of the dispute because the respondents' challenge did not turn on NEPA's "meaning" or any other "predominantly legal" question but instead "involve[d] primarily issues of fact." *Id.* at 376–77. And because "analysis of the relevant documents" for the respondents' NEPA claim "require[d] a high level of technical expertise," the Court held that it "must

defer to 'the informed discretion of the responsible federal agencies.'" *Id.* at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). The *Marsh* Court therefore concluded that "review of the narrow question before [it] whether the [agency's] determination . . . should be set aside is controlled by the 'arbitrary and capricious' standard of § 706(2)(A)." *Id.* at 376; *see also J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 391 (2d Cir. 2000) (explaining that "[u]nder the APA, this Court reviews errors of law de novo" but reviews "other agency findings, conclusions, and actions" under the arbitrary-and-capricious standard).

Marsh's reasoning applies here. *See Akiak*, 213 F.3d at 1144 (applying *Marsh* to a CZMA claim). Like that case, this case does not turn on predominantly legal issues, such as the EPA's interpretation of the CZMA. It depends instead on the fact-specific question of whether the EPA adequately responded to New York's objections to its consistency determination. So as in *Marsh*, "[t]he question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." 490 U.S. at 376. Thus, we follow *Marsh*'s lead in rejecting Plaintiffs-Appellants' "supposition that review is of a legal question and that the [EPA's] decision 'deserves no deference.'" *Id.* at 377.

Scheduled Airlines Traffic Offices, Inc. v. DOD, on which New York relies, in fact illustrates why the APA's "not in accordance with law" standard is *inapplicable* here. *See* 87 F.3d 1356, 1361 (D.C. Cir. 1996). That case involved "a pure question of

statutory interpretation independent of the complex factual determinations or policy judgments particularly within agencies' expertise." *Id.* For that reason, the court held that the issue there was "not whether the Department acted arbitrarily or capriciously, . . . but rather whether it acted 'in accordance with [federal] law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)) (alteration in original). And because "the Defense Department ha[d] not been entrusted to administer" the statute at issue in the case, the court reviewed the agency's interpretation *de novo*. *Id.*; *cf. Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("In reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard, we adhere to the familiar two-step test of *Chevron*, provided that the conditions for such review are met."). But unlike *Scheduled Airlines Traffic Offices*, this case turns on "complex factual determinations," not "a pure question of statutory interpretation." 87 F.3d at 1361. Thus, the arbitrary-and-capricious standard applies.

Nor does the presidential waiver provision found in 16 U.S.C. § 1456(c)(1)(B) imply, as New York contends, N.Y. Br. 44, that the CZMA forecloses arbitrary- and-capricious review. Section 1456(c)(1)(B) simply provides that *if* a federal court concludes that an agency's consistency determination was erroneous, the Secretary can seek a waiver of the CZMA's consistency requirement from the President. But this provision does not alter the standard of review by which a court determines *whether* a consistency determination was in error.

B. Application

Because we conclude that the arbitrary-and-capricious standard governs here, we apply that standard in reviewing Plaintiffs-Appellants' claims on the merits. Plaintiffs-Appellants argue that the district court erred by upholding the EPA's determination that its designation of the Eastern Site is consistent to the maximum extent practicable with the New York and Southold Programs. Southold also challenges the adequacy of the Environmental Impact Statement that the EPA submitted pursuant to NEPA in support of its designation. For the reasons set forth below, we reject these claims.

1. New York's Claims

New York generally asserts that the EPA's designation of the Eastern Site is inconsistent with the following policies of the New York Program:

> to "[p]rotect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material" (Policy 5, Sub-Policy 5.3); to work towards "reduction or elimination of adverse impacts associated with existing development" (Policy 6, Sub-Policy 6.1); to "[a]void placement of dredged material in Long Island Sound when opportunities for beneficial reuse of the material exist" (Policy 10, Sub-Policy 10.6); and to promote "marine resources by . . . protecting spawning grounds, habitats, and water quality" (Policy 11, Sub-Policy 11.1).

N.Y. Br. 50 (alterations and omission in original) (citations omitted); *see also* Joint App'x 3241–42. But the specific arguments that New York raises on appeal

pertain only to Sub-Policy 10.6 of the New York Program, entitled "Provide sufficient infrastructure for water-dependent uses." That policy states:

> Use suitable dredged material for beach nourishment, dune reconstruction, or other beneficial uses. Avoid placement of dredged material in Long Island Sound when opportunities for beneficial reuse of the material exist. Allow placement of suitable dredged material in nearshore locations to advance maritime or port-related functions, provided it is adequately contained and avoids negative impacts on vegetated wetlands and significant coastal fish and wildlife habitats. Avoid shore and water surface uses which would impede navigation.

Joint App'x 3214–15.

Relying on Sub-Policy 10.6, New York argues that the EPA did not adequately respond to four of its objections to the EPA's consistency determination: (1) that a new dredging site was not needed in the eastern Sound because the Western and Central Sites have adequate capacity to fulfill the Sound's dredging requirements, (2) that the EPA improperly considered a lack of funding in its consistency determination, (3) that certain waste materials disposed of at the Eastern Site could be subject to environmentally harmful "capping" practices, and (4) that the EPA unreasonably included site use restrictions based on the restrictions for the Western and Central Sites. We are not persuaded. As explained below, the EPA adequately responded to each of these objections.

First, New York argues that the EPA failed to adequately respond to its objection that the Eastern Site is unnecessary because the Western and Central Sites have adequate capacity to fulfill the Sound's dredging requirements for the next several decades.[8] But the EPA explained that

> [d]isposal capacity at the [Western Site] and [Central Site] does not obviate the need for the [Eastern Site]. [The Corps] projected in the DMMP that dredging in Long Island Sound would generate . . . 49.6 [million cubic yards or "mcy"] of material that could potentially need to be placed at an open-water disposal site. . . .
>
> . . . [T]he [Central Site] and [Western Site] are each estimated to have a disposal capacity of about 20 mcy. This 40 mcy of capacity is not enough to take the entire 49.6 mcy of material that *could* require open- water disposal.

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[8] The EPA argues that New York waived this argument by failing to raise it before the district court. As noted above, "where a party has shifted his position on appeal and advances arguments available but not pressed below, waiver will bar raising the issue on appeal." *Wal-Mart Stores*, 396 F.3d at 124 n.29 (citation, internal quotation marks, and alteration omitted). Before the district court, New York argued that the EPA's designation of the Eastern Site is inconsistent with Policy 5 and Sub-Policy 5.3 of the New York Program because there is no need for the Eastern Site. New York did not argue that the designation would be inconsistent with Sub-Policy 10.6 for that reason. Nonetheless, because New York's argument on appeal sufficiently resembles the argument that it advanced before the district court, we do not agree that New York has waived it.

Id. at 3243–44. And it cautioned that

> it must be understood that estimates of the amounts of material of different types needing to be managed in the future are unavoidably imperfect. The actual amount of material that will require management could be higher (or lower) over the 30-year planning horizon. This is especially evident when unpredictable events, such as large storms and possible improvement dredging projects, are considered.

Id. at 3245.

Although New York acknowledges that the Corps estimated that the Sound could generate up to 49.6 million cubic yards of dredged material requiring open- water disposal in the coming decades and that the total capacity of the Western and Central Sites was only 40 mcy, the State notes that the 49.6 figure included 15.5 million cubic yards[9] of dredged sand that might be put to "beneficial use, such as

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[9] We observe that New York's brief is inconsistent as to the amount of dredged sand that could be amenable to a beneficial use. *Compare* N.Y. Br. 27–28, 50–51 (15.2 million cubic yards), *with id.* at 18 (15.5 million cubic yards). The record also appears inconsistent on this point. The Corps apparently reported this figure as 15.5 million cubic yards, *see* Joint App'x 3968–69, but the EPA later stated that the Corps had reported it as 15.2 million cubic yards, *see* Joint App'x 3243–44. Because this discrepancy does not affect our conclusions, we use 15.5 million cubic yards without further discussion.

beach renourishment." N.Y. Br. 18.[10] So New York contends that the EPA should have subtracted out that 15.5 mcy from the topline 49.6 estimate, which would have led it to conclude that the Western and Central Sites had adequate capacity to accept all the dredged material the Corps projected the Sound would generate in the coming decades.

The EPA adequately responded to this objection. It reasoned, first, that there was "no guarantee" that it could find a beneficial use for dredged material from the Sound. Joint App'x 3244. The agency also noted that because the 49.6 million cubic yards figure was an estimate, the Sound might generate even more dredged material that would require additional disposal capacity. And the EPA's determination that the Eastern Site was necessary did not rest solely on an estimate of the quantity of dredged material the Sound might generate. As the agency explained:

> Beyond the question of disposal capacity, when EPA took into account overall environmental effects, environmental and safety risks, logistical difficulties, and the expense of using such distant sites, EPA concluded that the [Central Site], [Western Site], and [Rhode Island Sound Disposal Site (the "RI Site")] would not reasonably serve the needs of the eastern Long Island Sound

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[10] The Corps also estimated that 3.3 million cubic yards of dredged material would be contaminated with dangerous toxins and so would be unsuitable for open-water disposal. Joint App'x 3969.

> region. A key consideration in EPA's determination that a designated site is needed in eastern Long Island Sound is that going outside the region would involve far longer transit distances from dredging centers in the eastern Sound.

Id. at 3245. For those reasons, the EPA's conclusion that it was "reasonable and prudent to designate sites to ensure adequate disposal capacity is available for all the projected material" was not arbitrary and capricious. *Id.*

Second, New York argues that the EPA improperly "invoked the cost savings of having a dumping site proximate to dredging centers in the Eastern Sound" as a "benefit" of designating the Eastern Site. N.Y. Br. 53. That consideration, New York contends, violates 15 C.F.R. § 930.32(a)(3), which provides:

> Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program.

New York misstates the nature of the cost considerations that the EPA considered.

In responding to New York's objections, the EPA explained:

> Finally, longer haul distances also would increase the cost both to taxpayers and

> private entities of completing dredging projects. Using the [Central Site], [Western Site], or [RI Site] would greatly increase the transport distance for, and duration of, open-water disposal for dredging projects from the eastern Long Island Sound region. This, in turn, would greatly increase the cost of such projects. It could also render certain dredging projects too expensive to conduct. . . . EPA is *not* designating the [Eastern Site] solely in order to make dredging less expensive, but it would be irrational to ignore that reducing the cost of necessary dredging is another of the many benefits of designating the [Eastern Site], a site which EPA has determined to be environmentally sound, instead of relying on more distant sites.

Joint App'x 3246. Thus, the EPA did not rely on the agency's *own* cost considerations to support its consistency determination. It instead outlined the costs that would accrue *to taxpayers and private enterprises* from a failure to designate the new site. While 15 C.F.R. § 930.32(a)(3) prevents a federal agency from using its own budgetary constraints as an excuse to avoid complying with a state's coastal management program, it does not compel the agency to pursue activities that it deems economically wasteful.

Third, New York argues that the EPA ignored its objection that toxic "material from smaller nonfederal projects dumped at the Eastern site could be subject to capping," N.Y. Br. 57–58, a process that involves "using relatively cleaner material to cover

relatively less clean material and, thus, isolate the latter from the environment," Joint App'x 3258. The State asserts that dredged material is "often laden" with "toxins," and that nonfederal projects generating less than 25,000 cubic yards of dredged material are subject only to the Clean Water Act ("CWA") rather than the "more stringent" standards of the MPRSA. N.Y. Br. 57.

The EPA explicitly addressed this objection in its November 4, 2016, response letter. The EPA explained that New York's objection rests on a "misguided understanding" of the proposed designation of the Eastern Site. Joint App'x 3258. The agency "would *not* approve of the disposal of toxic sediments at the [Eastern Site] on the grounds that it could later be capped with cleaner material" because "MPRSA regulations clearly dictate that only 'suitable' material may be placed at an open-water disposal site regulated under the MPRSA," and a proposal to "cap" unsuitable material with cleaner material "does not change that."

Id.

New York asserts that the EPA's response was inadequate because it failed to address the prospect that "capping" may still occur for smaller, nonfederal projects subject to regulation under the CWA rather than the "more stringent" MPRSA standards. N.Y. Br. 57. But that amounts to an argument that the CWA, which indisputably applies to those projects, does not adequately regulate capping. And as the EPA persuasively argues, that objection lies "with Congress, not EPA." EPA Br. 44. The EPA notes, moreover, that concerns about capping in any

hypothetical future project can be addressed during the individual permitting process.

New York also contends that the EPA cannot now respond to New York's argument about small, nonfederal projects because it failed to do so during the notice-and-comment process. *See Michigan v. EPA*, 576 U.S. 743, 758 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action."). But New York, too, did not raise the issue of small, nonfederal projects during the notice-and-comment process, and arbitrary-and- capricious review does not require that an agency respond in advance to every hypothetical objection that might be raised. *See Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) ("It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue." (citation, internal quotation marks, and alteration omitted)).

Finally, New York argues that the EPA erred by "unilaterally" adding conditions to the proposed Eastern Site "and then rely[ing] on those restrictions as evidence of consistency under the CZMA despite the State's objection." N.Y. Br. 61 New York claims that the agency "transpose[d] negotiated restrictions for the Central and Western sites onto the Eastern site, and then use[d] them as a basis for nullifying New York's objection to the Eastern site." N.Y. Reply Br. 33. But the EPA never asserted that the additional site restrictions render its designation of the Eastern Site consistent with the New York

Program on their own. Rather, in responding to New York's objections, the agency explained:

> Applying these site use restrictions to the [Eastern Site] should be equally acceptable because the restrictions apply equally well to the eastern Sound and applying the same restrictions across the entire Sound makes good sense. As a result, the entire Sound will be covered by the same regulatory regime applied by the same federal and state regulators.

Joint App'x 3223. New York therefore fails to show that the EPA's decision to impose additional restrictions on the Eastern Site undermines the agency's efforts to achieve full consistency with the New York Program.

2. Town of Southold's Claims

In a separate brief, Southold challenges the EPA's determination that its designation of the Eastern Site is fully consistent with the Southold Program. Southold also contends that the EPA violated NEPA in designating the Eastern Site. As explained below, we conclude that the EPA's determination that its activity is fully consistent with the Southold Program is not arbitrary and capricious, and that Southold's NEPA claim is waived.

i. CZMA

Southold begins by arguing that the EPA's designation of the Eastern Site is inconsistent with several policies enumerated in the Southold Program. First, Southold claims that the EPA's designation conflicts with Sub-Policy 5.3 of the Southold Program,

entitled "Protect and enhance quality of coastal waters." It provides:

> A. Protect water quality based on an evaluation of physical factors (pH, dissolved oxygen, dissolved solids, nutrients, odor, color and turbidity), health factors (pathogens, chemical contaminants, and toxicity), and aesthetic factors (oils, floatables, refuse, and suspended solids).
>
> C. Protect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material.

Id. at 3252–53. Southold asserts, without elaboration, that "[c]oncerns regarding [the] extent of the testing and protocols used were raised repeatedly . . . without a satisfactory response." Southold Br. 27. The record demonstrates, however, that the EPA adequately responded to Southold's concerns about the Eastern Site's effect on the Sound's water quality. The agency noted that designating a new disposal site does not affect water quality; only individual projects, which require a permit, can do so. *See* Joint App'x 3254. So, the EPA explained, Southold's concerns about water quality can be addressed in the permitting process for any hypothetical future project. And the agency reasoned that "the sediment suitability criteria in EPA's MPRSA regulations require the assessment of physical, health and aesthetic factors," ensuring that the designation of the Eastern Site is consistent with the Southold Program. *Id.* Taken together, these two responses adequately addressed Southold's water-quality objection.

Second, Southold argues that the EPA's site designation conflicts with Sub- Policy 6.1 of the Southold Program, which emphasizes protecting "ecological quality." *Id.* at 3260–61. But the agency explained in detail how the Eastern Site designation would comport with that policy. The EPA highlighted "the aspects of [its] analysis relating to chemistry, toxicity, bioaccumulation, benthic health, aquatic organism impacts, and bathymetry, all of which contribute to the assessment of possible physical, chemical, and biological changes if the site is designated." *Id.* at 3262. Indeed, the agency noted, "[b]enthic analyses within . . . the [Eastern Site] indicate good quality habitats for benthic organisms," and "[t]he data shows rapid recovery of benthic organisms within the disposal sites after the initial effects of sediment placement." *Id.* at 3262 n.27. The EPA also explained that its "assessment is based on over 40 years of monitoring data on chemistry, toxicity, bioaccumulation, benthic health, and bathymetry to assess physical, chemical and biological changes at the [New London Site] and [Cornfield Shoals Site]." *Id.* at 3262–63. Thus, the record shows that the EPA adequately responded to Southold's objections regarding Sub-Policy 6.1.

Third, Southold argues that the EPA's site designation is inconsistent with Sub-Policy 6.2 of the Southold Program, which aims to protect coastal fish and wildlife habitats. But Southold failed to raise that objection during the notice-and- comment process or in the district court. Southold is therefore precluded from raising that issue for the first time on appeal. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("It is a well-established

general rule that an appellate court will not consider an issue raised for the first time on appeal." (citation, internal quotation marks, and alteration omitted)); *Appalachian Power Co.*, 251 F.3d at 1036 ("[A] party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue." (citation, internal quotation marks, and alteration omitted)).

Fourth, Southold argues that the EPA's site designation conflicts with Sub- Policies 8 and 10 of the Southold Program, which contain Southold's waste policy and water-dependent use policy, respectively. Southold failed to raise those two objections during the notice-and-comment process as well and is barred from doing so now. *See Appalachian Power*, 251 F.3d at 1036.

Fifth and finally, Southold argues that the EPA's site designation is inconsistent with Sub-Policy 11 of the Southold Program, which promotes the sustainable use of living marine organisms and the protection of their habitats. But the EPA's response to this objection, too, was adequate:

> EPA directly considered the question of habitat effects and concluded that the site would not have significant adverse effects on marine habitat. . . . Furthermore, . . . EPA re-delineated the boundaries of the [Eastern Site] to exclude two rocky, hardbottom areas that could provide relatively higher quality habitat for marine organisms. . . . Thus, EPA remains confident that designation of the [Eastern Site] is consistent with the Marine

> Resources Policies to the maximum extent practicable.

Joint App'x 3278. Southold does not explain why this response was inadequate, so its final objection fails as well.

ii. NEPA

Finally, Southold contends that the Environmental Impact Statement the EPA submitted in support of its Eastern Site designation is inadequate because the agency failed to take a sufficiently "hard look" at its environmental impact in violation of the Supreme Court's decision in *Kleppe*, 427 U.S. 390. Southold Br. 20.

Southold abandoned this claim in the district court. Although Southold's complaint raises a NEPA claim, the town did not mention that claim in its summary judgment briefing. And the district court's decision did not discuss it, either. We therefore conclude that Southold is precluded from belatedly asserting its NEPA claim on appeal. *See In re Nortel Networks*, 539 F.3d at 132.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Appendix B — Memorandum and Order of the Honorable Edward R. Korman, dated July 17, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROSSANA ROSADO, in her official capacity as NEW YORK STATE SECRETARY OF STATE, et al.,

Plaintiffs,

MEMORANDUM & ORDER

TOWN OF SOUTHOLD, NEW YORK, et al.,

1:17-cv-04843-ERK-RLM

Plaintiffs-Intervenors

– against –

ANDREW WHEELER, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, et al.,

Defendants,

CONNECTICUT DEPARTMENT OF ENERGY & ENVIRONMENTAL PROTECTION,

Defendant-Intervenor.

KORMAN, *J.*:

Beginning where the parties agree, Long Island Sound is a national treasure. It is home to abundant wildlife, host to a litany of activities, and serves as an engine of economic activity that expands throughout our nation. *See Town of Huntington v. Marsh*, 859 F.2d 1134 (2d Cir. 1988). For these same reasons, public and private stakeholders—neighbors and partners in a variety of realms—sometimes disagree on how to best safeguard its waters. This is particularly true when it comes to the topic of dredge disposal. *See Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Forbes v. U.S. Army Corps of Eng'rs*, Order and Judgment, No. 95-CV-4374 (E.D.N.Y. June 28, 2000) (Platt, J.). In this latest dispute, the question is whether the Environmental Protection Agency followed the decision-making processes set out by two laws— the Marine Protection, Research, and Safety Act ("MPRSA"), and the Coastal Zone Management Act ("CZMA")—when the agency designated the Eastern Long Island Sound Site as an open- water dredge disposal site in November 2016.

I. Background

A. Statutory and Regulatory Background

1. The Marine Protection, Research, and Sanctuaries Act

Congress enacted the MPRSA in 1972 to mitigate the environmental impact of unregulated dumping in ocean waters, and to prohibit the unauthorized transportation or dumping of waste from the United States into ocean waters. 33 U.S.C. § 1411. The MPRSA generally applies to ocean waters beyond U.S. territory, and in this regard,

complements the Clean Water Act, which prohibits the discharge of pollutants into the navigable waters of the United States. 33 U.S.C. §§ 1311, 1362(12). Since Long Island Sound lies in U.S. waters, it was not initially subject to the MPRSA. However, recognizing the Sound's unique contribution to our nation's environment, economy, and national security, Congress amended the MPRSA to cover the Sound's waters in 1980. Thus, under the Ambro Amendment, "the dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic yards" must comply with the MPRSA. 33 USC § 1416. To this day, the Sound is the only landward body of water subject to the MPRSA.

The MPRSA governs site designations as well as permitting for disposal at such sites. Under the law, EPA and the Army work together throughout these processes. Specifically, Section 1413 of the MPRSA provides that the Secretary of the Army may issue permits for the disposal of dredged material, on the conditions that the Secretary has determined that such dumping "will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. §1413(a). To determine whether proposed dumping meets this standard, the Army Corps of Engineers is directed to consider the regulatory criteria established by EPA pursuant to Section 1412(a), which states that the EPA "Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall

consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land- based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and non-living resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible

locations beyond the edge of the Continental Shelf.

Section 1412(c) directs EPA to consider these same factors in establishing and applying criteria for site designations.

Pursuant to these provisions, EPA has promulgated a set of general and specific criteria to guide its dredge disposal site designations. Section 228.5 establishes four general criteria for the selection open-water sites:

(a) The dumping of materials into the ocean will be permitted only at sites or in areas selected to minimize the interference of disposal activities with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation.
(b) Locations and boundaries of disposal sites will be so chosen that temporary perturbations in water quality or other environmental conditions during initial mixing caused by disposal operations anywhere within the site can be expected to be reduced to normal ambient seawater levels or to undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery.
(c) [Reserved by 73 FR 74987]
(d) The sizes of ocean disposal sites will be limited in order to localize for identification and control any immediate adverse impacts and permit the implementation of effective monitoring and

surveillance programs to prevent adverse long-range impacts. The size, configuration, and location of any disposal site will be determined as a part of the disposal site evaluation or designation study.

(e) EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used.

40 C.F.R. § 228.5. Section 228.6—the specific criteria—further provides that "[i]n the selection of disposal sites, in addition to other necessary or appropriate factors determined by the Administrator, the following factors will be considered:

(1) Geographical position, depth of water, bottom topography and distance from coast;
(2) Location in relation to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases;
(3) Location in relation to beaches and other amenity areas;
(4) Types and quantities of wastes proposed to be disposed of, and proposed methods of release, including methods of packing the waste, if any;
(5) Feasibility of surveillance and monitoring;
(6) Dispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction and velocity, if any;
(7) Existence and effects of current and previous discharges and dumping in the area (including cumulative effects);

(8) Interference with shipping, fishing, recreation, mineral extraction, desalination, fish and shellfish culture, areas of special scientific importance and other legitimate uses of the ocean;
(9) The existing water quality and ecology of the site as determined by available data or by trend assessment or baseline surveys;
(10) Potentiality for the development or recruitment of nuisance species in the disposal site;
(11) Existence at or in close proximity to the site of any significant natural or cultural features of historical importance.

40 C.F.R. § 228.6(a). EPA is further required to base site designations on environmental studies of each site, regions adjacent to the site, and on historical knowledge of the impact of dredged material disposal on areas similar to such sites in physical, chemical, and biological characteristics, and discuss these criteria in any environmental impact statement prepared in connection with a proposed site designation. 40 C.F.R. §§ 228.4, 228.6(b).

Before a site may be used, EPA and the Corps must develop a Site Management and Monitoring Plan ("SMMP"), including an assessment of site conditions, a program for monitoring the site, special management conditions or practices to be implemented at the site to protect the environment, consideration of the quantity of material to be disposed of at the site and the presence of contaminants in the material, consideration of the anticipated use of the site over the long term, and a schedule for review and

revision of the plan. 33 U.S.C. §§ 1412(c)(3), (c)(4). Finally, as outlined in greater detailed below, both the Corps and EPA play significant roles in ensuring that any proposed disposal at open-water sites complies with testing and environmental standards as required under the MPRSA (and separately, the Clean Water Act).

2. The Coastal Zone Management Act

The same week President Nixon signed the MPRSA into law, he also signed the CZMA. In view of the reality that environmental protection requires significant deliberation between the federal government and state and local authorities, Congress had enacted the CZMA to further the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Under the CZMA, coastal jurisdictions may develop their own coastal zone management programs, which are subject to federal approval by the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce. *Id.* § 1455(d).

Once a given coastal zone management program is approved, "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." *Id.* § 1456(c)(1)(A). Moreover, any such agency shall issue a consistency determination to the relevant State agency no later than 90 days before final approval of the federal

activity. *Id.* § 1456(c)(1)(C). Jurisdictions may then concur or object to the federal agency's consistency determination. *Id.* § 1456(c)(3)(A).

B. Factual Background

1. The Sound and the Need to Dredge Generally

Long Island Sound is a 110-mile long semi-enclosed tidal estuary spanning the coastlines of New York, Connecticut, and Rhode Island. The Sound connects to the Atlantic Ocean at its eastern end and New York Harbor at its western end, with the Connecticut-New York state line cutting east-west through the middle. It contains three general areas: the Western Basin, which runs from the Narrows (between Throgs Neck and Willets Point, New York) to the Stratford Shoal (between Stratford Point, near Bridgeport, Connecticut, and Port Jefferson, New York); the Central Basin, which stretches from the Stratford Shoal to the Mattituck Sill (between Mulberry Point, Connecticut, and Mattituck Point, New York); and the Eastern Basin, which extends from the Mattituck Sill to the Race at the eastern end of the Sound and includes Peconic Bay, Gardiners Bay, and Fishers Sound.

There are more than 200 harbors, coves, bays, and navigable rivers that require occasional dredging in the Sound. Essentially, dredging entails the excavation of materials and sediments that accumulate over time on the seafloor due to natural and industrial causes. While some of this sediment may be suitable for beneficial uses such as renourishing beaches, constructing wetlands, and capping landfills, a significant portion still requires

open-water disposal. And while dredged materials are not necessarily toxic, they may be contaminated by municipal, industrial wastes, or agricultural runoff. 40 C.F.R. § 227.13(a). The Army Corps of Engineers alone is responsible for 52 ongoing maintenance and improvement projects—aptly titled "Federal Navigation Projects"— in the Sound and adjacent waters, most of which are in Connecticut's waters. AR-82, DMMP at 3. While Corps projects generate a substantial portion of the material dredged in the Sound, other federal and non-federal projects are needed to accommodate marinas, boat yards, and coastal businesses. FSEIS at 74. Indeed, dredging has occurred in the Sound since at least the 1870s, and the continued need for dredging is not disputed. Even while objecting to the designation of the Eastern Site at issue here, New York asserted that "[a]s a state with considerable water dependent uses and navigation infrastructure, New York recognizes the need for, and is fully supportive of, dredging for maintaining these types of activities." AR-23, EPA Response to New York Objection, at 18–19. Southold's comments acknowledged the same. FSEIS at 3695–96. The trouble arises when all that material has to go somewhere.

2. Recent Site Designations in the Sound

The current dispute can be traced to 1999, when EPA published a notice of intention to consider whether it was appropriate to designate disposal sites in the Sound. 64 Fed. Reg. 29865–01 (June 3, 1999). In March 2002, EPA issued a notice stating the agency's intention to first consider whether disposal sites should be designated in the Western and Central

basins, and thereafter consider whether a site would be needed in the eastern Sound. 70 Fed. Reg. 32498–01, 32509 (June 3, 2005). Following that plan, EPA designated the Rhode Island Sound Disposal Site as a permanent site in 2004. DMMP at 164. The following year, EPA designated the Central and Western Long Island Disposal Sites. The EPA's Final Environmental Impact Statement in support of designating those sites did not address the dredging needs of the eastern Sound, but stated the agency would soon conduct supplemental analysis of the entire Sound. 70 Fed. Reg. at 32509.

While Connecticut concurred with EPA's determination that designation of the Central and Western sites was consistent with the state's coastal management program, New York initially objected. Negotiation ensued, and the parties agreed to certain site use restrictions, under which New York concurred that sites were consistent with their enforceable coastal zone management programs. *See* AR-62 (70 Fed. Reg. at 32498, 32511–514, 32518–520) (40 C.F.R. §§ 228.15(b)(4)(vi), (b)(5)(vi)); AR-A 060, pp. 1–2;. These restrictions included, among other conditions, agreements that: dredged material would only be placed at the sites after a demonstration that there were not practicable alternatives to open-water disposal, disposal would be barred during weather that would create a heightened risk of spillage during transit, and any party could petition the EPA to amend the site use restrictions in the event that the volume of open- water disposal has not declined by 2026. 81 Fed. Reg. 44220-01, 44229–30 (July 7, 2016).

Most significantly, EPA agreed to publish a

Sound-wide Dredged Material Management Plan ("DMMP"), researched and drafted by the Army Corps. The basic idea is that the DMMP would analyze dredging needs through 2045, contemplate beneficial uses of dredged material, and outline oceanographic and biological conditions across the Sound. AR-7, DSEIS, at 48–49, 80; AR-8, Report of the Public Scoping Meetings, at 47. In short, the DMMP aimed "to provide a 30 year management strategy to add certainty to dredging and placement activities from navigation channels and Port facilities within the region in an environmentally acceptable and economically practicable manner, and to develop alternatives to reduce or eliminate open water placement where practicable." DMMP at 60.

By 2011, the two dredged material disposal sites operating in the eastern Sound—the New London Disposal Site (NLDS) and the Cornfield Shoals Disposal Site (CSDS)—were scheduled to close. To buy time to evaluate a potential new site to service the eastern Sound, Congress extended the life of those sites for five additional years, until December 2016. AR-A 202; FSEIS at 58–59. In July 2012, EPA began investigating whether a new disposal site, or multiple sites, should be designated to service the eastern Sound, and reached out to cooperating agencies including the New York Department of State ("NY DOS") and the Connecticut Department of Energy and Environmental Protection ("DEEP"). Report of the Public Scoping Meetings at 60. Three months later, consistent with EPA's decision to follow the agency's Statement of Policy for Voluntary Preparation of National Environmental Policy Act ("NEPA") Documents, EPA issued a notice of intent to

prepare a supplemental environmental impact statement in connection with the evaluation of potential sites in the eastern Sound. 77 Fed. Reg. 63312 (Oct. 16, 2012). The notice stated EPA's intent "to evaluate the two current sites used in eastern Long Island Sound, the CSDS and NLDS, as well as other sites for, and means of, disposal and management." *Id.* The notice also expressly stated that, pursuant to the law, EPA would consider a "no action alternative," meaning the alternative of not designating any new sites. *Id.*

In furtherance of this process, EPA held two public "scoping" meetings in late 2012 and early 2013, in Groton, Connecticut and Riverhead, New York. These meetings allowed public input on the potential designation of one or more dredged material disposal sites. Both featured speakers from the NY DOS, CT DEEP, and the Army Corps of Engineers. Report of the Public Scoping Meetings at 19. At one of those meetings, which was attended by NY DOS and New York Department of Environmental Conservation ("NY DEC"), EPA stated that it was screening for potential sites using a Zone of Siting Feasibility ("ZSF") extending 25 nautical miles from the known dredging centers in the eastern Sound—*i.e.*, 25 nautical miles was the maximum haul distance between the projected dredging locations and potential disposal site. FSEIS at 888–891. The ZSF spanned from Guilford, Connecticut on the western end to Montauk Point, New York, on the eastern end. FSEIS at 30 (Figure ES-2).

EPA screened 11 potential sites and the "no action alternative" through a two-tier process. The

first tier was designed to ascertain which sites within the ZSF were more or less appropriate than others, while the second tier was designed to yield specific follow-up recommendations. To explain this process to stakeholders and solicit feedback, EPA held two public meetings in June 2014: one in Riverheard, New York, and one in New London, Connecticut. EPA then held two additional meetings in December 2014 to convey the agency's findings as memorialized in its Supplemental Environmental Impact Statement, including the agency's oceanography survey results covering the entire eastern Sound area. EPA explained that the agency had narrowed the field of 11 potential sites down to six: Cornfield Shoals, New London, Niantic Bay, Orient Point, Clinton, and Six Mile Reef. *See* Report of the Public Scoping Meetings at 329. In April 2015, EPA published an analysis of these six sites. AR-9. At that time, EPA explained it was in fact considering a modified version of the New London Site, including two new areas reaching roughly 1.5 nautical miles to the west of the site's existing boundaries, called "NL-Wa" and "NL-Wb." *Id.* at 70.

In December 2015, the Corps completed its Dredged Material Management Plan. The DMMP projected that between 2015–2045, dredging projects across the Sound would generate 52.89 million cubic yards of material, 34 million of which would be fine-grained sediment suitable for disposal at an open-water site. The Corps projected that the majority of the remaining material—roughly 15.5 million cubic yards—would be sand that could be used for

beneficial beach use.[1] DMMP at 150.

In April 2016, EPA issued its Proposed Rule for public comment, and concurrently published its Draft Supplemental Environmental Impact Statement ("DSEIS"). AR-5, Proposed Rule (81 Fed. Reg. 24748); DSEIS. In line with EPA's April 2015 site analysis, the Proposed Rule suggested designating an Eastern Sound Disposal Site ("ELDS" or "Eastern Site") comprised of the western half of the existing New London Site, coupled with two new adjacent areas extending roughly a mile and a half to the west. EPA explained that this site would be appropriate because unlike the existing Niantic Bay and Cornfield Shoals sites, it is a containment site, meaning that disposed sediment would not drift from the site and contaminate nearby areas. EPA also asserted the Eastern Site would have minimal environmental impacts on water quality and benthic habitat in the eastern Sound compared against the other candidates. DSEIS at 377–86. Moreover, EPA pointed out that the existing New London Site had limited capacity after years of use, the eastern portion of the site interfered with the New London Submarine Base, and a more compact site would be more manageable. *Id*. at 377. EPA supported the Proposed Rule with a variety of findings, including: analysis of alternative sites; the physical oceanography of the eastern Sound; sonar data; biological data; disposal monitoring data from the existing New London Disposal Site; a survey of physical and chemical characteristics of sediment

[1] The Corps estimated that the remaining 3.3 million cubic yards of sediment would be unsuitable for open-water disposal. DMMP at 150.

found across the eastern Sound; fish habitat data; the extensive public involvement throughout the designation process; and a draft site management and monitoring plan ("SMMP") for the prospective Eastern Site. EPA proposed attaching the same site use restrictions to the Eastern Site that the agency had agreed to apply to the Central and Western Sites. 81 Fed. Reg. 24748–01, 24763 (Apr. 27, 2016).

The public comment period in connection with the proposed designation of the Eastern Site ran from April 27, 2016 through July 18, 2016. 81 Fed. Reg. 87820, 87832 (Dec. 6, 2016). During this period, the EPA held four public hearings, all in May 2016. The agency received over 6,700 letters, emails, petition signatures, and verbal comments. FSEIS at 68. On the last day of the public comment period, NY DOS and NY DEC submitted comments arguing that a new permanent site designation was unnecessary given the available capacity at the Central Site, which they alleged was far more than the 20 million cubic yards ultimately claimed by the EPA.

In July 2016, based on the Corps' findings in the DMMP, EPA amended the site use restrictions for the Western and Central Sites. On July 18, New York concurred with EPA's determination that the amended designations were consistent to the maximum extent practicable with the enforceable policies of New York's CMP. That same day, New York submitted a letter to EPA with comments regarding the proposed Eastern Site, stating that although it agreed that the same site-use restrictions that were recently added to the Western and Central Sites should be applied to the Eastern Site as well, EPA

should designate the Niantic Bay and New London Sites as remediation sites—only for use in certain exigent circumstances—instead of designating a new long-term site to service the eastern Sound. AR-A-43, July 18, 2016 Letter at 1–2. New York also objected to the Eastern Site's designation on the basis that the site would be "on top of vessel traffic lanes." *Id.* at 3. In response to New York's objections, EPA requested that the Corps take a harder look at projected dredging needs in the eastern Sound. AR-80. In September 2016, the Corps provided updated projections, concluding that a disposal capacity of 20 million cubic yards, based on water volume below a depth of 59 feet, would likely be sufficient. *See* FSEIS at 78.

Two weeks later, pursuant to the CZMA, EPA sent its consistency determination for the Eastern Site to New York, arguing that the designation—like that of the Central and Western Sites—was consistent to the maximum extent possible with all enforceable policies within the NY CMP and LWRP. In early October, New York responded with its objections that the EPA's analysis contradicted certain specific policies contained in the state's coastal zone management programs. AR-20, New York's Objection.

On August 4, 2016, after the public comment period closed, New York Governor Cuomo sent a letter to President Obama and EPA indicating that New York was opposed to *any* dredged material site being designated in the eastern region of Long Island Sound. August 4, 2016, Governor Cuomo Letter. This was the first time the Governor—or any representative from New York's cooperating

agencies—voiced wholesale opposition to a site in the eastern Sound. The letter indicated New York's intent to initiate legal action to block the designation of the Eastern Site, and reiterated the State's position that the remaining capacity at existing sites obviated the need for the Eastern Site.

On November 4, 2016, EPA responded to New York's Objection, again arguing the Eastern Site was in fact consistent to the maximum extent practicable with the enforceable coastal policies of the NYS Coastal Management Program. AR-22. That same day, EPA issued its final rule designating the Eastern Site as a permanent disposal site under the MPRSA. Notwithstanding EPA's disagreement with New York's objections, the agency agreed to make further changes to the Eastern Site. In particular, EPA excluded the portion of the proposed site that overlapped with the prior New London Site, such that the designated site included only the adjacent NL-Wa and NL-Wb areas. 81 Fed. Reg. 87824. The rule was published on December 6, 2016, and went into effect on January 5, 2017. 81 Fed. Reg. 87820.

II. PROCEDURAL HISTORY

New York filed its amended complaint on October 11, 2017. ECF No. 9. Connecticut moved to intervene as a defendant on November 30, 2017. ECF No. 12. The Town of Southold, New York, moved to intervene as a plaintiff on December 21, 2017, and filed its complaint in intervention on February 2, 2018. ECF Nos. 14, 18, 21. The County of Suffolk, New York, moved to intervene as a plaintiff on March 27, 2018. ECF No. 29. EPA filed its answer to the Southold complaint on March 26, 2018, and its

answer to Suffolk on June 6, 2018. ECF Nos. 27, 43. Connecticut filed its answer to the Southold complaint on March 29, 2018. ECF No. 31.

Plaintiffs move for summary judgment on five claims for relief under the MPRSA, CZMA, and APA. First, Plaintiffs argue EPA's determination that a new site was needed to service the eastern Sound was arbitrary and capricious. Second, Plaintiffs argue EPA failed to adequately consider potential interference with shipping and navigation. Third, Plaintiffs argue EPA arbitrarily decided to designate a new site rather than relying on historically used sites. Fourth, Plaintiffs argue EPA failed to consider the pollutive effects of disposing dredged materials from non-federal projects of less than 25,000 cubic yards. Fifth, Plaintiffs argue EPA's designation of the Eastern Site as a permanent dredged material disposal site was not consistent to the maximum extent practicable with their coastal zone management programs. In addition to these claims, Southold raises three additional claims alleging that EPA failed to respond to certain public comments.

Defendants and Defendant-Intervenor cross-move for summary judgment and in opposition to Plaintiffs' and Plaintiffs-Intervenors' motions for summary judgment. Those cross motions are before the court.[2]

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[2] Suffolk filed a separate brief echoing the arguments made by New York. Suffolk also highlighted that a 2014 study showed how the LIS adds between $17 billion and $36 billion in economic activity. Suffolk Br. at 4. Suffolk also maintains, without explanation, that "Dumping dredged materials at the Eastern Site *could* have a significant harmful effect on this multi-million-dollar industry." *Id*. But for the reasons outlined in

III. STANDARD OF REVIEW

The Administrative Procedure Act ("APA") provides that a court may set aside an agency's findings, conclusions of law or action if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 119 (2d Cir. 2013). An agency decision may be deemed arbitrary and capricious: "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir. 2006). Thus, in evaluating agency actions under the "arbitrary and capricious" standard, courts do not ask "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782, (2016). Instead, the question is whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Ore. Nat. Res. Council,* 490 U.S. 360, 378 (1989) (quotation omitted).

Section 4.B.1, EPA considered countervailing evidence showing that the failure to designate the Eastern Site would in fact result in economic harms unacceptable to the coastal fishing and maritime communities.

Judicial review of agency rulemaking is limited to the administrative record, and "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). Where, as here, review of an agency's action is "bound up with a record-based factual conclusion," the reviewing court must determine whether that conclusion "is supported by substantial evidence." *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) (quotations omitted). In this context, substantial evidence means "enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury." *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)). Moreover, when an agency has made predictions at the frontiers of science, a reviewing court must generally be at its most deferential. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Accordingly, the court's scrutiny of an agency's reasoning is especially narrow "in a technical area" within an agency's special expertise. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

The court is also limited to reviewing claims that have been properly exhausted in the administrative process. In this case, that pertains to the public comment period EPA held during the rulemaking process. Nonetheless, exhaustion will not bar a claim when "the agency had the opportunity to consider the very argument pressed by the petitioner on judicial review." *Nat. Res. Def. Council, Inc. v. E.P.A.*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (en banc)

(internal quotations omitted). This is consistent with the purpose of administrative exhaustion requirements, which "is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule." *Appalachian Power Co. v. E.P.A.*, 135 F.3d 791, 818 (D.C. Cir. 1998). *See also Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019) ("a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question"); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1290 (D.C. Cir. 2004) ("To preserve a legal or factual argument, we require its proponent to have given the agency a 'fair opportunity' to entertain it in the administrative forum before raising it in the judicial one.").

IV. DISCUSSION

A. Subject Matter Jurisdiction

Before turning to Plaintiffs' substantive challenges, EPA moves to dismiss Plaintiffs' claims under the MPRSA for lack of subject matter jurisdiction. EPA contends that because the MPRSA does not waive sovereign immunity, Plaintiffs are barred from bringing standalone claims under that statute. EPA is incorrect. "Sovereign immunity shields the United States from suit absent a consent to be sued that is 'unequivocally expressed.'" *United States v. Bormes*, 568 U.S. 6, 9–10 (2012) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992)). The MPRSA provides that "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the

extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit[.]" 33 U.S.C. § 1415(g)(1). This constitutes an unambiguous waiver of sovereign immunity for purposes of Plaintiffs' second, third, and fourth claims, each of which claim that EPA violated certain criteria promulgated under Sections 1412 and 1413. *See Town of Huntington v. Marsh*, 859 F.2d at 1143. Thus, this court has jurisdiction to review Plaintiffs' standalone MPRSA claims.

In any event, as all parties agree, this court has subject matter jurisdiction over each of Plaintiffs' claims under the APA. Indeed, it is axiomatic that the APA embodies a "basic presumption of judicial review," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). *See also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (In determining whether a suit can be brought under the APA, "[w]e begin with the strong presumption that Congress intends judicial review of administrative action."). This "presumption may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or if the action is "committed to agency discretion by law, § 701(a)(2)." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Neither the MPRSA nor the CZMA triggers these exceptions. *See Lincoln v. Vigil*, 508 U.S. 182, 191–92 (1993) (judicial review is precluded where a standard of review would be impossible to devise).

Although the APA does not itself confer subject matter jurisdiction, *see Califano v. Sanders,* 430 U.S. 99, 106–07 (1977), the Federal Question Statute, 28

U.S.C. § 1331, confers jurisdiction over a suit that "arises under" a "right of action" created by the APA. *See Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988) ("[I]t is common ground that if review is proper under the APA, the District Court ha[s] jurisdiction under 28 USC § 1331."); *see also Sharkey v. Quarantillo*, 541 F.3d 75, 83–84 (2d Cir. 2008) (same). Thus, "[t]he 'right of action' in such cases is expressly created by the [APA], which states that 'final agency action for which there is no other adequate remedy in a court [is] subject to judicial review,' at the behest of '[a] person ... adversely affected or aggrieved by agency action.'" *Japan Whaling Ass'n v. Am. Cetacean So'y.,* 478 U.S. 221, 230 n. 4, (1986) (quoting 5 U.S.C. §§ 702, 704). Here, Plaintiffs' second, third, and fourth claims allege EPA disregarded its legal obligations under the MPRSA, and the agency's decision- making process was otherwise arbitrary, capricious, or not in accordance with the law. Such claims are plainly within the ambit of the APA.

B. Plaintiffs' Challenges to the Eastern Long Island Disposal Site

1. Need for a New Site in the Eastern Sound

Plaintiffs' first allegation is that EPA failed to justify its determination that a new site was needed in the eastern Sound. Specifically, Plaintiffs allege EPA inflated the capacity needed in the Sound by: (1) unreasonably including sand that will be used for beach nourishment; (2) understating the remaining capacity at the Central Site by approximately 16 million cubic yards; and (3) unreasonably assuming that material dredged from the eastern Sound area

could not be disposed of at a more distant, existing site, such as the Rhode Island site. ECF. No. 9, Amended Complaint ¶ 146. Plaintiffs now concede that the EPA did not underestimate disposal capacity at the Central Site, but maintain their arguments regarding sand use and the Rhode Island Site. NY Reply Br. at 19. In response, EPA argues that as a threshold matter, neither the MPRSA nor the agency's implementing regulations require EPA to justify the need for a new site with reference to capacity at existing sites. EPA Br. at 31. EPA further responds that it reasonably concluded that the eastern Sound's disposal needs could only be serviced by a new site in the eastern Sound, rather than pre-existing sites farther afield.

a) Obligations Under the MPRSA and EPA Regulations

EPA is correct that the factors listed in MPRSA Section 1412(a) are not directly enforceable for purposes of showing a procedural defect in the agency's designation process. As the D.C. Circuit has explained, EPA "is not required by any provision in the [MPRSA] to include in the criteria, in any literal sense, the evaluation factors listed in the [MPRSA] . . . Rather, [the agency] will have satisfied the requirements of [1412](a) by considering those factors, by taking them into account, when [] establish[ing] the criteria" under Sections 228.5 and 228.6. *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 135 (D.C. Cir. 1980). In this regard, the MPRSA "gives unqualifiedly broad authority to the Administrator to weigh and consider the evaluation factors and, to the extent that he does so, the criteria he promulgates will 'reflect'

the factors listed in the Act and the Convention. *Id.* at 132. Moreover, while the MPRSA directs EPA to consider "the need for proposed dumping" in establishing its criteria to designate disposal sites, 33 U.S.C. 1412(a)(A), it does not follow that EPA may only designate a new site upon a showing that existing sites lack capacity.

Turning to EPA's site designation criteria, EPA must consider of the "[t]ypes and quantities of wastes proposed to be disposed of[.]" 40 C.F.R. § 228.6. This criterion ensures that an assessment of dredging and disposal needs is baked into the designation process, and that the agency justifies each new site with reference to such needs. Furthermore, EPA has a separate regulation, aptly titled "Need for Ocean Dumping," that requires the need for disposal to be established before a dumping permit is awarded. 40 C.F.R. Part 227, Subpart C. At any rate, EPA did in fact consider dredging needs. Accordingly, the question is whether EPA's determinations regarding the eastern Sound's dredging needs were consistent with the "reasoned decisionmaking" mandated by the APA. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52. To adjudicate that question, it is first helpful to consider why and how EPA used the ZSF in the designation process.

b) The Zone of Siting Feasibility in the Eastern Sound

EPA announced its ZSF for the eastern Sound at a January 2013 meeting, at which New York DOS and DEC representatives were present. Establishing the ZSF was a standard step in the designation process, outlined in EPA's 1986 "Ocean Dumping Site

Designation Delegation Handbook." AR-A 061, Designation Handbook at 77. Following the Handbook and prior practice, EPA explained it would use the same ZSF that all parties had agreed was reasonable with respect to the Western and Central designation processes—25 nautical miles, measured from known dredging centers. FSEIS at 891. EPA noted that metric was chosen to incorporate what the agency had learned through the Corps' analysis of dredging needs. *Id.*; Report of the Public Scoping Meetings at 222. EPA further justified the ZSF on the grounds that more distant sites would require longer, more expensive trips, increasing air pollution and elevating the risk of collisions and spills. EPA solicited objections to the ZSF, but no one, including Plaintiffs' representatives, raised any.[3] FSEIS at 891. It bears emphasizing that at this point, EPA was not determined to designate a site in the eastern Sound. Instead, as part of EPA's holistic approach to dredging across the entire Sound, and in tandem with the Corps' work with respect to the DMMP, the agency had simply decided to compare the viability of disposing material from the eastern Site at various candidates across the Sound.

EPA again memorialized its justification for the

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[3] New York argues that its current challenge to the ZSF was preserved by a statement made by Fishers Island resident Marguerite Purnell, asserting the ZSF was an "artificial construct." FSEIS at 4222. Putting aside that New York never expressed this view, Ms. Purnell's opinion did not require EPA to justify use of the ZSF, which the agency has never held out as a statutory or regulatory requirement. *See Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (comments must do more than state disagreement with an agency's premise or conclusions).

ZSF in its Draft Supplemental Environmental Impact Statement and Proposed Rule. *See* DSEIS at 98; *see also* AR-A 061 at 77. EPA highlighted that economic and environmental costs would be exacerbated by the inability of large barges to transport dredged material from many of the shallow, non-navigable areas that required dredging in the eastern Sound. *See* DSEIS at 98. Based on these considerations, EPA asserted that sites beyond the ZSF "would be economically and operationally infeasible." *Id*. New York again voiced no objection. New York's silence is particularly significant because it was clear that applying the ZSF ruled out the possibility that EPA would conclude that the Central, Western, and Rhode Island Sites were feasible alternatives to a site in the eastern Sound, regardless oftheir available capacity.

Consistent with the above, EPA concluded that without a new site in the eastern Sound, dredging would either be blocked—endangering public safety, economic activity, recreation and national security could suffer—or dredging would proceed, causing significant environmental and economic problems. Critically, the Central Site and the Rhode Island Site are 34.7 nautical miles and 44.5 nautical miles from New London Harbor, respectively. The Western Site is even farther, approximately 59 nautical miles west of New London Harbor. 81 Fed. Reg. 87820–01, 87822 (Dec. 6, 2016). EPA found that requiring dredging centers in the eastern Sound to transport their material to those sites "would likely render many dredging projects too expensive to conduct and needed dredging would not take place." FSEIS at 45. *See also* 81 Fed. Reg. at 87822.

The record plainly supports that conclusion. The ferry, shipbuilding, and boating industries in the eastern Sound depend on occasional dredging of the area's waterways to maintain the integrity of their routes. To that end, EPA received public comments stating that marinas on the Connecticut coastline have been essentially "choked off" by the lack of a nearby disposal site. Report of the Public Scoping Meetings at 77. The national security implications were even more stark. For example, the U.S. Navy Submarine Base is expected to generate 425,000 cubic yards of dredged material by 2025. The Corps estimated that disposal of that material at the Central Site would cost nearly $25 million, as opposed to less than $12 million at the Eastern Site. 81 Fed. Reg. at 87820-01. Disposal at the Western or Rhode Island Sites would be even more expensive in economic and environmental terms. It is unsurprising, therefore, that the U.S. Navy Submarine Base in New London, as well as Electric Boat, one of Connecticut's largest employers and maker of the Navy's *Columbia* class nuclear submarine, support designation of the Eastern Site. *See* Conn. Br. at 14-15. On this record, EPA has fulfilled its obligation to explain its reasoning, and the "court will not second-guess EPA's analysis nor 'undertake [its] own economic study.'" *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 565 (D.C. Cir. 2002) (alteration in original) (citation omitted). Against this backdrop, I turn to the two specific defects Plaintiffs argue undermine EPA's determination that a new site is needed in the eastern Sound.

c) Beneficial Use of Dredged Sand

Plaintiffs allege EPA undercounted the portion of dredged sand that would likely be eligible for beneficial uses such as beach replenishment. NY Br. at 45–47. This alleged defect relates to the updated estimate EPA requested from the Corps in response to comments from New York asserting the DMMP overestimated how much disposal capacity that the eastern Sound would need over the next 30 years. When New York made this same claim during the public comment period, EPA had two rebuttals. First, EPA reiterated that because the agency was concerned with ensuring operationally and economically feasible disposal for material dredged in the eastern Sound, the relevant consideration was how much sand would be dredged from the eastern Sound, not the entire Sound. FSEIS at 3528–3531; 81 Fed. Reg. at 87825–27. Second, EPA explained that in view of the uncertainties inherent in a 30-year projection, and the costs of underestimating disposal needs, the agency had taken a conservative approach to protect against that contingency. *Id*. Nonetheless, in response to these comments by New York and others, EPA requested that the Corps take a closer look at the projected dredging disposal needs in the eastern Sound. *See* 81 Fed. Reg. 87822; FSEIS at 78, 3415; AR-A 074 at 2.

The Corps' updated analysis, produced in September 2016, concluded that a site with only 20 million cubic yards would be sufficient:

> [T]he revised projected disposal capacity need of approximately 20 million cy is based on the need to accommodate approximately 12.5 million cy of suitable fine- grained sediment;

> 2.8 million cy from potential improvement (deepening) dredging projects; 1.8 million cy of shoal material resulting from extreme storm events; *1.1 million cy of sand (recognizing that beach nourishment may not be a practicable alternative for all 9.1 million cy of the projected sand)*; and 160,000 cy for the excavation of Confined Aquatic Disposal cells (for material unsuitable for open- water disposal); for a total of 18,364,500 cy; and a bulking factor of approximately 10 percent of the total, which brings the total to about 20 million cy.

81 Fed. Reg. at 87824 (emphasis added). EPA reviewed the Corps' updated projections and agreed that the eastern Sound could be serviced by a disposal site with 20 million cubic yards of capacity.

New York correctly points out, and EPA concedes, that whereas the agency had previously reasoned that all dredged sand *could* require open-water disposal, the Corps' September 2016 update assumed that only 12% dredged sand would likely require open-water disposal. New York suggests that "[i]f this assumption were applied to the original Sound-wide projection used to project disposal capacity need not only for an Eastern Sound site, but for the Western and Central Sites, the projection of dredged material relied on in the Proposed Rule would drop from 49.6 million cubic yards to 36.26 million cubic yards." New York Reply at 16. According to New York, EPA therefore took two different approaches to the same data point, rendering the

designation process arbitrary and capricious. NY Br. at 45–57. New York is incorrect.

EPA did not arbitrarily apply two different standards to the same data point at different times. Rather, EPA independently reviewed the Army Corps of Engineers' updated projections— which EPA requested in response to New York's concerns—and decided that based on those projections, the Eastern Site could be reduced from 22.6 to 20.2 million cubic yards. Without question, part of EPA's rationale was its conclusion that most of the sand dredged from the eastern basin could likely be used for beneficial uses like beach re-nourishment. But EPA's updated analysis was more refined than its initial review in other ways as well. For instance, it credited the Corps' updated finding that storms and other extreme weather events could produce *more* sediment than the DMMP initially projected. 81 Fed. Reg. at 87822, 87825–26; FSEIS at 3521–23, 3528–29. In addition, EPA credited the Corps' 10% volume bulking factor to more accurately account for how sediment behaves once dumped in an open-water site. *See* 81 Fed. Reg. at 87823–24; FSEIS at 3529–30; AR-A 074 at 7–8. At the same time, EPA realized that one million cubic yards of material projected to be dredged near Guilford could be omitted from the dredging needs estimate for eastern Long Island Sound because Guilford is located closer to the Central Site, and would likely be disposed of at that site, rather than the Eastern Site. FSEIS at 78; AR-A 074 at 3. Having responded to New York's comments regarding the eastern Sound's dredging needs, EPA was under no obligation to revisit its Sound-wide projection, which was not the basis for its determination that a new site

was needed in the eastern Sound. *See Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1063 (D.C. Cir. 2017) ("Agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives."). Forcing EPA to update the estimated amount of sand that may be beneficially repurposed Sound-wide "would be an idle and useless formality" without any impact on the Final Rule. *Li v. I.N.S.*, 453 F.3d 129, 136–37 (2d Cir. 2006) (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)).

d) The Rhode Island Site

The second defect Plaintiffs allege with respect to EPA's determination that a new site was needed in the eastern Sound is that EPA ignored the feasibility of relying on the Rhode Island Sound Disposal Site.[4] I have already agreed that EPA's ZSF was reasonable and need not retread that territory here. Nonetheless, I address the arguments New York raises with respect

[4] New York's first claim for relief alleges that EPA "excluded the possibility of disposing of any material from the eastern Sound at the Rhode Island Site, even though the Sound extends well into Rhode Island, and that site has ample remaining capacity and lies only 44 nautical miles from the New London Harbor dredging center." Amended Complaint ¶ 146. While New York's opening brief follows this argument, New York's Reply appears to broaden this allegation to encompass the Central and Western Sites, in addition to the Rhode Island Site. *See* New York Reply at 26. Because the Complaint governs, and because the Central and Western Sites are addressed in the discussion of New York's third claim, *see infra* at Section IV.B.3, my discussion here focuses on the Rhode Island Site.

to the Rhode Island Site specifically. First, New York argues EPA arbitrarily ignored the fact that the Rhode Island Site has previously been deemed a suitable option for disposal of dredged spoils from two portions of the Eastern Sound—Mystic Harbor and Little Narragansett Bay. Second, New York argues that EPA's decision not to rely on the Rhode Island Sound Site was contrary to the agency's own statement that it was designating the eastern Site to service, among other areas, Rhode Island's waters. Both arguments are without merit.

With respect to Mystic Harbor, the Corps estimated that federal maintenance and improvement projects will require dredging approximately 550,000 cubic yards of fine sediment suitable for open-water disposal over the next 30 years. DMMP at 5159. While Mystic Harbor is approximately seven nautical miles from the Eastern Site, it is considerably farther from the Rhode Island Site. DMMP at 5242. Unsurprisingly, when the Corps compared the estimated cost of disposing sediment from Mystic Harbor at the New London Site against alternatives, the Rhode Island Site was not even among the 15 most feasible alternative sites in terms of cost and available capacity. DMMP at 242. (That same alternative site screening estimated that disposal at the Central and Western Sites would be more than two and three times as expensive as disposal at the New London Site, respectively.) This finding was consistent with the Corps' estimate that disposing of sediment dredged from New London Harbor at the Central or Rhode Island Sound Sites would be 2.7 times the cost of using the New London Site. *Id.* at 255. Similarly, the Corps' analysis demonstrated that disposing of

fine-grained material from Little Narragansett Bay at the Rhode Island Site would cost 77% more than at the New London Site. *Id.* at 239. Beyond Mystic Harbor and Little Narragansett Bay, the Corps' analysis presents a clear picture that even though the Rhode Island Site has an estimated remaining capacity of 16.5 to 19.5 million cubic yards, it would be prohibitively expensive for federal and private dredgers in the eastern Sound. *Id.* at 164. As just one example, the Corps estimated that disposing of the 785,300 cubic yards of fine sediment from federal navigation maintenance projects in New London Harbor would be 269% more expensive at the Rhode Island Site. *Id.* at 576.

Finally, EPA simply did not designate the Eastern Site to serve all of Rhode Island waters. Instead, EPA designated the Eastern Site to serve the eastern Sound, which includes a small portion of Rhode Island's waters near Block Island Sound. *See* 81 Fed. Reg. at 24762; FSEIS at 63–64 (Fig. 1-2), 73. In fact, EPA omitted projects from this small area in its estimates for eastern Sound dredging disposal needs precisely because dredging centers there would likely use the Rhode Island Site instead of the Eastern Site. *See* 81 Fed. Reg. at 24750; FSEIS at 102. For these reasons, Plaintiffs' first claim fails.

2. Interference with Shipping and Navigation

Plaintiffs' second claim is that EPA failed to consider vessel traffic across the Eastern Site, and Cross Sound Ferry's route between New London and Orient Point in particular. Plaintiffs allege that EPA failed to respond to this same concern during the

public comment period, and that these defects violated EPA's obligation to apply certain general and specific criteria related to navigation, Sections 228.5(a) and 228.6(a)(8). *See* NY Br. at 50. Under Section 228.5(a), "[t]he dumping of materials into the ocean will be permitted only at sites or in areas selected to minimize the interference of disposal activities with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation." 40 C.F.R. § 228.5(a).[5] Next, under Section 228.6(a)(8), EPA is required to consider a proposed site's potential "[i]nterference with shipping, fishing, recreation, mineral extraction, desalination, fish and shellfish culture, areas of special scientific importance and other legitimate uses of the ocean." *Id.* § 228.6(a)(8).

EPA's Final Rule argues the site satisfies provisions for five reasons: (1) the site is not located in shipping lanes or any other region of heavy commercial or recreational navigation; (2) the site is not located in an area that is important for commercial or recreational fishing or shellfish harvesting; (3) use of the site would have minimal potential for

[5] New York and EPA disagree about whether Section 228.5(a) requires that the EPA "avoid" regions of heavy commercial or recreational navigation, or whether it merely requires the agency to select sites "to minimize the interference with" those regions. But to the extent the provision is ambiguous, this court defers to EPA's reasonable interpretation in view of the fact that the agency "conduct[ed] factual investigations . . . consult[ed] with affected parties, [and] consider[ed] how their experts have handled similar issues over the long course of administering a regulatory program." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (plurality opinion).

interfering with other existing or ongoing uses of the marine environment in and or around the ELDS, including lobster harvesting or fishing activities; (4) the adjacent, and now closed, NLDS has been used for dredged material disposal for many years and activity there has not significantly interfered with the uses identified in this regulation, but mariners in the area are accustomated to dealing with the presence of a dredged material disposal site; and (5) time-of-year restrictions imposed to protect fishery resources will typically limit dredged material disposal activities to the months of October through April, thus further minimizing any possibility of interference with the various maritime activities in the area. 81 Fed. Reg. at 87833.

The record plainly demonstrates that the designation of the Eastern Site comports with EPA's navigation-related regulatory criteria. Notably, although New York insists the site will threaten Cross Sound Ferry's route between New London and Orient Point, Cross Sound itself has filed an amicus brief—along with nearly a dozen other ferry and boating operators—rejecting that exact argument as "entirely false." ECF No. 78, Ferry Br. at 17. As Cross Sound states, "[f]erries are not confined to a discrete specific route, but rather operate in a three-mile area when travelling between Connecticut and New York, the exact route being different for every crossing depending on a variety of factors including weather conditions, visibility, sea state, state and magnitude of tide and current, *and marine traffic conditions*." *Id.* at 17–18 (emphasis added). Thus, any given ferry can adjust its route in the unlikely event that a scow is operating in its path. In fact, Cross Sound's ferries

never experienced any problems from the use of the New London Disposal Site, and there is no reason to expect the Eastern Site will present distinct challenges. *Id*. at 18.

Cross Sound and other navigation companies made their support for the Eastern Site known from the beginning of EPA's scoping and screening process. At an initial public scoping meeting, the representative of Cross Sound and other ferry companies commented:

> Economically, if dredging projects are to occur in Eastern Connecticut and there is not an Eastern Long Island Sound disposal area, those dredge spoils have to be towed to either the Central Long Island Sound disposal site or the Western Long Island Sound disposal site. The cost of that additional towing can more than double the cost of the dredging. That is the economic impact. The environmental impact of towing those dredge spoils across Long Island Sound can be measured in air quality impacts. To tow those dredge spoils a tug has to tow that scow. That tug burns diesel fuel. The amount of diesel fuel that it takes to tow a scow from Eastern Connecticut to these disposal sites, as compared to towing them right to an Eastern Long Island Sound disposal site, is significant.

Report of the Public Scoping Meetings at 76.[6] No one contested this comment or its clear implications

[6] Wronowski made these same points in a contemporaneous letter submitted to the EPA. AR-A 105 at 2.

regarding the need for a site in the eastern Sound. Thus, there is no evidence that EPA's determination that the Eastern Site would not interfere with such navigation was a "post hoc" or "convenient litigating position." *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 155 (2012) (quotation omitted). To the contrary, EPA's position is supported by multiple reliable sources, including Cross Sound itself.

Ignoring this evidence, New York focuses on a single map (the "Density Map") EPA used in public meetings in 2013, which New York argues misled the agency's consideration of navigation near the Eastern Site. New York asserts the Density Map misrepresented that data from 2009 was from 2012, and, separately, undercounted vessel traffic in the vicinity of the Eastern Site. NY MSJ at 52-59. These arguments are without merit.

When EPA presented the Density Map in May 2013, the agency accompanied the map with a note stating, "[t]he density grid was created using tracklines that were generated from the 2009 United States Automatic Identification System Database; the data grids represent only 339 days in 2009." FSEIS at 990. The meeting's attendees, including representatives from NY DOS, were on clear notice that the map was based on 2009 data, and made no objections or comments demanding more current information. EPA Br. at 56. Next, while the Density Map was used in the May 2013 to convey a snapshot of traffic patterns, it was not the basis for EPA's determination that the Eastern Site would accommodate regional navigation pursuant to the criteria under Sections 228.5 and 228.6. Indeed, in

support of that conclusion, EPA relied on an array of sources, including more current data provided by the Corps, the Coast Guard, and the ferry operators themselves. EPA Br. at 59–60. New York has not shown how EPA's reliance on these sources, much less the agency's conclusion that the Eastern Site posed no threat to navigation in the site's vicinity, was unreasonable. *See Baltimore Gas*, 462 U.S. at 103.

Finally, Plaintiffs have no answer to EPA's argument that time-of-year restrictions will ensure that scows will not interfere with navigation. These restrictions will limit dredge disposal at the Eastern Site to October through April, when ferry traffic is considerably lower. And during these months, notice will be provided to mariners in the area when disposal occurs. Combined with the fact that the shallowest disposal depth permitted at a designated site would be 59 feet, there is no reason to expect that the disposal site will present navigational challenges to the eastern Sound's boating and shipping communities. 81 Fed. Reg. at 87833; FSEIS at 43. On these facts, Plaintiffs' second claim is without merit.

3. EPA's Consideration of Previously Used Disposal Sites

Plaintiffs' third claim is that designation of the Eastern Site violated the MPRSA and was arbitrary and capricious because "it was feasible to designate the historically used Niantic Bay Site, or use the designated Western, Central, and Rhode Island Sites." Amended Complaint ¶¶ 48–49. Here, New York does not press its claim that EPA should have designated the Niantic Bay Disposal Site, but continues to assert that EPA arbitrarily excluded the

Rhode Island Site from consideration.[7] New York further argues that the agency disingenuously labeled the Eastern Site as a historically used site insofar as it incorporated a portion of the NLDS.

EPA responds first by reiterating that it was not feasible to designate the Western, Central, or Rhode Island Sites for disposal of material dredged in the eastern Sound. I agreed with EPA's reasoning to that effect with respect to Plaintiffs' first claim and do so again here. Next, EPA responds that this claim must fail because there is no requirement to designate available historically used sites. EPA is correct on this point as well.

Contrary to what Plaintiffs suggest, EPA's site selection criteria do not require the agency to designate historically used sites with remaining capacity regardless of other considerations. One of EPA's general site selection criterion is that the agency "will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used."[8] 40

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[7] EPA's April 2016 Proposed Rule indicated that EPA was considering the possibility of designating one or two additional dredged material disposal site alternatives within the ZSF—the Niantic Bay Disposal Site ("NBDS") and the Cornfield Shoals Disposal Site ("CSDS"). *See* 81 Fed. Reg. 24748, 24749. EPA considered designated these sites, individually or together, as either a substitute for, or a complement to, the Eastern Site. But EPA determined they were less suitable than the Eastern Site for a variety of reasons. Indeed, the public comment period elicited adamant opposition to designating the Niantic Bay Site. *See* FSEIS at 3699.

[8] EPA determined that because the continental shelf lies as far from the eastern Sound dredging centers as the WLDS, CLDS,

C.F.R. § 228.5(e). New York emphasizes the word "will," New York Br. 68, suggesting the provision constitutes a mandate, even though "will" is immediately qualified by the phrase "wherever feasible." New York argues that in interpreting feasibility under Section 228.5(e), EPA overemphasized economic cost, pointing to the following passage from EPA's 1986 Ocean Dumping Site Designation Delegation Handbook:

> The distance from the dredge area to dump site affects the costs of ocean disposal operations. However, cost of disposal cannot be the main consideration used for locating a site. Alternate siting at greater distances from the dredging area must be considered when they offer environmental benefits at reasonable increases in costs.

AR-A-61, Designation Handbook at 77. New York argues that particularly in light of prior instances of eastern Sound dredging centers shipping material to the Central and Western Sites,[9] EPA arbitrarily ruled out relying on these sites in the future.

But New York's reliance on the Designation Handbook is misplaced. In a nearby passage, the Handbook also states that "[f]or new sites, the best site will be selected, with *the best site being defined as*

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and RISDS, a site there would be similarly impractical. FSEIS at 45.

[9] I observe that prior disposal of certain eastern Sound material at the Central and Western Sites indicates nothing about whether other projects were stalled or cancelled, let alone whether those sites are viable options going forward.

the candidate site that has the least adverse environmental impact at acceptable economic cost." *Id.* at 60 (emphasis added). Read in its entirety, the Designation Handbook supports EPA's holistic approach to its regulatory criteria. As explained above, *see supra* at Section IV.B.1, these considerations reasonably supported EPA's conclusion that "candidate disposal sites more than 25 nautical miles (nmi) (46 km) from a dredging center in the eastern Long Island Sound were determined to be neither economically nor operationally feasible." DSEIS at 98. *See also* 81 Fed. Reg. at 24749–50, 24762. Incidentally, the only way EPA could have come to a different conclusion would have been to ignore the dredging needs of eastern Sound communities.

Turning to the historically-used sites *within* the ZSF, New York's claim is difficult to square with the fact that EPA shifted the Eastern Site westward precisely because New York objected to adding dredged material to the existing New London Site. EPA Response to New York Objection at 15. After New York made this objection:

> EPA decided to shift the boundaries of the ELDS to the west so that the site would be entirely outside of the submarine transit corridor into the Thames River, the existing [New London Disposal Site], and New York state waters, as well as farther from Fishers Island . . . EPA also adjusted the boundaries of the ELDS to exclude two hard-bottom areas that have the potential to provide relatively more valuable marine habitat. These

> modifications to the site boundaries reduced the area of the ELDS from two square nautical miles (nmi^2) to approximately a.3 nmi^2), and the capacity of the site from approximately 27 mcy to 20 mcy.

Id. In addition, EPA's exclusion of certain portions of the New London Site aimed to protect sensitive lobster habitat close to Fishers Island. 81 Fed. Reg. at 87833, 87838.

In sum, EPA properly balanced the preference for historic sites against the other general and specific criteria enumerated in Sections 228.5 and 228.6, which reflect the full range of environmental values embedded in the MPRSA. 81 Fed. Reg. 87822–23.

4. EPA's Consideration of Non-Federal Projects Under 25,000 cy

Plaintiffs' fourth claim is that EPA's failure to consider the environmental impacts of dredged materials exempt from MPRSA standards rendered the designation of the Eastern Site procedurally flawed. NY Br. at 69. Specifically, Plaintiffs assert EPA ignored dredged material that will be sourced from non-federal projects of less than 25,000 cubic yards, triggering only the testing standards of the Clean Water Act, and not the MPRSA standards that govern disposal of all projects over 25,000 cubic yards. Plaintiffs further insist that due to this lapse in EPA's in decision- making there is a "very real possibility that millions of cubic yards of dredge spoils destined for the Eastern Site will be screened for suitability under the Clean Water Act, not the [MPRSA]." *Id*. at 70. Finally, Plaintiffs argue that EPA's alleged failure

to account for the smaller non-federal projects undermines EPA's "assumption" that all dredged material dumped at the Eastern Site will meet the standards of the MPRSA. *Id*.

Southold Commissioner Scott Russell raised the substance of this claim in a public hearing on May 25, 2016. Russell asked three questions: (1) what is the sampling protocol of the sediments from non-Federal facilities; (2) how do the Federal and non-Federal sediment testing protocols compare to each other; and (3) what are the quality control measures on testing of non-Federal projects? FSEIS at 3696. Russell also submitted written comments and questions on behalf of Southold.

EPA responded to Southold's comments, and explained the overlapping regulatory structures of the CWA and MPRSA as follows:

> The commenter asks if the protocols are the same for non-federal and federal projects. . . [and] expresses concern that material from smaller non-federal dredging projects might still be placed in open water with management steps under Section 404 of the Clean Water Act (CWA), despite the material's potential to cause adverse impacts. In addition, [he] is concerned that non-federal projects may be "segmented" into smaller projects involving 25,000 cubic yards or less in order to remain below the qualifying threshold for the MPRSA and to avoid addressing the cumulative adverse impacts of multiple events . . . The evaluation of dredged material proposed for open-water

> disposal is governed by the requirements of USEPA's sediment quality criteria regulations found at 40 CFR Part 227 as well as a set of memoranda or "manuals" developed under the regulation to provide more detailed guidance . . . The manuals provide national technical guidance for determining the suitability of dredged material for disposal in ocean and inland waters through physical, chemical, and biological evaluations. The manuals recommend standardized testing procedures and, among other things, provide guidance on choosing appropriate test organisms for bioassay testing . . . In addition, the Regional Implementation Manual (RIM), consistent with the Green Book and the Inland Testing Manual, provides specific testing and evaluation methods for dredging projects in New England and outlines the USEPA and USACE coordination process.

FSEIS at 3550–3553. Plaintiffs' claim that EPA failed to consider the disparate testing regimes under the CWA is impossible to square with EPA's response to Southold's comments.

There is no basis for New York's claim that EPA's treatment of potential small, non-federal dredging was procedurally defective. Under the Ambro Amendment, it is clear that the MPRSA applies to the dumping of dredged material by federal agencies, or by private parties dumping more than 25,000 cubic yards of dredged material. But it is equally clear that Congress left testing of sediment proposed through smaller, non-federal projects to the

regulatory framework of the Clean Water Act. That is not to say that Congress failed to consider small non-federal projects. To the contrary, Representative Ambro himself noted that federal projects and private operations dredging more than 25,000 cubic yards comprised the overwhelming majority of dredging activity in the Sound. *Town of Huntington*, 859 F.2d at 1139 (citing 126 Cong. Rec. H34063 (Dec. 13, 1980) (remarks of Rep. Ambro)). Thus, to the extent the MPRSA may demand more stringent testing than the CWA, that is "because federal law makes it so." Conn. Br. at at 33. EPA simply enforced the mandatory limits of federal law, which in general mean "that disposal in the Long Island Sound is controlled by *more* stringent standards than apply to dredged material disposal anywhere else." *Id*. To the extent New York disagrees with the scope of the MPRSA, such disagreement does not constitute a viable legal claim.

Moreover, throughout the screening and designation process, EPA repeatedly pointed out that Section 404 of the Clean Water Act would cover disposal of dredged material from smaller non-federal projects. Plaintiffs offer no substantive attack on the Clean Water Act's testing standards, other than to say they are deficient because they are less stringent than those under MPRSA. New York also overlooks the permitting process's gatekeeping function. Section 1344(b) of the CWA directs the Corps to issue permits for discharges of dredged or fill material based on the application of EPA guidelines, published at 40 C.F.R. Part 230. These guidelines establish that: (1) no discharge will be permitted if "there is a practicable alternative to the proposed discharge which would

have less adverse impact on the aquatic ecosystems, so long as the alternative does not have other significant adverse environmental consequences," 40 C.F.R. § 230.10(a); and (2) "no discharge . . . shall be permitted which will cause or contribute to significant degradation of the waters of the United States." *Id.* § 230.10(c). Thus, under both the MPRSA and CWA, disposal cannot take place until a project-specific review has been conducted and the required permit or authorization has been issued. And as New York concedes, EPA consults "the highly technical EPA/Army Corps Regional Implementation Manual for the Evaluation of Dredged Materials Proposed for Disposal in New England Waters, a 2004 agency guidance manual," when making such decisions. NY Br. at 77; AR-A-208. On this record, it is unclear what else EPA could have done beyond explaining the regulatory framework related to sediment testing and incorporating the Regional Implementation Manual's protocols into its decision-making process. Indeed, New York concurred in site use restrictions for the Central and Western Sites that recognized the Ambro Amendment's scope *and* limitations. 40 C.F.R. §§ 228.15(b)(4)(vi), 228.15(b)(5)(vi).

Finally, Plaintiffs' concerns about segmentation and cumulative impacts are premature. Permit actions under Section 404 of the CWA trigger NEPA review, providing opportunities to raise these exact issues. DSEIS at 58. To the extent segmentation of non-federal projects poses a hypothetical risk, the courts stand ready to guard against such gamesmanship if and when it arises. *See Town of Huntington*, 859 F.2d at 1140 (voicing "serious doubts as to whether the Corps should have considered the

[dredging] Applicants separately" where the total yardage of waste collected among them would exceed 25,000 cubic yards). Until that juncture, Plaintiffs cannot complain that EPA abided by the applicable statutory scheme. *Pub. Citizen, Inc.*, 988 F.2d at 197 (D.C. Cir. 1993) (agencies need not respond to comments raising speculative problems).

C. Southold's Additional APA Arguments

In addition to joining New York's claims, Southold argues EPA arbitrarily and capriciously failed to respond to certain comments submitted by Town Supervisor Russell, Fishers Island resident Marguerite Purnell, and the Fishers Island Conservancy. An agency "need not address every comment, but it must respond in a reasoned manner to those that raise significant problems." *City of Waukesha v. E.P.A.,* 320 F.3d 228, 257 (D.C. Cir. 2003) (quoting *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997)). Thus, when a public comment raises a major substantive concern, an agency's failure to respond can render a decision arbitrary and capricious. *Sierra Club v. E.P.A.*, 863 F.3d 834, 838 (D.C. Cir. 2017). I have reviewed the record in detail and disagree with Southold's claims. EPA sufficiently responded to each of the comments and objections raised by Southold, Purnell, and Fishers Island. Many of the concerns Southold raises echo points dealt with above, and I need not retread that territory here. Nonetheless, to the extent Southold's claims raise distinct points, I briefly discuss why they are without merit here.

First, EPA explained why the site management plan for the Eastern Site does not include an in-depth

overview of remediation protocols. Southold asked EPA whether EPA's economic analysis included potential remediation and bonding costs, and whether the agency was going to include remediation plans in its rule designating the Eastern Site. EPA squarely responded to these questions, explaining that while remediation and bonding were outside the scope of designation, the site's management plan would include protocols for discerning whether post-disposal remediation may be needed, and what form such remediation could take. This answer fulfilled EPA's obligations under the APA. *See Cement Kiln Recycling Coal. v. E.P.A.*, 493 F.3d 207, 225– 26 (D.C. Cir. 2007).

Second, EPA sufficiently addressed Southold's concerns regarding EPA's reliance on testing manuals from the 1990s. EPA explained that "regardless of their age, these manuals continue to be relied upon and are scientifically valid and protective of the environment." EPA Br. at 94. Southold has failed to explain why the age of these manuals renders the agency's reliance upon them defective, or which resources the agency should have consulted in their place.

Third, EPA thoroughly responded to concerns—raised by Southold, Ms. Purnell, and the Fisher Island Conservancy—regarding the potential cumulative effects of toxic sediment disposal at the Eastern Site. As a general matter, EPA responded that "sediment quality criteria regulations found at 40 CFR Part 227 will preclude the placement of toxic material" at the Eastern Site. FSEIS at 3553. EPA further explained that "[t]oxicity tests are conducted on benthic organisms and risk assessments are

conducted using lobster, fish, clam, and worm data, and this work supports the designation of the ELDS." *Id*. The FSEIS also discusses how Eastern Site will not adversely impact benthic organisms, lobsters, fish, or clams because the site is not home to substantial populations of those species. Indeed, EPA excluded preferred lobster habitats from the final Eastern Site, which has a flat and sandy bottom, without the structures that support diverse fish and shellfish populations. 81 Fed. Reg. at 87824.

Fourth, EPA sufficiently responded to concerns raised by the Fishers Island Conservancy regarding the possible dispersion of contaminated sediment during the disposal process. Specifically, a representative of the Conservancy asserted that disposal of sediment in the shallow waters near Fishers Island would lead to an unacceptable risk of contaminants dispersing into the water column before reaching the seafloor. Southold Br. at 49. Again, EPA explained that the permitting and testing processes would effectively screen out toxic sediments in dredged material. *See* FSEIS at 50, 52-55, 61, 3518–19. And more specifically, EPA determined that "99-100 percent of sand, silt, and clumps would reach the seafloor under both mean and high flow conditions. Under high flow conditions, 83 percent of the clay would reach the seafloor during disposal operations, while 96 percent of the clay would reach the seafloor under man flow conditions." *Id*. at 3549. EPA's analysis also demonstrated that precisely because the Eastern Site is relatively shallow, it contains less essential fish habitat than the (deeper) previously-used sites in the eastern Sound. *See* AR-15, Essential Fish Habitat Assessment. In addition, the two

endangered fish who have been found in the vicinity of the Eastern Site, the shortnose sturgeon and the Atlantic sturgeon, are highly mobile species that are not expected to be impacted by occasional disposal activities. AR-16, Draft Eastern Site SMMP at 27. Finally, EPA explained that after each disposal, the Corps compares the conditions of the seafloor to pre-disposal conditions, ensuring the Corps learns how much material was dispersed in the process. *Id.* Southold offers no explanation for how this process is deficient. For these reasons, Southold's claims are without merit.

D. Plaintiffs' CZMA Claims

The last claim in this action is that EPA's designation of the Eastern Site violated the APA because the designation of the Eastern Site was "not in accordance" with the CZMA, which is to say it was not "carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies" of New York's federally-approved coastal management program. Amended Complaint ¶¶ 173-77.

> NOAA regulations under the CZMA explain that:
>
> An enforceable policy shall contain standards of sufficient specificity to guide public and private uses. Enforceable policies need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency. State agencies may identify management measures which are based on enforceable policies, and, if

> implemented, would allow the activity to be conducted consistent with the enforceable policies of the program.

15 C.F.R. § 930.11(h).

Under the CZMA, all federal agency activities that affect a land or water use or natural resource in a coastal zone must be "carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies" of any state coastal management program which encompasses that coastal zone and which has been approved by the U.S. Secretary of Commerce. 16 U.S.C. § 1456(c)(1)(A). While long-term site designation does not itself permit the disposal of any material, such disposal—and its secondary effects on coastal uses—is an "indirect" effect that triggers CZMA obligations under Department of Commerce regulations. 15 C.F.R. § 930.11(g).

There is no dispute EPA met its procedural obligations to determine whether the Eastern Site was consistent to the maximum extent practicable with both New York's CMP and Long Island's WRP. Consistent with CZMA § 307(c), in July 2016, shortly after EPA and New York came to an agreement that the designation of the Western and Central Sites was consistent with New York's CMP, EPA delivered its 50-page consistency determination to the NY DOS. AR-18. New York responded with its objections on October 3, 2016, and EPA responded to those objections in a 59-page letter dated November 4, 2016. Although EPA's response expressly noted that the agency had adjusted the Eastern Site in a good-faith effort to ameliorate New York's concerns, New

York apparently did not reply one way or another to the agency's subsequent outreach.

Here, Plaintiffs renew many of the arguments raised in New York's objections, and allege the designation process for the Eastern Site was inconsistent with the following five policies: Policy 5 of the Long Island Sound and Southold Programs, to Protect and Improve Water Quality and Supply; Policy 6 of the Long Island Sound and Southold Programs, to Protect and Restore the Quality of Function of the Ecosystem; Policy 8 of both Programs, to Minimize Environmental Degradation from Solid Waste and Hazardous Substances and Wastes; Policy 10 of both Programs, to Protect Water-Dependent Uses; and Policy 11 of both Programs, to Promote the Sustainable Use of Living Marine Resources.

As a general matter, New York is correct that its CZMA claim is adjudicated under a different standard than its MPRSA claims, and in theory, neither is dispositive of the other. Nonetheless, New York rests its CZMA claim largely on the "same conduct and actions upon which New York's first four claims for relief" are based. NY Br. at 84. I rejected those claims above and reject the same arguments here. Proceeding from that baseline, New York has not offered any additional viable explanations for how EPA's designation of the Eastern Site is inconsistent with New York, Long Island, or Southold's Programs. This is especially significant in light of regulations requiring that "enforceable policies" "contain standards of sufficient specificity to guide public and private uses." 15 C.F.R. § 930.11(h). In the absence of such standards, accepting New York's view of what

constitutes a violation of their policies would effectively transform their coastal programs into a veto over otherwise lawful agency actions.

In addition, New York's repeated assertion that the previously unused portion of the Eastern Site represents an "unwarranted expansion" of the New London Site that may adversely affect environmental conditions is without merit. NY Br. at 84–88. Throughout the designation process, EPA emphasized its view that the historically used portion of the NLDS, combined with the new NL-Wa and NL-Wb areas, would constitute a suitable disposal site precisely because it is a containment site, from which disposed material will not depart. EPA supported this position with a series of studies looking at the stability of sediment in the water column and near the seafloor.

See, e.g., AR-10 (FSEIS App. C, Physical Oceanography Study). Likewise, as the FSEIS points out:

> concerns about the disposal of toxic sediments at the NLDS and other Long Island Sound disposal sites also have been addressed by the [Corps]'s Disposal Area Monitoring System (DAMOS), which has collected data at these sites 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. These reports indicate that toxic sediments are not being placed at open-water disposal sites. Moreover, 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. Monitoring at the NLDS has verified that past management practices have been successful in adequately controlling any potential adverse impacts to water quality and benthic habitat. With the nearly 40-year record of surveys, these investigations also have also demonstrated long-term stability of the mounds at all three containment sites in Long Island Sound (i.e., WLDS, CLDS, and NLDS).

FSEIS at 3519 (response to comment 2).

Finally, New York was directly involved in the development of the site use restrictions for the Central and Western Sites and concurred that they were satisfactory under the New York CMP. Plaintiffs offer no good explanation for why those same restrictions are all of a sudden violative in the context of the Eastern Site. Meanwhile, EPA has explained that the uniformity of site restrictions across the entire Sound will contribute to providing "a rational predictable, and consistent regulatory regime to the public." EPA Response to New York Objection at 16.

On this record, there is no doubt that EPA's consistency determination "was the result of a thorough and reasonable analysis of the relevant factors and different alternatives available." *Matter of Defend H20 v. Town Bd. of the Town of E. Hampton*, 147 F. Supp. 3d 80, 111 (E.D.N.Y. 2015). *See also Karpova v. Snow*, 497 F.3d 262, 268 (2d Cir.2007) ("[S]o long as the agency examines the relevant data

and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned.").

CONCLUSION

So long as there are practical limits to the beneficial uses of dredged material, there will be fierce disputes over where such material goes. In adjudicating this particular dispute, I neither endorse the practice of open-water disposal, nor discourage EPA from pursuing more environmentally sustainable alternatives. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 (2020). Instead, I simply conclude that, in designating the Eastern Site, EPA based its findings on substantial evidence, and followed the agency's obligations under the law. *See Jewell*, 815 F.3d at 9. For these reasons, Plaintiffs' and Plaintiffs-Intervenors' motions for summary judgment are denied, and Defendants' and Defendant-Intervenor's cross- motions for summary judgment are granted.

SO ORDERED.

Edward R. Korman

Brooklyn, New York
July 17, 2020

Edward R. Korman
United States District Judge

Appendix C — Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing, dated November 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-two,

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Town of Southold,

Plaintiff-Intervenor-Appellant,

Rossana Rosado, in her official capacity as New York State Secretary of State, Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, State of New York,

Plaintiffs - Appellants,

County of Suffolk,

Plaintiff - Intervenor,

v.

ORDER

Docket Nos.
20-3188 (Lead)
20-3189 (CON)

Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection of the United States Environmental Protection Agency, United States Environmental Protection Agency, Dennis Deziel, in his official capacity as Regional Administrator of United States Environmental Protection Agency Region 1,

Defendants - Appellees,

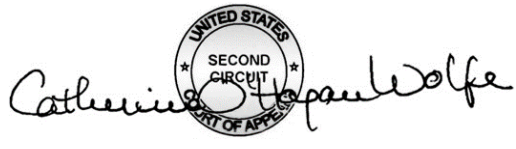
Connecticut Department of Energy and Environmental Protection,

Defendant - Intervenor - Appellee.

Appellant, Town of Southold, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED, that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



Appendix D —
Pertinent Statutes and Regulations

§ 930.1 Overall objectives., 15 C.F.R. § 930.1

Code of Federal Regulations
Title 15. Commerce and Foreign Trade
Subtitle B. Regulations Relating to Commerce and Foreign Trade
Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)
Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos) Subpart A. General Information

15 C.F.R. § 930.1

§ 930.1 Overall objectives.

Effective: February 6, 2006

Currentness

The objectives of this part are:

(a) To describe the obligations of all parties who are required to comply with the federal consistency requirement of the Coastal Zone Management Act;

(b) To implement the federal consistency requirement in a manner which strikes a balance between the need to ensure consistency for federal actions affecting any coastal use or resource with the enforceable policies of approved management programs and the importance of federal activities (the term "federal action" includes all types of activities subject to the federal consistency

requirement under subparts C, D, E, F and I of this part.);

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the federal consistency requirement of the Act are satisfied. Federal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, and may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable policies are considered. State agencies should participate in the administrative processes of federal agencies concerning federal actions that may be subject to state review under subparts C, D, E, F and I of this part.

(d) To interpret significant terms in the Act and this part;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the enforceable policies of approved management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved management programs; and

(g) To provide procedures which permit the Secretary to review federal license or permit

activities, or federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security.

Credits

[71 FR 826, Jan. 5, 2006]

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (1)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.4 Conditional concurrences.,
15 C.F.R. § 930.4

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart A. General Information

15 C.F.R. § 930.4

§ 930.4 Conditional concurrences.

Currentness

(a) Federal agencies, applicants, persons and applicant agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under subpart C or in a Federal agency's approval under subparts D, E, F or I of this part, would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific

enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable subpart and notify, pursuant to § 930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of the State agency's conditional concurrence/objection or 30 days after receiving notice from the Federal agency that the application will not be approved as amended by the State agency's conditions; and

(2) The Federal agency (for subpart C), applicant (for subparts D and I), person (for subpart E) or applicant agency (for subpart F) shall modify the applicable plan, project proposal, or application to the Federal agency pursuant to the State agency's conditions. The Federal agency, applicant, person or applicant agency shall immediately notify the State agency if the State agency's conditions are not acceptable; and

(3) The Federal agency (for subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions.

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable subpart.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (1)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.5 State enforcement action.,
15 C.F.R. § 930.5

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart A. General Information

15 C.F.R. § 930.5

§ 930.5 State enforcement action.

Currentness

The regulations in this part are not intended in any way to alter or limit other legal remedies, including judicial review or State enforcement, otherwise available. State agencies and Federal agencies should first use the various remedial action and mediation sections of this part to resolve their differences or to enforce State agency concurrences or objections.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.6 State agency responsibility.,
15 C.F.R. § 930.6

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart A. General Information

15 C.F.R. § 930.6

§ 930.6 State agency responsibility.

Currentness

(a) This section describes the responsibilities of the "State agency" described in § 930.11(o). A designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State's management program, efficiently coordinate all State coastal management requirements, and to provide a single point of contact for Federal agencies and the public to discuss consistency issues. Any appointment by the State agency of the State's consistency responsibilities to a designee agency must be described in the State's management program. In the absence of such description, all consistency

determinations, consistency certifications and federal assistance proposals shall be sent to and reviewed by the State agency. A State may have two State agencies designated pursuant to § 306(d)(6) of the Act where the State has two geographically separate federally- approved management programs.

(b) The State agency is responsible for commenting on and concurring with or objecting to Federal agency consistency determinations and negative determinations (see subpart C of this part), consistency certifications for federal licenses, permits, and Outer Continental Shelf plans (see subparts D, E and I of this part), and reviewing the consistency of federal assistance activities proposed by applicant agencies (see subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies, and, where applicable, the public. Thereafter, only the State agency is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination, a consistency certification, or determine the consistency of a proposed federal assistance activity.

(c) If described in a State's management program, the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met. The State

agency shall monitor such permits issued by another State agency.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (1)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.30 Objectives., 15 C.F.R. § 930.30

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.30

§ 930.30 Objectives.

Currentness

The provisions of this subpart are intended to assure that all Federal agency activities including development projects affecting any coastal use or resource will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for Federal agency activities having interstate coastal effects.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.31 Federal agency activity.,
15 C.F.R. § 930.31

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.31

§ 930.31 Federal agency activity.

Effective: February 6, 2006

Currentness

(a) The term "Federal agency activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term "Federal agency activity" includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. "Federal agency activity" does not include the issuance of a federal license or permit to an

applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

(b) The term federal "development project" means a Federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource.

(c) The Federal agency activity category is a residual category for federal actions that are not covered under subparts D, E, or F of this part.

(d) A general permit proposed by a Federal agency is subject to this subpart if the general permit does not involve case-by- case or individual issuance of a license or permit by a Federal agency. When proposing a general permit, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions, based on specific enforceable policies, that would permit the State agency to concur with the Federal agency's consistency determination. State agency concurrence shall remove the need for the State agency to review individual uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, pursuant to the consistent to the maximum extent practicable standard in § 930.32, incorporate State conditions into the general permit. If the State agency's conditions are not incorporated into the general permit or a State agency objects to the

general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not available for use in that State unless an applicant under subpart D of this part or a person under subpart E of this part, who wants to use the general permit in that State provides the State agency with a consistency certification under subpart D of this part and the State agency concurs. When subpart D or E of this part applies, all provisions of the relevant subpart apply.

(e) The terms "Federal agency activity" and "Federal development project" also include modifications of any such activity or development project which affect any coastal use or resource, provided that, in the case of modifications of an activity or development project which the State agency has previously reviewed, the effect on any coastal use or resource is substantially different than those previously reviewed by the State agency.

Credits

[71 FR 826, Jan. 5, 2006]

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (4)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

End of Document

§ 930.32 Consistent to the maximum extent practicable., 15 C.F.R. § 930.32

Code of Federal Regulations

Title 15. Commerce and Foreign Trade

Subtitle B. Regulations Relating to Commerce and Foreign Trade

Chapter IX. National Oceanic and Atmospheric Administration, Department of Commerce
Subchapter B. Ocean and Coastal Resource Management (Refs & Annos)

Part 930. Federal Consistency with Approved Coastal Management Programs (Refs & Annos)

Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.32

§ 930.32 Consistent to the maximum extent practicable.

Currentness

(a)(1) The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

(2) Section 307(e) of the Act does not relieve Federal agencies of the consistency requirements under the Act. The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable

policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates. If a Federal agency asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program.

(3) For the purpose of determining consistent to the maximum extent practicable under paragraphs (a)(1) and (2) of this section, federal legal authority includes Federal appropriation Acts if the appropriation Act includes language that specifically prohibits full consistency with specific enforceable policies of management programs. Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the Act (16 U.S.C. 1456(c)(1)(B)). In cases where the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency's budget and

planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of an emergency or other similar unforeseen circumstance ("exigent circumstance"), which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Any deviation shall be the minimum necessary to address the exigent circumstance. Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the exigent circumstance allows. Federal agencies shall consult with State agencies to the extent that an exigent circumstance allows and shall attempt to seek State agency concurrence prior to addressing the exigent circumstance. Once the exigent circumstances have passed, and if the Federal agency is still carrying out an activity with coastal effects, Federal agencies shall comply with all applicable provisions of this subpart to ensure that the activity is consistent to the maximum extent practicable with the enforceable policies of management programs. Once the Federal agency has addressed the exigent circumstance or

completed its emergency response activities, it shall provide the State agency with a description of its actions and their coastal effects.

(c) A classified activity that affects any coastal use or resource is not exempt from the requirements of this subpart, unless the activity is exempted by the President under section 307(c)(1)(B) of the Act. Under the consistent to the maximum extent practicable standard, the Federal agency shall provide to the State agency a description of the project and coastal effects that it is legally permitted to release or does not otherwise breach the classified nature of the activity. Even when a Federal agency may not be able to disclose project information, the Federal agency shall conduct the classified activity consistent to the maximum extent practicable with the enforceable policies of management programs. The term classified means to protect from disclosure national security information concerning the national defense or foreign policy, provided that the information has been properly classified in accordance with the substantive and procedural requirements of an executive order. Federal and State agencies are encouraged to agree on a qualified third party(ies) with appropriate security clearance(s) to review classified information and to provide non-classified comments regarding the activity's reasonably foreseeable coastal effects.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (6)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.33 Identifying Federal agency activities affecting any..., 15 C.F.R. § 930.33

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.33

§ 930.33 Identifying Federal agency activities affecting any coastal use or resource.

Currentness

(a) Federal agencies shall determine which of their activities affect any coastal use or resource of States with approved management programs.

(1) Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource. An action which has minimal or no environmental effects may still have effects on a coastal use (e.g., effects on public access and recreational opportunities, protection of historic property) or a coastal resource, if the activity initiates an event or series of events where coastal effects are reasonably foreseeable. Therefore, Federal

agencies shall, in making a determination of effects, review relevant management program enforceable policies as part of determining effects on any coastal use or resource.

(2) If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource, and a negative determination under § 930.35 is not required, then the Federal agency is not required to coordinate with State agencies under section 307 of the Act.

(3)(i) De minimis Federal agency activities. Federal agencies are encouraged to review their activities, other than development projects within the coastal zone, to identify de minimis activities, and request State agency concurrence that these de minimis activities should not be subject to further State agency review. De minimis activities shall only be excluded from State agency review if a Federal agency and State agency have agreed. The State agency shall provide for public participation under section 306(d)(14) of the Act when reviewing the Federal agency's de minimis activity request. If the State agency objects to the Federal agency's de minimis finding then the Federal agency must provide the State agency with either a negative determination or a consistency determination pursuant to this subpart. OCRM is available to facilitate a Federal agency's request.

(ii) De minimis activities are activities that are expected to have insignificant direct or indirect

(cumulative and secondary) coastal effects and which the State agency concurs are de minimis.

(4) Environmentally beneficial activities. The State agency and Federal agencies may agree to exclude environmentally beneficial Federal agency activities (either on a case-by-case basis or for a category of activities) from further State agency consistency review. Environmentally beneficial activity means an activity that protects, preserves, or restores the natural resources of the coastal zone. The State agency shall provide for public participation under section 306(d)(14) of the Act for the State agency's consideration of whether to exclude environmentally beneficial activities.

(5) General consistency determinations, phased consistency determinations, and national or regional consistency determinations under § 930.36 are also available to facilitate federal–State coordination.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities affecting any coastal use or resource. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they affect any coastal use or resource.

(c) Federal agency activities and development projects outside of the coastal zone, are subject to Federal agency review to determine whether they affect any coastal use or resource.

(d) Federal agencies shall broadly construe the effects test to provide State agencies with a consistency determination under §930.34 and not a negative

determination under § 930.35 or other determinations of no effects. Early coordination and cooperation between a Federal agency and the State agency can enable the parties to focus their efforts on particular Federal agency activities of concern to the State agency.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (5)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.34 Federal and State agency coordination., 15 C.F.R. § 930.34

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.34

§ 930.34 Federal and State agency coordination.

Currentness

(a)(1) Federal agencies shall provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource. To facilitate State agency review, Federal agencies should coordinate with the State agency prior to providing the determination.

(2) Use of existing procedures. Federal agencies are encouraged to coordinate and consult with State agencies through use of existing procedures in order to avoid waste, duplication of effort, and to reduce Federal and State agency administrative burdens. Where necessary, these existing procedures should be modified to facilitate coordination and consultation under

the Act.

(b) Listed activities. State agencies are strongly encouraged to list in their management programs Federal agency activities which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. Listed Federal agency activities shall be described in terms of the specific type of activity involved (e.g., federal reclamation projects). In the event the State agency chooses to describe Federal agency activities that occur outside of the coastal zone, which the State agency believes will have reasonably foreseeable coastal effects, it shall also describe the geographic location of such activities (e.g., reclamation projects in coastal floodplains).

(c) Unlisted activities. State agencies should monitor unlisted Federal agency activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, and the Federal Register) and should notify Federal agencies of unlisted Federal agency activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. The provisions in paragraphs (b) and (c) of this section are recommended rather than mandatory procedures for facilitating federal-State coordination of Federal agency activities which affect any coastal use or resource. State agency notification to the Federal agency (by listed or unlisted notification) is neither a substitute for nor does it eliminate Federal agency responsibility to comply

with the consistency requirement, and to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal agency activities which the Federal agency finds affect any coastal use or resource, regardless of whether the State agency has listed the activity or notified the Federal agency through case-by-case monitoring.

(d) State guidance and assistance to Federal agencies. As a preliminary matter, a decision that a Federal agency activity affects any coastal use or resource should lead to early consultation with the State agency (i.e., before the required 90–day period). Federal agencies should obtain the views and assistance of the State agency regarding the means for determining that the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the enforceable policies of a management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document. Upon request by the Federal agency, the State agency shall identify any enforceable policies applicable to the proposed activity based upon the information provided to the State agency at the time of the request.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (2)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.35 Negative determinations for proposed activities., 15 C.F.R. § 930.35

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.35

§ 930.35 Negative determinations for proposed activities.

Effective: February 6, 2006

Currentness

(a) If a Federal agency determines that there will not be coastal effects, then the Federal agency shall provide the State agencies with a negative determination for a Federal agency activity:

(1) Identified by a State agency on its list, as described in § 930.34(b), or through case-by-case monitoring of unlisted activities; or

(2) Which is the same as or is similar to activities for which consistency determinations have been prepared in the past; or

(3) For which the Federal agency undertook a

thorough consistency assessment and developed initial findings on the coastal effects of the activity.

(b) Content of a negative determination. A negative determination may be submitted to State agencies in any written form so long as it contains a brief description of the activity, the activity's location and the basis for the Federal agency's determination that the activity will not affect any coastal use or resource. In determining effects, Federal agencies shall follow § 930.33(a) (1), including an evaluation of the relevant enforceable policies of a management program and include the evaluation in the negative determination. The level of detail in the Federal agency's analysis may vary depending on the scope and complexity of the activity and issues raised by the State agency, but shall be sufficient for the State agency to evaluate whether coastal effects are reasonably foreseeable.

(c) A negative determination under paragraph (a) of this section shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule. A State agency is not obligated to respond to a negative determination. If a State agency does not respond to a Federal agency's negative determination within 60 days, State agency concurrence with the negative determination shall be presumed. State agency concurrence shall not be presumed in cases where the State agency, within the 60–day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or

less. If a State agency objects to a negative determination, asserting that coastal effects are reasonably foreseeable, the Federal agency shall consider submitting a consistency determination to the State agency or otherwise attempt to resolve any disagreement within the remainder of the 90–day period. If a Federal agency, in response to a State agency's objection to a negative determination, agrees that coastal effects are reasonably foreseeable, the State agency and Federal agency should attempt to agree to complete the consistency review within the 90–day period for the negative determination or consider an alternative schedule pursuant to § 930.36(b)(1). Federal agencies should consider postponing final Federal agency action, beyond the 90–day period, until a disagreement has been resolved. State agencies are not required to provide public notice of the receipt of a negative determination or the resolution of an objection to a negative determination, unless a Federal agency submits a consistency determination pursuant to § 930.34.

(d) General negative determinations. In cases where Federal agencies will be performing a repetitive activity that a Federal agency determines will not have reasonably foreseeable coastal effects, whether performed separately or cumulatively, a Federal agency may provide a State agency(ies) with a general negative determination, thereby avoiding the necessity of issuing separate negative determinations for each occurrence of the activity. A general negative determination must adhere to all requirements for negative determinations under § 930.35. In addition, a general negative

determination must describe in detail the activity covered by the general negative determination and the expected number of occurrences of the activity over a specific time period. If a Federal agency issues a general negative determination, it may periodically assess whether the general negative determination is still applicable.

(e) In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity affects any coastal use or resource, either party may seek the Secretarial mediation or OCRM mediation services provided for in subpart G.

Credits

[71 FR 827, Jan. 5, 2006]

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (3)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.36 Consistency determinations for proposed activities., 15 C.F.R. § 930.36

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.36

§ 930.36 Consistency determinations for proposed activities.

Currentness

(a) Federal agencies shall review their proposed Federal agency activities which affect any coastal use or resource in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. Federal agencies should consult with State agencies at an early stage in the development of the proposed activity in order to assess whether such activities will be consistent to the maximum extent practicable with the enforceable policies of such programs.

(b) Timing of consistency determinations.

(1) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to reasonably determine the consistency of the activity with the management program, but before the Federal agency reaches a significant point of decisionmaking in its review process, i.e., while the Federal agency has the ability to modify the activity. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

(2) Federal and State agencies may mutually agree upon procedures for extending the notification requirement beyond 90 days for activities requiring a substantial review period, and for shortening the notification period for activities requiring a less extensive review period, provided that public participation requirements are met.

(c) General consistency determinations. In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal) which cumulatively has an effect upon any coastal use or resource, the Federal agency may develop a general consistency determination, thereby avoiding the

necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A Federal agency may provide a State agency with a general consistency determination only in situations where the incremental actions are repetitive and do not affect any coastal use or resource when performed separately. A Federal agency and State agency may mutually agree on a general consistency determination for de minimis activities (see § 930.33(a)(3)) or any other repetitive activity or category of activity(ies). If a Federal agency issues a general consistency determination, it shall thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(d) Phased consistency determinations. In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project or other activity from planning to completion, the Federal agency shall provide the State agency with one consistency determination for the entire activity or development project. In cases where federal decisions related to a proposed development project or other activity will be made in phases based upon developing information that was not available at the time of the original consistency determination, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall

ensure that the development project or other activity continues to be consistent to the maximum extent practicable with the management program.

(e) National or regional consistency determinations.

(1) A Federal agency may provide States with consistency determinations for Federal agency activities that are national or regional in scope (e.g., rulemaking, national plans), and that affect any coastal use or resource of more than one State. Many States share common coastal management issues and have similar enforceable policies, e.g., protection of a particular coastal resource. The Federal agency's national or regional consistency determination should, at a minimum, address the common denominator of these policies, i.e., the common coastal effects and management issues, and thereby address different States' policies with one discussion and determination. If a Federal agency decides not to use this section, it must issue consistency determinations to each State agency pursuant to § 930.39.

(2) Federal agency activities with coastal effects shall be consistent to the maximum extent practicable with the enforceable policies of each State's management program. Thus, the Federal agency's national or regional consistency determination shall contain sections that would apply to individual States to address coastal effects and enforceable policies unique to particular States, if common coastal effects and

enforceable policies cannot be addressed under paragraph (e)(1). Early coordination with coastal States will enable the Federal agency to identify particular coastal management concerns and policies. In addition, the Federal agency could address the concerns of each affected State by providing for State conditions for the proposed activity. Further, the consistency determination could identify the coordination efforts and describe how the Federal agency responded to State agency concerns.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (26)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.37 Consistency determinations and National Environmental..., 15 C.F.R. § 930.37

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.37

§ 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements.

Effective: February 6, 2006

Currentness

A Federal agency may use its NEPA documents as a vehicle for its consistency determination or negative determination under this subpart. However, a Federal agency's federal consistency obligations under the Act are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. State agencies shall not require Federal agencies to submit NEPA documents as information required pursuant to § 930.39. If a Federal agency includes its consistency determination or negative determination in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and

adheres to the timeframes required by this subpart. Federal agencies and State agencies should mutually agree on how to best coordinate the requirements of NEPA and the Act.

Credits

[71 FR 827, Jan. 5, 2006]

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.38 Consistency determinations for activities initiated prior..., 15 C.F.R. § 930.38

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15 C.F.R. § 930.38

§ 930.38 Consistency determinations for activities initiated prior to management program approval.

Currentness

(a) A consistency determination is required for ongoing Federal agency activities other than development projects initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or

identifies through monitoring as subject to consistency with the management program.

(b) A consistency determination is required for major, phased federal development project decisions described in § 930.36(d) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider effects on any coastal use or resource not fully evaluated at the outset of the project. This provision shall not apply to phased federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to NEPA).

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.39 Content of a consistency determination., 15 C.F.R. § 930.39

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.39

§ 930.39 Content of a consistency determination.

Currentness

(a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document. Where a Federal agency is aware, prior to its submission of its consistency determination, that its activity is not

fully consistent with a management program's enforceable policies, the Federal agency shall describe in its consistency determination the legal authority that prohibits full consistency as required by § 930.32(a)(2). Where the Federal agency is not aware of any inconsistency until after submission of its consistency determination, the Federal agency shall submit its description of the legal authority that prohibits full consistency to the State agency as soon as possible, or before the end of the 90–day period described in § 930.36(b)(1). The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity its effects on any coastal use or resource, associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, and the effects of the associated facilities (e.g., erosion, wetlands, beach access impacts), must all be consistent to the maximum extent practicable with the enforceable policies of the management program.

(c) In making their consistency determinations, Federal agencies shall ensure that their activities are consistent to the maximum extent practicable with the enforceable, policies of the management program. However, Federal agencies should give consideration to management program provisions which are in the nature of recommendations.

(d) When Federal agency standards are more restrictive than standards or requirements contained in the management program, the Federal agency may continue to apply its stricter standards. In such cases the Federal agency shall inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

(e) State permit requirements. Federal law, other than the CZMA, may require a Federal agency to obtain a State permit. Even when Federal agencies are not required to obtain State permits, Federal agencies shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (1)

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§ 930.40 Multiple Federal agency participation., 15 C.F.R. § 930.40

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.40

§ 930.40 Multiple Federal agency participation.

Currentness

Whenever more than one Federal agency is involved in a Federal agency activity or its associated facilities affecting any coastal use or resource, or is involved in a group of Federal agency activities related to each other because of their geographic proximity, the Federal agencies may prepare one consistency determination for all the federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination shall be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies and shall comply with the

requirements of § 930.39.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.41 State agency response.,
15 C.F.R. § 930.41

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.41

§ 930.41 State agency response.

Effective: February 6, 2006

Currentness

(a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time, after providing for public participation in the State agency's review of the consistency determination. The Federal agency may presume State agency concurrence if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information required by § 930.39(a). The 60–day review period begins when the State agency receives the consistency determination and supporting information required

by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall notify the Federal agency in writing within 14 days of receiving the determination and supporting information that the 60–day review period has not begun, identify missing information required by § 930.39(a), and that the 60–day review period will begin when the missing information is received by the State agency. If the State agency has not notified the Federal agency that information required by § 930.39(a) is missing within the 14 day notification period, then the 60–day review period shall begin on the date the State agency received the consistency determination and accompanying information. The State agency's determination of whether the information required by § 930.39(a) is complete is not a substantive review of the adequacy of the information provided. Thus, if a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60–day review period has not begun because the information contained in the items required by § 930.39(a) is substantively deficient. The failure to submit information not required by 930.39(a) shall not be a basis for asserting that the 60–day review period has not begun.

(b) State agency concurrence shall not be presumed in cases where the State agency, within the 60–day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency

should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final Federal agency action shall not be taken sooner than 90 days from the receipt by the State agency of the consistency determination unless the State concurs or concurrence is presumed, pursuant to paragraphs (a) and (b), with the activity, or unless both the Federal agency and the State agency agree to an alternative period.

(d) Time limits on concurrences. A State agency cannot unilaterally place an expiration date on its concurrence. If a State agency believes that an expiration date is necessary, State and Federal agencies may agree to a time limit. If there is no agreement, later phases of, or modifications to, the activity that will have effects not evaluated at the time of the original consistency determination will require either a new consistency determination, a supplemental consistency determination under § 930.46, or a phased review under § 930.36(d) of this subpart.

(e) State processing fees. The Act does not require Federal agencies to pay State processing fees. State agencies shall not assess a Federal agency with a fee to process the Federal agency's consistency determination unless payment of such fees is required by other federal law or otherwise agreed to by the Federal agency and allowed by the Comptroller General of the United States. In no case may a State agency stay the consistency review period or base its objection on the failure of a Federal agency to pay a fee.

Credits

[71 FR 827, Jan. 5, 2006]

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (3)

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§ 930.42 Public participation., 15 C.F.R. § 930.42

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15 C.F.R. § 930.42

§ 930.42 Public participation.

Currentness

(a) Management programs shall provide for public participation in the State agency's review of consistency determinations. Public participation, at a minimum, shall consist of public notice for the area(s) of the coastal zone likely to be affected by the activity, as determined by the State agency.

(b) Timing of public notice. States shall provide timely public notice after the consistency determination has been received by the State agency, except in cases where earlier public notice on the consistency determination by the Federal agency or the State agency meets the requirements of this section. A public comment period shall be provided by the State sufficient to give the public an opportunity to develop and provide comments on

whether the project is consistent with management program enforceable policies and still allow the State agency to issue its concurrence or objection within the 60 day State response period.

(c) Content of public notice. The public notice shall:

(1) Specify that the proposed activity is subject to review for consistency with the enforceable policies of the management program;

(2) Provide sufficient information to serve as a basis for comment;

(3) Specify a source for additional information, e.g., a State agency web site; and

(4) Specify a contact for submitting comments to the State agency.

(d) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official State gazette, a local newspaper serving areas of coastal zone likely to be affected by the activity, individual State mailings, public notice through a management program newsletter, and electronic notices, e.g., web sites. However, electronic notices, e.g., web sites, shall not be the sole source of a public notification, but may be used in conjunction with other means. Web sites may be used to provide a location for the public to obtain additional information. States shall not require that the Federal agency provide public notice. Federal and State agencies are encouraged to issue joint public notices, and hold joint public hearings, to minimize duplication of effort and to avoid unnecessary delays, so long as the joint notice meets

the other requirements of this section.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.43 State agency objection.,
15 C.F.R. § 930.43

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.43

§ 930.43 State agency objection.

Currentness

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe:

(1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and

(2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if

adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

(b) If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.

(c) State agencies shall send to the Director a copy of objections to Federal agency consistency determinations.

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90–day notice period (see § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90–day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90–day period the Federal agency shall not proceed with the activity over a State agency's objection unless:

(1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by

existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or

(2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Notes of Decisions (2)

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.44 Availability of mediation for disputes concerning..., 15 C.F.R. § 930.44

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.44

§ 930.44 Availability of mediation for disputes concerning proposed activities.

Currentness

In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed federal activity affecting any coastal use or resource, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.45 Availability of mediation for previously reviewed activities., 15 C.F.R. § 930.45

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Subpart C. Consistency for Federal Agency Activities

15 C.F.R. § 930.45

§ 930.45 Availability of mediation for previously reviewed activities.

Currentness

(a) Federal and State agencies shall cooperate in their efforts to monitor federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program.

(b) The State agency may request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a Federal agency activity, including those activities where the State agency's concurrence was presumed, which was:

(1) Previously determined to be consistent to the maximum extent practicable with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent to the maximum extent practicable with the enforceable policies of the management program; or

(2) Previously determined not to be a Federal agency activity affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, the activity affects any coastal use or resource and is not consistent to the maximum extent practicable with the enforceable policies of the management program. The State agency's request shall include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G of this part.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.150 Objectives., 15 C.F.R. § 930.150

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.150

§ 930.150 Objectives.

Currentness

(a) A federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur. Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the management program of each affected State.

(b) The application of the federal consistency requirement to activities having interstate coastal effects is addressed by this subpart in order to encourage cooperation among States in dealing with activities having interstate coastal effects, and to provide States, local governments, Federal agencies, and the public with a predictable framework for

evaluating the consistency of these federal activities under the Act.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.151 Interstate coastal effect.,
15 C.F.R. § 930.151

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.151

§ 930.151 Interstate coastal effect.

Currentness

The term "interstate coastal effect" means any reasonably foreseeable effect resulting from a federal action occurring in one State of the United States on any coastal use or resource of another State that has a federally approved management program. Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting

from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. The term "affects" means have an effect on. Effects on any coastal use or resource may also be referred to as "coastal effects."

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.152 Application., 15 C.F.R. § 930.152

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.152

§ 930.152 Application.

Currentness

(a) This subpart applies to federal actions having interstate coastal effects, and supplements the relevant requirements contained in 15 CFR part 930, subparts C (Consistency for Federal Agency Activities), D (Consistency for Activities Requiring a Federal License or Permit), E (Consistency for OCS Exploration, Development and Production Activities) and F (Consistency for Federal Assistance to State and Local Governments). Except as otherwise provided by this subpart, the requirements of other relevant subparts of part 930 apply to activities having interstate coastal effects.

(b) Federal consistency is a requirement on federal actions affecting any coastal use or resource of a

State with a federally-approved management program, regardless of the activities' locations (including States without a federally approved management program). The federal consistency requirement does not alter a coastal State's jurisdiction. The federal consistency requirement does not give States the authority to review the application of laws, regulations, or policies of any other State. Rather, the Act allows a management program to review federal actions and may preclude federal action as a result of a State objection, even if the objecting State is not the State in which the activity will occur. Such objections to interstate activities under subparts D, E and F may be overridden by the Secretary pursuant to subpart H of this part.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.153 Coordination between States in developing coastal..., 15 C.F.R. § 930.153

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.153

§ 930.153 Coordination between States in developing coastal management policies.

Currentness

Coastal States are encouraged to give high priority to:

(a) Coordinating State coastal management planning, policies, and programs with respect to contiguous areas of such States;

(b) Studying, planning, and implementing unified coastal management policies with respect to such areas; and

(c) Establishing an effective mechanism, and adopting a federal–State consultation procedure, for the identification, examination, and cooperative

resolution of mutual problems with respect to activities having interstate coastal effects.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.155 Federal and State agency coordination., 15 C.F.R. § 930.155

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.155

§ 930.155 Federal and State agency coordination.

Currentness

(a) Identifying activities subject to the consistency requirement. The provisions of this subpart are neither a substitute for nor eliminate the statutory requirement of federal consistency with the enforceable policies of management programs for all activities affecting any coastal use or resource. Federal agencies shall submit consistency determinations to relevant State agencies for activities having coastal effects, regardless of location, and regardless of whether the activity is listed.

(b) Notifying affected States. Federal agencies, applicants or applicant agencies proposing activities listed for interstate consistency review, or determined by the Federal agency, applicant or applicant agency to have an effect on any coastal use or resource, shall notify each affected coastal State of the proposed activity. State agencies may also notify Federal agencies and applicants of listed and unlisted activities subject to State agency review and the requirements of this subpart.

(c) Notice of intent to review. Within 30 days from receipt of the consistency determination or certification and necessary data and information, or within 30 days from receipt of notice of a listed federal assistance activity, each State intending to review an activity occurring in another State must notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur (either the State's management program, or if the State does not have a management program, the Governor's office), and the Director, of its intent to review the activity for consistency. The State's notice to the parties must be received by the 30th day after receipt of the consistency determination or certification. If a State fails, within the 30 days, to notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur, and the Director, of its intent to review the activity, then the State waives its right to review the activity for consistency. The waiver does not apply where the State intending to review the activity does not receive notice of the activity.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.156 Content of a consistency determination or..., 15 C.F.R. § 930.156

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.156

§ 930.156 Content of a consistency determination or certification and State agency response.

Currentness

(a) The Federal agency or applicant is encouraged to prepare one determination or certification that will satisfy the requirements of all affected States with approved management programs.

(b) State agency responses shall follow the applicable requirements contained in subparts C, D, E and F of this part.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 930.157 Mediation and informal negotiations., 15 C.F.R. § 930.157

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Subpart I. Consistency of Federal Activities Having Interstate Coastal Effects

15 C.F.R. § 930.157

§ 930.157 Mediation and informal negotiations.

Currentness

The relevant provisions contained in subpart G of this part are available for resolution of disputes between affected States, relevant Federal agencies, and applicants or applicant agencies. The parties to the dispute are also encouraged to use alternative means for resolving their disagreement. OCRM shall be available to assist the parties in these efforts.

SOURCE: 57 FR 43323, Sept. 18, 1992; 57 FR 55444, Nov. 25, 1992; 65 FR 77154 Dec. 8, 2000, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1451 et seq.

Current through Feb. 13, 2023, 88 FR 9384. Some sections may be more current. See credits for details.

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§ 706. Scope of review, 5 USCA § 706

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 706, 5 USCA § 706

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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§ 1401. Congressional finding, policy, and declaration of purpose, 33 USCA § 1401

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 27. Ocean Dumping (Refs & Annos)

33 U.S.C.A. § 1401

§ 1401. Congressional finding, policy, and declaration of purpose

Currentness

a. Dangers of unregulated dumping

Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

b. Policy of regulation and prevention or limitation

The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

c. Policy of regulation and prevention or limitation

It is the purpose of this Act to regulate (1) the transportation by any person of material from the United States and, in the case of United

States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

CREDIT(S)

(Pub.L. 92-532, § 2, Oct. 23, 1972, 86 Stat. 1052; Pub.L. 93-254, § 1(1), Mar. 22, 1974, 88 Stat. 50.)

33 U.S.C.A. § 1401, 33 USCA § 1401

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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§ 1411. Prohibited acts, 33 USCA § 1411

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 27. Ocean Dumping (Refs & Annos)
Subchapter I. Regulation (Refs & Annos)

33 U.S.C.A. § 1411

§ 1411. Prohibited acts

Currentness

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

(1) no person shall transport from the United States, and

(2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base

line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

CREDIT(S)

(Pub.L. 92-532, Title I, § 101, Oct. 23, 1972, 86 Stat. 1053; Pub.L. 93-254, § 1(3), Mar. 22, 1974, 88 Stat. 51.)

33 U.S.C.A. § 1411, 33 USCA § 1411

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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§ 1412. Dumping permit program, 33 USCA § 1412

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 27. Ocean Dumping (Refs & Annos)
Subchapter I. Regulation (Refs & Annos)

33 U.S.C.A. § 1412

§ 1412. Dumping permit program

Effective: November 8, 2007

Currentness

(a) Environmental Protection Agency permits

Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents, high-level radioactive waste, and medical waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the

marine environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(1) The need for the proposed dumping.

(2) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(3) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(4) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(5) The persistence and permanence of the effects of the dumping.

(6) The effect of dumping particular volumes and concentrations of such materials.

(7) Appropriate locations and methods of disposal or recycling, including land-based

alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(8) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and non-living resource exploitation.

(9) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issued for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

(b) Permit categories

The Administrator may establish and issue various categories of permits, including the general permits

described in section 1414(c) of this title.

(c) Designation of sites

(1) In general

The Administrator shall, in a manner consistent with the criteria established pursuant to subsection (a), designate sites or time periods for dumping. The Administrator shall designate sites or time periods for dumping that will mitigate adverse impact on the environment to the greatest extent practicable.

(2) Prohibitions regarding site or time period

In any case where the Administrator determines that, with respect to certain materials, it is necessary to prohibit dumping at a site or during a time period, the Administrator shall prohibit the dumping of such materials in such site or during such time period. This prohibition shall apply to any dumping at the site or during such time period. This prohibition shall apply to any dumping at the site or during the time period, including any dumping under section 1413(e) of this title.

(3) Dredged material disposal sites

In the case of dredged material disposal sites, the Administrator, in conjunction with the Secretary, shall develop a site management plan for each site designated pursuant to this section. In developing such plans, the Administrator and the Secretary shall provide opportunity for public comment. Such plans

shall include, but not be limited to--

(A) a baseline assessment of conditions at the site;

(B) a program for monitoring the site;

(C) special management conditions or practices to be implemented at each site that are necessary for protection of the environment;

(D) consideration of the quantity of the material to be disposed of at the site, and the presence, nature, and bioavailability of the contaminants in the material;

(E) consideration of the anticipated use of the site over the long term, including the anticipated closure date for the site, if applicable, and any need for management of the site after the closure of the site; and

(F) a schedule for review and revision of the plan (which shall not be reviewed and revised less frequently than 10 years after adoption of the plan, and every 10 years thereafter).

(4) General site management plan requirement; prohibitions

After January 1, 1995, no site shall receive a final designation unless a management plan has been developed pursuant to this section. Beginning on January 1, 1997, no permit for dumping pursuant to this Act or authorization for dumping under section 1413(e) of this title

shall be issued for a site (other than the site located off the coast of Newport Beach, California, which is known as "LA-3") unless such site has received a final designation pursuant to this subsection or an alternative site has been selected pursuant to section 1413(b) of this title. Beginning January 1, 2011, no permit for dumping pursuant to this Act or authorization for dumping under section 1413(e) of this title shall be issued for the site located off the coast of Newport Beach, California, which is known as "LA-3", unless such site has received a final designation pursuant to this subsection or an alternative site has been selected pursuant to section 1413(b) of this title.

(5) Management plans for previously designated sites

The Administrator shall develop a site management plan for any site designated prior to January 1, 1995, as expeditiously as practicable, but not later than January 1, 1997, giving priority consideration to management plans for designated sites that are considered to have the greatest impact on the environment.

(d) Fish wastes

No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological

systems in a specific location. Where the Administrator makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

(e) Foreign State permits; acceptance

In the case of transportation of material, by an agency or instrumentality of the United States or by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section: Provided, That in the case of an agency or instrumentality of the United States, no application shall be made for a permit to be issued pursuant to the authority of a foreign State Party to the Convention unless the Administrator concurs in the filing of such application.

CREDIT(S)

(Pub.L. 92-532, Title I, § 102, Oct. 23, 1972, 86 Stat. 1054; Pub.L. 93-254, § 1(4), Mar. 22, 1974, 88 Stat. 51; Pub.L. 96-572, § 3, Dec. 22, 1980, 94 Stat. 3345; Pub.L. 100-688, Title III, § 3201(b), Nov. 18, 1988, 102 Stat. 4153; Pub.L. 102-580, Title V, § 506(a), Oct. 31, 1992, 106 Stat. 4868; Pub.L. 104-303, Title V, § 582, Oct. 12, 1996, 110 Stat. 3791; Pub.L. 106-53, Title V, § 562, Aug. 17, 1999, 113 Stat. 355; Pub.L. 110-114, Title V, § 5046, Nov. 8, 2007, 121 Stat. 1209.)

33 U.S.C.A. § 1412, 33 USCA § 1412

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1413. Dumping permit program for dredged material, 33 USCA § 1413

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 27. Ocean Dumping (Refs & Annos)
Subchapter I. Regulation (Refs & Annos)

33 U.S.C.A. § 1413

§ 1413. Dumping permit program for dredged material

Currentness

(a) Issuance by Secretary of the Army

Subject to the provisions of subsections (b), (c), and (d) of this section, the Secretary may issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it into ocean waters, where the Secretary determines that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(b) Independent determination of need for dumping, other methods of disposal, and appropriate locations; alternative sites

In making the determination required by subsection (a), the Secretary shall apply those criteria, established pursuant to section 1412(a) of this title, relating to the effects of the dumping. Based upon an evaluation of the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of

the United States, the Secretary shall make an independent determination as to the need for the dumping. The Secretary shall also make an independent determination as to other possible methods of disposal and as to appropriate locations for the dumping. In considering appropriate locations, he shall, to the maximum extent feasible, utilize the recommended sites designated by the Administrator pursuant to section 1412(c) of this title. In any case in which the use of a designated site is not feasible, the Secretary may, with the concurrence of the Administrator, select an alternative site. The criteria and factors established in section 1412(a) of this title relating to site selection shall be used in selecting the alternative site in a manner consistent with the application of such factors and criteria pursuant to section 1412(c) of this title. Disposal at or in the vicinity of an alternative site shall be limited to a period of not greater than 5 years unless the site is subsequently designated pursuant to section 1412(c) of this title; except that an alternative site may continue to be used for an additional period of time that shall not exceed 5 years if--

(1) no feasible disposal site has been designated by the Administrator;

(2) the continued use of the alternative site is necessary to maintain navigation and facilitate interstate or international commerce; and

(3) the Administrator determines that the continued use of the site does not pose an unacceptable risk to human health, aquatic resources, or the environment.

(c) Concurrence by Administrator

(1) Notification

Prior to issuing a permit to any person under this section, the Secretary shall first notify the Administrator of the Secretary's intention to do so and provide necessary and appropriate information concerning the permit to the Administrator. Within 30 days of receiving such information, the Administrator shall review the information and request any additional information the Administrator deems necessary to evaluate the proposed permit.

(2) Concurrence by Administrator

Within 45 days after receiving from the Secretary all information the Administrator considers to be necessary to evaluate the proposed permit, the Administrator shall, in writing, concur with (either entirely or with conditions) or decline to concur with the determination of the Secretary as to compliance with the criteria, conditions, and restrictions established pursuant to sections 1412(a) and 1412(c) of this title relating to the environmental impact of the permit. The Administrator may request one 45-day extension in writing and the Secretary shall grant such request on receipt of the request.

(3) Effect of concurrence

In any case where the Administrator makes a determination to concur (with or without conditions) or to decline to concur within the time period specified in paragraph (2) the determination shall prevail. If the Administrator

declines to concur in the determination of the Secretary no permit shall be issued. If the Administrator concurs with conditions the permit shall include such conditions. The Administrator shall state in writing the reasons for declining to concur or for the conditions of the concurrence.

(4) Failure to act

If no written documentation is made by the Administrator within the time period provided for in paragraph (2), the Secretary may issue the permit.

(5) Compliance with criteria and restrictions

Unless the Administrator grants a waiver pursuant to subsection (d), any permit issued by the Secretary shall require compliance with such criteria and restrictions.

(d) Waiver of requirements

If, in any case, the Secretary finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in non-compliance with the criteria established pursuant to section 1412(a) of this title relating to the effects of dumping or with the restrictions established pursuant to section 1412(c) of this title relating to critical areas, he shall so certify and request a waiver from the Administrator of the specific requirements involved. Within thirty days of the receipt of the waiver request, unless the Administrator finds that the dumping of the material will result in an unacceptably adverse impact on municipal water supplies, shell-fish beds,

wildlife, fisheries (including spawning and breeding areas), or recreational areas, he shall grant the waiver.

(e) Federal projects involving dredged material

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

CREDIT(S)

(Pub.L. 92-532, Title I, § 103, Oct. 23, 1972, 86 Stat. 1055; Pub.L. 102-580, Title V, §§ 504, 506(b), Oct. 31, 1992, 106 Stat. 4866, 4869.)

33 U.S.C.A. § 1413, 33 USCA § 1413

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1451. Congressional findings, 16 USCA § 1451

United States Code Annotated
Title 16. Conservation
Chapter 33. Coastal Zone Management (Refs & Annos)

16 U.S.C.A. § 1451

§ 1451. Congressional findings

Currentness

The Congress finds that--

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The habitat areas of the coastal zone, and the

fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, exclusive economic zone, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters; [1]

(g) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

(h) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

(i) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally

affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

(j) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

(k) Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved.

(l) Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence.

(m) Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.

CREDIT(S)

(Pub.L. 89-454, Title III, § 302, as added Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1280; amended Pub.L. 94-370, § 2, July 26, 1976, 90 Stat. 1013; Pub.L. 96-464, § 2, Oct. 17, 1980, 94 Stat. 2060; Pub.L. 101-508, Title VI, § 6203(a), Nov. 5, 1990, 104 Stat. 1388-300.)

Footnotes

1 So in original. Probably should be a period.

16 U.S.C.A. § 1451, 16 USCA § 1451

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1452. Congressional declaration of policy, 16 USCA § 1452

United States Code Annotated
Title 16. Conservation
Chapter 33. Coastal Zone Management (Refs & Annos)

16 U.S.C.A. § 1452

§ 1452. Congressional declaration of policy
Currentness

The Congress finds and declares that it is the national policy--

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve 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, which programs should at least provide for--

(A) 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,

(B) the management of coastal development to minimize the loss of life and property caused by

improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands. 1

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters,

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(E) public access to the coasts for recreation purposes,

(F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(G) the coordination and simplification of procedures in order to ensure expedited governmental decision making for the management of coastal resources,

(H) continued consultation and coordination with, and the giving of adequate consideration

to the views of, affected Federal agencies,

(I) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decision making,

(J) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies, and

(K) the study and development, in any case in which the Secretary considers it to be appropriate, of plans for addressing the adverse effects upon the coastal zone of land subsidence and of sea level rise; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great Lakes, and improved predictability in governmental decision making;

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of

this chapter;

(5) to encourage coordination and cooperation with and among the appropriate Federal, State, and local agencies, and international organizations where appropriate, in collection, analysis, synthesis, and dissemination of coastal management information, research results, and technical assistance, to support State and Federal regulation of land use practices affecting the coastal and ocean resources of the United States; and

(6) to respond to changing circumstances affecting the coastal environment and coastal resource management by encouraging States to consider such issues as ocean uses potentially affecting the coastal zone.

CREDIT(S)

(Pub.L. 89-454, Title III, § 303, as added Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1281; amended Pub.L. 96-464, § 3, Oct.17, 1980, 94 Stat. 2060; Pub.L. 101-508, Title VI, § 6203(b), Nov. 5, 1990, 104 Stat. 1388-301; Pub.L. 102-587, Title II, §2205(b)(2), Nov. 4, 1992, 106 Stat. 5050.)

Footnotes

1 So in original. The period probably should be a comma.

16 U.S.C.A. § 1452, 16 USCA § 1452

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1453. Definitions, 16 USCA § 1453

United States Code Annotated
Title 16. Conservation
Chapter 33. Coastal Zone Management (Refs & Annos)

16 U.S.C.A. § 1453

§ 1453. Definitions

Currentness

For purposes of this chapter--

(1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.), the Act of March 2, 1917 (48 U.S.C. 749), the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976, or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705), as applicable. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal

waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

(2) The term "coastal resource of national significance" means any coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value.

(3) The term "coastal waters" means (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes and (B) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

(4) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this chapter, the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.

(5) The term "coastal energy activity" means any

of the following activities if, and to the extent that (A) the conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion, or operation of any equipment or facility; and (B) any technical requirement exists which, in the determination of the Secretary, necessitates that the siting, construction, expansion, or operation of such equipment or facility be carried out in, or in close proximity to, the coastal zone of any coastal state;
[1]

(i) Any outer Continental Shelf energy activity.

(ii) Any transportation, conversion, treatment, transfer, or storage of liquefied natural gas.

(iii) Any transportation, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deepwater port, as defined in section 1502(10) of Title 33).

For purposes of this paragraph, the siting, construction, expansion, or operation of any equipment or facility shall be "in close proximity to" the coastal zone of any coastal state if such siting, construction, expansion, or operation has, or is likely to have, a significant effect on such coastal zone.

(6) The term "energy facilities" means any equipment or facility which is or will be used primarily--

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities used for the transportation, conversion, treatment, transfer, or storage of liquefied natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.

(6a) The term "enforceable policy" means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.

(7) The term "estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term includes estuary- type areas of the Great Lakes.

(8) The term "estuarine sanctuary" means a research area which may include any part or all of an estuary and any island, transitional area, and upland in, adjoining, or adjacent to such estuary, and which constitutes to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

(9) The term "Fund" means the Coastal Zone Management Fund established under section 1456a(b) of this title.

(10) The term "land use" means activities which are conducted in, or on the shorelands within, the coastal zone, subject to the requirements outlined in section 1456(g) of this title.

(11) The term "local government" means any political subdivision of, or any special entity created by, any coastal state which (in whole or part) is located in, or has authority over, such state's coastal zone and which (A) has authority to levy taxes, or to establish and collect user fees, or (B) provides any public facility or public service which is financed in whole or part by taxes or user fees. The term includes, but is not limited to, any school district, fire district, transportation authority, and any other special purpose district or authority.

(12) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this

chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(13) The term "outer Continental Shelf energy activity" means any exploration for, or any development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 1331(a) of Title 43) or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

(14) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any state; the Federal Government; any state, regional, or local government; or any entity of any such Federal, state, regional, or local government.

(15) The term "public facilities and public services" means facilities or services which are financed, in whole or in part, by any state or political subdivision thereof, including, but not limited to, highways and secondary roads, parking, mass transit, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care. Such term may also include any other facility or service so financed which the Secretary finds will support increased population.

(16) The term "Secretary" means the Secretary of Commerce.

(17) The term "special area management plan" means a comprehensive plan providing for

natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone.

(18) The term "water use" means a use, activity, or project conducted in or on waters within the coastal zone.

CREDIT(S)

(Pub.L. 89-454, Title III, § 304, as added Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1281; amended Pub.L. 94-370, § 3, July 26, 1976, 90 Stat. 1013; Pub.L. 96-464, § 4, Oct. 17, 1980, 94 Stat. 2061; Pub.L. 101-508, Title VI, § 6204, Nov. 5, 1990, 104 Stat.1388-302; Pub.L. 102-587, Title II, § 2205(b)(3) to (7), Nov. 4, 1992, 106 Stat. 5050, 5051.)

Footnotes

1 So in original. The semicolon probably should be a colon.

16 U.S.C.A. § 1453, 16 USCA § 1453

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1454. Submittal of State program for approval, 16 USCA § 1454

United States Code Annotated
Title 16. Conservation
Chapter 33. Coastal Zone Management (Refs & Annos)

16 U.S.C.A. § 1454

§ 1454. Submittal of State program for approval
Effective: October 1, 1999

Currentness

Any coastal state which has completed the development of its management program shall submit such program to the Secretary for review and approval pursuant to section 1455 of this title.

CREDIT(S)

(Pub.L. 89-454, Title III, § 305, as added Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1282; amended Pub.L. 93-612, § 1(1), Jan. 2, 1975, 88 Stat. 1974; Pub.L. 94-370, § 4, July 26, 1976, 90 Stat. 1015; Pub.L. 101-508, Title VI, § 6205, Nov. 5, 1990, 104 Stat. 1388-302; Pub.L. 102-587, Title II, § 2205(b)(1)(A), Nov. 4, 1992, 106 Stat. 5050; Pub.L. 104-150, § 2(a), (b)(1), June 3, 1996, 110 Stat. 1380.)

16 U.S.C.A. § 1454, 16 USCA § 1454

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 1456. Coordination and cooperation, 16 USCA § 1456

United States Code Annotated
Title 16. Conservation
Chapter 33. Coastal Zone Management (Refs & Annos)

16 U.S.C.A. § 1456

§ 1456. Coordination and cooperation

Currentness

(a) Federal agencies

In carrying out his functions and responsibilities under this chapter, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies

The Secretary shall not approve the management program submitted by a state pursuant to section 1455 of this title unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activities with State management programs; Presidential exemption; certification

(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the

enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of Title 28, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's

failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until--

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's

certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such

certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) Application of local governments for Federal assistance; relationship of activities with approved management programs

State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of Title 31. Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security.

(e) Construction with other laws

Nothing in this chapter shall be construed--

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning,

development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Construction with existing requirements of water and air pollution programs

Notwithstanding any other provision of this chapter, nothing in this chapter shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this chapter and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) Concurrence with programs which affect inland areas

When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 1455 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

(h) Mediation of disagreements

In case of serious disagreement between any Federal agency and a coastal state--

(1) in the development or the initial implementation of a management program under section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

(i) Application fee for appeals

(1) With respect to appeals under subsections (c)(3) and (d) which are submitted after November 5, 1990, the Secretary shall collect an application fee of not less than $200 for minor appeals and not less than $500 for major appeals, unless the Secretary, upon consideration of an applicant's request for a fee waiver, determines that the applicant is unable to pay the fee.

(2)(A) The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c).

(B) If the Secretary waives the application fee under paragraph (1) for an applicant, the Secretary shall waive all other fees under this subsection for the applicant.

(3) Fees collected under this subsection shall be deposited into the Coastal Zone Management Fund established under section 1456a of this title.

CREDIT(S)

(Pub.L. 89-454, Title III, § 307, as added Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1285; amended Pub.L. 94-370, § 6, July 26, 1976, 90 Stat. 1018; Pub.L. 95-372, Title V, § 504, Sept. 18, 1978, 92 Stat. 693; Pub.L. 101-508, Title VI, § 6208, Nov. 5, 1990, 104 Stat. 1388-307; Pub.L. 102-587, Title II, § 2205(b)(13), (14), Nov. 4, 1992, 106 Stat. 5051.)

16 U.S.C.A. § 1456, 16 USCA § 1456

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

§ 4332. Cooperation of agencies; reports; availability of..., 42 USCA § 4332

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and

technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long- term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(vi) Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the

existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State

agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

Ocean Disposal; Designation of a Dredged Material Disposal Site..., 81 FR 87820-01

81 FR 87820-01, 2016 WL 7049365(F.R.) RULES and REGULATIONS ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 228

[FRL-9955-13-Region 1]

Ocean Disposal; Designation of a Dredged Material Disposal Site in Eastern Region of Long Island Sound; Connecticut Tuesday, December 6, 2016

AGENCY: Environmental Protection Agency (EPA).

***87820** ACTION: Final rule.

SUMMARY: With the publication of this Final Rule, the Environmental Protection Agency (EPA) is designating the Eastern Long Island Sound Disposal Site (ELDS), located offshore from New London, Connecticut, for the disposal of dredged material from harbors and navigation channels in eastern Long Island Sound and Little Narragansett Bay in the states of Connecticut, New York, and Rhode Island. This action is necessary to provide a long-term, open-water dredged material disposal site as an alternative for the possible future disposal of such material. This disposal site designation is subject to restrictions designed to support the goal of reducing or eliminating the disposal of dredged material in Long Island Sound.

The basis for this action is described herein and in the Final Supplemental Environmental Impact Statement ***87821** (FSEIS) released by EPA on November 4, 2016 in conjunction with this Final

Rule. The FSEIS identifies designation of the ELDS as the preferred alternative from the range of options considered.

DATES: This final rule is effective on January 5, 2017.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R01-OW-2016-0239. All documents in the docket are listed on the http://www.regulations.gov Web site. Publically available docket materials are also available from EPA's Web site https://www.epa.gov/ocean-dumping/dredged-material-management-long-island-sound.

FOR FURTHER INFORMATION CONTACT: Jean Brochi, U.S. Environmental Protection Agency, New England Regional Office, 5 Post Office Square, Suite 100, Mail Code: OEP06-1, Boston, MA 02109-3912, telephone (617) 918-1536, electronic mail: brochi.jean@epa.gov.

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

I. Final Action

EPA is publishing this Final Rule to designate the ELDS to provide an environmentally sound, open-water disposal option for possible use in managing dredged material from harbors and navigation channels in eastern Long Island Sound and its vicinity in the states of Connecticut, New York, and Rhode Island. The site designation is effective for an indefinite period of time. The use of the site is subject to restrictions designed to reduce or eliminate open-water disposal of dredged material in Long Island Sound, and to ensure protection of the environment if and when the site is used.

The site designation process has been conducted consistent with the requirements of the Marine Protection, Research, and Sanctuaries Act (MPRSA), National Environmental Policy Act (NEPA), Coastal Zone Management Act (CZMA),

and other applicable federal and state statutes and regulations. Compliance with these requirements is described in detail in Section VIII ("Compliance with Statutory and Regulatory Requirements"). The basis for this federal action is further described in an FSEIS that identifies EPA designation of the ELDS as the preferred alternative. The FSEIS was released on November 4, 2016 on the EPA Region 1 Web site: https://www.epa.gov/ocean-dumping/final-supplemental-environmental-impact-statement-eastern- long-island-sound and is provided as a supporting document in the docket for this Final Rule. See 40 CFR 1506.10. This Final Rule also serves as EPA's Record of Decision (ROD) for the NEPA review supporting the designation of this site.

Dredged material disposal sites designated by EPA under the MPRSA are subject to detailed management and monitoring protocols to track site conditions and prevent the occurrence of unacceptable adverse effects. The management and monitoring protocols for the ELDS are described in the Site Management and Monitoring Plan (SMMP) that is incorporated into the FSEIS as Appendix I. See 33 U.S.C. 1412(c)(3). EPA is authorized to close or limit the use of these sites to further disposal activity if their use causes unacceptable adverse impacts to the marine environment or human health.

The designation of this disposal site does not constitute or imply EPA's approval of open-water disposal of dredged material at the site from any specific project. Disposal of dredged material from federal projects, or non-federal projects involving more than 25,000 cubic yards (cy) of material, will

not be allowed at the ELDS until the proposed disposal operation first receives, among other things, proper authorization from the U.S. Army Corps of Engineers (USACE) under MPRSA section 103. (Proposals to dispose of material from non-federal projects involving less than 25,000 cy yards of material are subject to regulation under Section 404 of the Clean Water Act.) In addition, any authorization by the USACE under MPRSA section 103 is subject to EPA review under MPRSA section 103(c), and EPA may concur, concur with conditions, or decline to concur with the authorization as a result of such review. In order to properly obtain authorization to dispose of dredged material at the ELDS under the MPRSA, the dredged material proposed for disposal must first satisfy the applicable criteria for testing and evaluating dredged material specified in EPA regulations at 40 CFR part 227, and it must be determined in accordance with EPA regulations at 40 CFR part 227, subpart C, that there is a need for open-water disposal (i.e., that there is no practicable dredged material management alternative to open-water disposal with less adverse environmental impact). In addition, any proposal to dispose of dredged material under the MPRSA at the designated site will need to satisfy all the site restrictions included in the Final Rule as part of the site designation. See 40 CFR 228.8 and 228.15(b)(6).

II. Background

On April 27, 2016, EPA published in the Federal Register (81 FR 24748) a proposed rule (the Proposed Rule) to designate an Eastern Long Island Sound Dredged Material Disposal Site (ELDS),

located offshore from New London, Connecticut. EPA's Proposed Rule also stated that two other alternative sites, the Niantic Bay and Cornfield Shoals disposal sites and CSDS), met the site selection criteria in the Ocean Dumping Regulations and could be designated for long-term use. EPA indicated that it was not proposing to designate those two alternative sites but requested public comment on the advisability of using those sites.

On July 7, 2016, EPA published in the Federal Register (81 FR 44220) a final rule to amend the 2005 rule that designated the Central and Western Long Island Sound dredged material disposal sites (CLDS and WLDS, respectively). The rule amendments established new restrictions on the use of those sites to support the goal of reducing or eliminating open-water disposal in Long Island Sound. The restrictions include standards and procedures to promote the development and use of practicable alternatives to open-water disposal, including establishment of an interagency "Steering Committee" and "Regional Dredging Team" that will oversee implementation of the rule. As explained in the Proposed Rule for the ELDS, the restrictions applicable to the CLDS and WLDS also will be applied to use of the ELDS.

III. Purpose

The purpose of EPA's action is to provide a long-term, environmentally acceptable dredged material disposal option for potential use by the USACE and other federal, state, county, municipal, and private entities that must dredge channels, harbors,

marinas, ***87822** and other aquatic areas in eastern Long Island Sound in order to maintain conditions for safe navigation for marine commerce and recreation, and for military and public safety operations. This action is necessary because: (1) Periodic dredging is needed to maintain safe navigation and occasionally improve ports and harbors to maintain competitiveness and support a changing economy, and open-water dredged material disposal is necessary when practicable alternative means of managing the material are not available; (2) EPA determined that dredged material disposal/handling needs in the eastern region of Long Island Sound exceed the available disposal/handling capacity in that region; (3) the two currently used disposal sites in this region, the New London Disposal Site (NLDS) and CSDS, are only authorized for use until December 23, 2016; (4) there are currently no disposal sites designated for long-term use in the eastern Long Island Sound region; and (5) under the MPRSA, an EPA designation is required for any long-term open-water dredged material disposal site in Long Island Sound.

In addition, the closest designated sites outside the eastern Long Island Sound region are the Central Long Island Sound Disposal Site (CLDS) and the Rhode Island Sound Disposal Site (RISDS), and both are too far from dredging centers in the eastern region of the Sound to be reasonable alternatives to the proposed site designation. For example, the distance from New London Harbor to the CLDS is 34.7 nautical miles (nmi) and to the RISDS is 44.5 nmi. The Western Long Island Sound

Disposal Site (WLDS) is approximately 59 nmi west of New London Harbor, making it an even less feasible alternative.

While the CLDS, WLDS, and RISDS have all been determined to be environmentally sound sites for receiving suitable dredged material, proposing to use any of them for suitable dredged material from the eastern region of Long Island Sound would be problematic, and EPA would consider them to be options of last resort. Using the CLDS or RISDS would greatly increase the transport distance for, and duration of, open-water disposal for dredging projects from the eastern Long Island Sound region. This, in turn, would greatly increase the cost of such projects and would likely render many dredging projects too expensive to conduct. For example, maintenance dredging of the U.S. Navy Submarine Base berths planned for 2016-2020 is expected to generate about 75,000 cy of suitable material; the estimated cost of disposal at the ELDS is $31/cy for a total cost of $2,325,000, while disposal at the CLDS is estimated at $64/cy for a total of $4,800,000. An improvement (deepening) project to accommodate a larger class of submarine planned for 2016-2025 is expected to generate about 350,000 cy; the estimated cost of disposal at the ELDS is $26/cy for a total cost of $9,100,000, while disposal at the CLDS is estimated at $57/cy for a total of $19,950,000 (USACE, 2016b). Thus, the longer haul distance more than doubles the cost to the public for the federal government to dredge the same project.

Furthermore, the greater transport distances would be environmentally detrimental, in that they would entail greater energy use, increased air emissions,

and increased risk of spills and short dumps (FSEIS, Section 2.1). Regarding air emissions, increased hauling distances might require using larger scows with more powerful towing vessels, which would use more fuel and cause more air pollution. Longer haul distances also may increase the amount of time necessary to complete a dredging project, resulting in an extended period of disruption to the areas being dredged.

In its Long Island Sound Dredged Material Management Plan (DMMP), the USACE projected that dredging in eastern Long Island Sound would generate approximately 22.6 million cubic yards (mcy) of dredged material over the next 30 years. Of the total amount of 22.6 mcy, approximately 13.5 mcy was projected to be fine-grained sediment that meets MPRSA and Clean Water Act (CWA) standards for aquatic disposal (i.e., "suitable" material), and 9.1 mcy was projected to be coarse-grained sand that also meets MPRSA and CWA standards for aquatic disposal (i.e., also "suitable" material). In addition, the DMMP projected that approximately 80,900 cy of material from eastern Long Island Sound would be fine-grained sediment that does not meet MPRSA and CWA standards for aquatic disposal (i.e., "unsuitable" material).

In response to comments asserting that no disposal site is needed in the eastern region of Long Island Sound, and comments urging that the size of any site be reduced or minimized, EPA asked the USACE to revisit once more its estimate of disposal capacity needs and to revise the figures, if appropriate. Although the values from the DMMP reflected substantial analysis and public input, the

USACE agreed to reassess the capacity needs in coordination with EPA. This reassessment has resulted in a projected disposal capacity need of approximately 20 mcy, which still supports the conclusion that a disposal site is needed in the eastern region of the Sound. The reassessment of capacity needs is discussed further in Sections V ("Disposal Site Description") and VI ("Summary of Public Comments and EPA's Responses") of this document and in Section 5.8 of the FSEIS.

The detailed assessment of alternatives to open-water disposal in the USACE's DMMP determined that, while the sand generated in this region may be able to be used beneficially to nourish beaches, there are not practicable alternatives to open-water disposal with sufficient capacity to handle the projected volume of fine-grained sediment. As described in the Proposed Rule and in Section IX of the Final Rule itself, EPA has placed restrictions on the use of all Long Island Sound dredged material disposal sites that are designed to facilitate and promote the use of practicable alternatives to open-water disposal whenever available, but EPA has determined that one designated open-water disposal site is needed in eastern Long Island Sound.

Given the need to provide an open-water disposal site as an option for dredged material management, EPA designation of a long-term dredged material disposal site(s) provides environmental benefits. First, when a site being used under the USACE's short-term site selection authority is due to expire, designation by EPA is the only way to authorize continued use of that site, even if the site is

environmentally suitable or even environmentally preferable to all other sites. With the NLDS and CSDS closing in December 2016, EPA's site designation studies were designed to determine whether these or any other sites should be designated for continued long-term use. Congress has directed that the disposal of dredged material should take place at EPA- designated sites, rather than USACE-selected sites, when EPA-designated sites are available (see MPRSA 103(b)). Consistent with that Congressional intent, EPA's policy is that it is generally environmentally preferable to concentrate any open-water disposal at sites that have been used historically and at fewer sites, rather than relying on the selection by the USACE of multiple sites to be used for a limited time, see 40 CFR 228.5(e).

Second, MPRSA criteria for selecting and designating sites require EPA to consider previously used disposal sites, with active or historically used sites given preference in the evaluation (40 CFR 228.5(e)). This preference will concentrate the effects, if any, of open- ***87823** water disposal of dredged material to discrete areas that have already received dredged material, and avoid distributing any effects over a larger geographic area. Finally, unlike USACE-selected sites, EPA-designated sites require a SMMP that will help ensure environmentally sound monitoring and management of the sites.

Designating an environmentally sound open-water disposal site to allow for and facilitate necessary dredging in the eastern region of Long Island Sound also will yield a number of public benefits. First,

designating an environmentally sound disposal site will yield economic benefits. There are a large number of important navigation-dependent businesses and industries in the eastern Long Island Sound region, ranging from shipping (especially the movement of petroleum fuels and the shipping of bulk materials), to recreational boating-related businesses, marine transportation, commercial and recreational fishing, interstate ferry operations, ship building, and military and public safety operations, such as those associated with the U.S. Naval Submarine Base in Groton and the U.S. Coast Guard facilities in New London. These businesses and industries contribute substantially to the region's economic output, the gross state product (GSP) of the bordering states, and tax revenue. Continued access to navigation channels, harbors, berths, and mooring areas is vital to ensuring the continued economic health of these industries, and to preserving the ability of the region to import fuels, bulk supplies, and other commodities at competitive prices. Second, preserving navigation channels, marinas, harbors, berthing areas, and other marine resources, improves the quality of life for residents and visitors to the eastern Long Island Sound region by facilitating recreational boating and associated activities, such as fishing and sightseeing. Finally, by facilitating dredging needed to support U.S. Navy and Coast Guard operations, designation of an open-water dredged material disposal site also supports national defense planning and operations as well as public safety.

IV. Potentially Affected Entities

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

Category	Examples of potentially affected entities
Federal government	USACE (Civil Works Projects), and other federal agencies.
State, local, and tribal governments	Governments owning and/or responsible for ports, harbors, and/or berths, government agencies requiring disposal of dredged material associated with public works projects.

Industry and general public	Port authorities, shipyards and marine repair facilities, marinas and boatyards, and berth owners.

This table is not intended to be comprehensive, but rather provides a guide for readers regarding the types of entities that could potentially be affected by this Final Rule. EPA notes that nothing in this rule alters the jurisdiction or authority of EPA, the USACE, or the types of entities regulated under the MPRSA and/or CWA. Questions regarding the applicability of this Final Rule to a particular entity should be directed to the contact person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

V. Disposal Site Description

This rule designates the ELDS, but with site boundaries modified from those in the Proposed Rule, for open-water disposal of dredged material for several reasons. First, the entire ELDS is a containment site, which will protect the environment by retaining the dredged material within the site and, accordingly, will also support effective site management and monitoring. Second, the NLDS, which is immediately to the east of the ELDS, has been used for dredged material disposal for over 60 years, and monitoring of the NLDS over the past 35 years has determined that past and present management practices have been successful in minimizing short-term, long-term, and cumulative impacts to water quality and benthic habitat in this vicinity. EPA has determined that the

ELDS also can be successfully managed. Third, designating the ELDS, which is immediately adjacent to the NLDS, would be consistent with USEPA's ocean disposal regulations, which indicate a preference for designating disposal sites in areas that have been used in the past, rather than new, relatively undisturbed areas (40 CFR 228.5(e)).

Finally, in response to public comments, which are described further in Section VI ("Summary of Public Comments and EPA's Responses"), EPA is designating an ELDS that has been relocated farther to the west and is smaller in size than the preferred alternative described in the Proposed Rule. Thus, the boundaries of the ELDS have been redrawn for this Final Rule. For the Proposed Rule, EPA proposed an ELDS with an estimated capacity of 27 mcy based on an estimated need for disposal capacity of approximately 22.6 mcy for material from the eastern region of the Sound, which in turn was based on the dredging needs assessment from the DMMP. See 81 FR 24750. EPA received comments stating that there was no need for a disposal site to be designated in the eastern region of Long Island Sound. As part of its consideration of, and response to, these comments, EPA requested the USACE prepare a more refined estimate of the dredged material disposal capacity needed for sediments projected to be dredged from the eastern region of the Sound. The USACE undertook this analysis and projected that a disposal capacity of approximately 20 mcy (based on water volume below a depth of 59 feet [18 meters] and slope calculations, with a buffer zone) would likely be sufficient. This estimate reflects a variety of factors,

some of which involve an unavoidable degree of uncertainty. These factors include the following: Specific dredging projects currently projected within the region (including possible "improvement projects" to further deepen channels or berthing areas); how much of each type of material (e.g., sand, suitable and unsuitable fine-grained material) is estimated to be generated by each project; how much of this material is estimated to require open-water disposal; the possibility of increased ***87824** dredging needs caused by larger-than-normal storms; and a "bulking factor" of approximately 10 percent. More specifically, the revised projected disposal capacity need of approximately 20 mcy is based on the need to accommodate approximately 12.5 mcy of suitable fine-grained sediment; 2.8 mcy from potential improvement (deepening) dredging projects; 1.8 mcy of shoal material resulting from extreme storm events; 1.1 mcy of sand (recognizing that beach nourishment may not be a practicable alternative for all 9.1 mcy of the projected sand); and 160,000 cy for the excavation of Confined Aquatic Disposal cells (for material unsuitable for open-water disposal); for a total of 18,364,500 cy; and a bulking factor of approximately 10 percent of the total, which brings the total to about 20 mcy. The "bulking factor" assumes that dredged material placed at a disposal site is relatively unconsolidated and, thus, will require more capacity when it is placed at a disposal site than it occupied when in it was in a consolidated state on the seafloor prior to dredging. EPA discussed this disposal capacity needs analysis with the USACE before, during, and after its development, and EPA has also independently assessed it. Based on all of this, EPA

regards the disposal capacity needs analysis to be reasonable, especially in light of the unavoidable uncertainty associated with some of its elements.

EPA also received comments opposing designation of the ELDS but expressing a willingness to accept the NBDS site, lying farther in Connecticut waters. EPA regards these comments to be at least suggestive of a desire to move the site farther from New York waters, while recognizing that such comments do not necessarily indicate an acceptance of an ELDS relocated to lie exclusively in Connecticut waters. In addition, EPA received comments supporting the ELDS but urging that its eastern boundary be pushed westward farther away from the submarine transit corridor in that area of the Sound. Finally, EPA received several comments opposing designation of the NBDS due to its proximity to the Millstone Power Plant.

Taking all of these comments and the above dredged material disposal capacity needs analysis into account, EPA has redrawn the boundaries of the ELDS. The site has been moved to the west so that it avoids the submarine transit corridor. The entire site now also lies in Connecticut waters approximately 0.2 nm from New York waters. In addition, the northern and southern site boundaries were modified to avoid two areas of rocky outcroppings that might provide habitat for fish and other marine life that are attracted to "structure" on the seafloor. EPA has determined that the reconfigured ELDS would provide approximately 20 mcy of disposal capacity, which will meet the disposal capacity need estimated by the USACE.

The following site description is based on information in section 3.4.3 of the FSEIS and other support documents. Specifically, Figure 5.6 in the FSEIS show the location of the site and Table 5-11 provides coordinates for the site boundaries.

The ELDS, as described in the Proposed Rule, comprised approximately the western half of the existing NLDS, along with Sites NL-Wa and NL-Wb, which are adjacent areas immediately to the west of the NLDS. The ELDS now being designated excludes the NLDS entirely and encompasses most of former Site NL-Wa (excluding the northern bedrock area) and former Site NL-Wb (excluding the southern bedrock area) (see FSEIS, Figure 5.6). The ELDS combines these two areas, forming an irregularly-shaped polygon that is 1 x 1.5 nmi, but that excludes the two previously described bedrock areas for a total area of approximately 1.3 square nautical miles (nmi[FN2]).

Water depths in the ELDS range from approximately 59 feet (18 m) in the north to 100 feet (30 m) in the south. The seafloor at the site consists of mostly flat, sandy areas, sloping gradually from north to south. However, there is an area of boulders and bedrock in the northern part of former Site NL-Wa that has been excluded from the reconfigured site boundaries due to its potential value as fisheries habitat. This boulder area may be a lag deposit of a glacial moraine. The water depth in parts of the boulder area is shallower than 59 feet (18 m). The southwestern corner of former Site NL-Wb also contains an area of bedrock and boulders, which is an extension of a larger area with a similar substrate further to the south. The

reconfigured site boundaries also exclude this area of potentially high value fisheries habitat.

The distance from the ELDS to the closest points of land and the state border are as follows: From the northern boundary to the Connecticut shoreline (specifically, Harkness Memorial State Park in Waterford, Connecticut, is 1.1 nmi; from the southeastern corner to Fishers Island, New York, is 2.3 nmi; and from the southeastern corner to the Connecticut/New York state border is .19 nmi).

VI. Summary of Public Comments and EPA's Responses

EPA received numerous comments on its proposed site designation as described in the DSEIS and Proposed Rule from federal and state elected officials in Connecticut, New York, and Rhode Island; the USACE; the U.S. Navy; the states of Connecticut and New York; a number of municipalities; environmental groups; harbor and marine trade groups; and many private citizens. EPA received comments both in support of and in opposition to its proposed action, with some offering suggested improvements. Documents containing copies of all of the public comments received by EPA and EPA's response to each of the comments have been placed in the public docket and on the Web site 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 the Agency's responses.

Comment 1B1. EPA received many comments in support of the designation of ELDS from members of the Connecticut and Rhode Island Congressional

delegations (including a separate submission from Congressman Joseph Courtney), the U.S. Navy, the Connecticut Department of Energy and Environmental Protection, the Connecticut Port Authority, the Connecticut Harbor Management Association, marina and boatyard operators, several local government officials, and private citizens. While many of these comments were of a general nature, some of the commenters also provided additional, specific comments related to the proposed action which are addressed in more detail farther below in this section.

Response 1B1. EPA acknowledges the support provided for the Proposed Rule to designate the ELDS.

Comment 1B2. EPA also received a number of nearly identical comments stating opposition to the DSEIS and the Proposed Rule to designate the ELDS, and dredged material disposal in Long Island Sound in general. These included comments from Congressman Lee Zeldin, Suffolk County Legislators Sarah Anker and Al Krupski, the Citizens Campaign for the Environment, the Fishers Island Conservancy, the Group for the East End, the East End Sailing Association, several local government officials, and private citizens.

Some of these commenters found the DMMP to be inadequate, criticized the DMMP's use of the Federal Standard in evaluating alternatives, criticized what they see as a lack of progress toward ***87825** reducing or eliminating dredged material disposal in Long Island Sound (and, conversely, a lack of progress in increasing beneficial use), and

opposed the preferred alternative of designating the ELDS as a dredged material disposal site. Some of the commenters also provided additional, specific comments, which are addressed in more detail elsewhere in this section.

Response 1B2. EPA acknowledges, but disagrees with, the opposition to the designation of the ELDS, and to the open-water disposal of dredged material in Long Island Sound in general, expressed by these commenters. At the same time, as discussed further in response to other comments in this section, EPA concludes that some amount of open-water disposal of dredged material into Long Island Sound will be necessary in the future because: (1) Dredging is essential to allow for safe navigation for recreational, commercial and military and public safety vessels in Long Island Sound, and (2) practicable alternatives to open- water disposal are unlikely to be sufficient to accommodate the amount of material projected to be dredged from the eastern region of Long Island Sound over the 30-year planning horizon. Furthermore, the ELDS is an environmentally appropriate disposal site and restrictions on the type of material that can be placed at the ELDS, coupled with regulatory requirements to use available practicable alternatives to open-water disposal, should ensure that any use of the disposal site is minimized and does not harm the environment. The Final Rule includes the same site use restrictions that were promulgated for the CLDS and WLDS and are designed to reduce or eliminate the disposal of dredged material into the waters of Long Island Sound.

In response to concerns regarding the adequacy of the DMMP, EPA believes the DMMP provides useful information to help the agencies achieve the goal of reducing or eliminating the open-water disposal of dredged material in the Sound. To help realize this goal, the DMMP recommends standards and procedures for the agencies to use in the review of dredged material management proposals. In addition, the DMMP identifies and discusses a range of specific alternatives to open-water disposal for each of the 52 Federal Navigation Projects (FNPs) in Long Island Sound. The choice of which alternative (or alternatives) should be implemented for a specific dredging project will be made in the future based on the facts, law and policy that exist at the time of the decision. EPA has provided a more detailed discussion regarding the Federal Standard in the preamble to the final rule for the Central and Western Disposal Sites (81 FR 44220) and in the complete Response to Comments document placed in the public docket and on the Web site identified in the ADDRESSES section of this document.

Comment 1B3. Commenters provided a range of opinions on the need for a disposal site in Eastern Long Island Sound. Some commenters noted that dredging is necessary to ensure recreational boating and commercial shipping access to the waters of Long Island Sound. They point out that marinas, boatyards, and boat clubs provide the main access for the public to get out onto the Sound and these facilities must dredge periodically to maintain sufficient depth for safe berthing and navigation. In addition, they comment that dredging is vital to

ensure the continued existence of commercial and recreational industries that generate billions of dollars of economic activity and support thousands of jobs around the Sound. They also note that dredging is important to support the function of national interest facilities, such as the Naval Submarine Base New London and U.S. Coast Guard facilities. These commenters conclude that the ELDS site, as proposed, will meet the dredging needs for the region over the next 30 years and, therefore, there is no need to designate additional sites (such as the CSDS or NBDS).

Other commenters conclude that the dredging needs in the DMMP are vastly overstated, and that there is no need for a disposal site in eastern Long Island Sound. In comments provided by the New York State Department of State (NYSDOS) and New York State Department of Environmental Conservation (NYSDEC), the departments noted that they did not think it was necessary to designate a site in the eastern region of Long Island Sound, but they also recognized the importance of providing stakeholders with a range of options for management of dredged material and recommended EPA designate the NBDS alternative and the NLDS as a "remediation site." EPA received a letter from New York Governor Andrew Cuomo after the end of the comment period expressing opposition to any disposal site designation in eastern Long Island Sound. The Governor's comments further state that the EPA and USACE are incorrectly seeking to justify an eastern site based on the assertion that there is inadequate capacity at the CLDS, WLDS, and Rhode Island Sound Disposal Site (RISDS).

(Additional points in the Governor's letter are addressed at Comment and Response 1B4 below.)

Response 1B3. EPA agrees that dredging is necessary to provide for safe navigation in and around Long Island Sound and acknowledges that the marine trade industry is an important contributor to the economies of both Connecticut and New York. EPA also agrees that dredging is necessary to provide recreational boating access to Long Island Sound. Recreational boating, and associated activities such as fishing and sightseeing, are important public uses of the Sound that improve the quality of life for residents and visitors alike, while also contributing to the local economy. EPA also notes that by helping to provide for safe navigation, not only does environmentally-sound dredging and dredged material management benefit commercial and recreational uses of Long Island Sound, but it also contributes to national security and public safety by facilitating navigation for U.S. Navy, U.S. Coast Guard, and other types of military and public safety vessels.

EPA disagrees with the suggestion in the letter from NYSDOS and NYSDEC and the Governor's letter that an eastern Long Island Sound disposal site is not needed because there is sufficient capacity at other already designated sites outside of the eastern Sound, such as the CLDS, WLDS, and RISDS. The USACE projected in the DMMP that dredging in Long Island Sound would generate approximately 52.9 mcy of material over the 30-year planning horizon, with approximately 30.3 mcy coming from the western and central regions, and 22.6 mcy from the eastern region. Of the 52.9 mcy,

approximately 3.3 mcy of material are projected to be unsuitable for open-water disposal, see 81 FR 24750, leaving approximately 49.6 mcy of material that could potentially be placed at an open-water disposal site, if necessary. Of this 49.6 mcy, 15.2 mcy are projected to be sand that could potentially be used for beneficial uses, such as beach nourishment, while 34.4 is projected to be fine-grained material suitable for open-water disposal. Obviously, it is likely that beneficial uses, or some other upland management option, will be found for some amount of the sand, and even some amount of the fine-grained materials, but there is no guarantee of this and it is impossible to be sure in advance what these amounts will be.

As noted in the DSEIS, the CLDS and WLDS are each estimated to have a disposal capacity of about 20 mcy. This 40 mcy of capacity is not enough to take ***87826** the full 49.6 mcy of material that could require open-water disposal. The RISDS was designated in 2005 to serve the dredging needs of the Rhode Island and southeastern Massachusetts region.

Furthermore, the predicted amounts of material to be managed are unavoidably imperfect estimates. The actual amounts of material to be managed could be higher (or lower) over the 30-year planning horizon, especially when unpredictable events such as large storms and possible improvement dredging needs are considered. Therefore, EPA deems it reasonable to take a conservative approach and designate sites to ensure adequate disposal capacity is available for all the projected material, recognizing that all the capacity might not end up

being needed. Indeed, as per the site use restrictions, EPA will be working with others to try to find beneficial use options for dredged material to minimize how much disposal capacity is needed.

Beyond the issue of having enough disposal capacity, EPA also determined that the CLDS, WLDS, and RISDS would not reasonably serve the needs of the eastern Long Island Sound region once the environmental effects, cost, environmental and safety risks, and logistical difficulties of using such distant sites were taken into account. Thus, part of the basis of EPA's determination that a designated site is needed in eastern Long Island Sound is the longer transit distances from dredging centers in the region to the CLDS, WLDS, and RISDS. These longer trips would result in greater energy use, increased air emissions, increased risk of spills, more difficult project logistics, and greater cost.

As part of its consideration of, and response to, comments asserting that no disposal site is needed in the eastern region of Long Island Sound, and comments urging that the size of any site be reduced or minimized, EPA asked the USACE to revisit once more its estimate of disposal capacity needs and prepare a more refined estimate of the dredged material disposal capacity needed for sediments projected to be dredged from the eastern region of the Sound. Although the values from the DMMP reflected substantial analysis and public input, the USACE agreed to reassess the capacity needs in coordination with EPA. The USACE undertook this analysis and projected that a disposal capacity of approximately 20 mcy would likely be sufficient to meet disposal needs over the

next 30 years.

Comment 1B4. EPA received a letter from New York Governor Andrew Cuomo (and undersigned by 32 federal and state elected officials) after the end of the comment period (dated August 4, 2016). The Governor's letter expresses opposition to any disposal site being designated in the eastern region of Long Island Sound and indicates his intent to legally challenge any EPA rule designating a disposal site in eastern Long Island Sound and seek to prevent any disposal pursuant to any such rule. The Governor states that this stance is consistent with the State of New York's decades-long opposition to "the unabated dumping of dredged materials in Long Island Sound." The letter also states that the designation of a site in eastern Long Island Sound is not necessary and may further impede progress toward reducing or eliminating open water disposal, a fundamental component of the rule. In addition, the letter indicates that the State of New York opposes the site designation based on comments provided by NYSDOS and NYSDEC in a joint letter. The letter further states that the EPA and USACE are incorrectly seeking to justify an eastern site based on the assertion that there is inadequate capacity at the WLDS, WLDS, and RISDS.

Response 1B4. EPA is not legally obligated to consider and respond to the Governor's comment letter in this rulemaking process and environmental review under NEPA because the letter was submitted after the close of the comment period. Nevertheless, EPA has reviewed and given careful consideration to the views presented by Governor

Cuomo and provides a response here.

EPA disagrees with the stance presented by the Governor's letter. Without waiting to read EPA's final analysis of whether an appropriate site can be identified, and whether there is a need for such a site to provide a dredged material disposal option to ensure that dredging needed to ensure safe navigation and suitable berthing areas for recreational, commercial, public safety and military vessels, the Governor expresses a plan to sue over any rule designating a site in the eastern region of Long Island Sound.

While the Governor's letter suggests that New York "has for decades opposed" dredged material disposal in Long Island Sound, the reality is more nuanced. Over the years, as with the Connecticut shore of the Sound, harbors and marinas on the New York shore of Long Island Sound have been dredged and in some cases the sediments have been placed at disposal sites in Long Island Sound, without objection from New York (e.g., Mamaroneck Harbor). At other times, NY has not objected as long as materials were not placed at the NLDS near to Fisher's Island, NY, and were instead placed at the CLDS, just south of New Haven, Connecticut. At other times, when practicable alternatives were available, material dredged from New York waters has been managed at upland sites. The same is true for material dredged from Connecticut waters (i.e., that some material has been placed at open-water disposal sites, while other material has been managed at upland sites). Furthermore, in still other cases, the dredged material from particular projects has been analyzed and found to be

unsuitable for open-water disposal and such material has been managed using methods other than open-water disposal (e.g., placement in a confined aquatic disposal [CAD] cell or confined disposal facility [CDF]). Thus, some suitable material from New York has been placed at open-water disposal sites, while some has been managed at upland locations (e.g., for beach nourishment) and unsuitable material has been managed without open-water disposal. EPA supports this type of overall approach (i.e., choosing a management method appropriate to the facts of each individual case from a menu of environmentally sound methods).

Consistent with this more nuanced history, EPA believes these issues should be addressed based on their technical, factual, legal, and policy merits, rather than taking an across-the-board position for or against dredged material disposal in the waters of the Sound. EPA has found that the DMMP and the USACE's more recent updated dredged material disposal capacity needs analysis clearly establish a need for a dredged material disposal site to be designated in the eastern region of the Sound. EPA's analysis, in turn, establishes that the ELDS is an appropriate site for designation. This designation will provide an option for potential use for suitable material when practicable alternatives to open-water disposal are not available. Going forward, application of EPA's sediment quality criteria will ensure that only environmentally suitable dredged material can be approved for open-water disposal. Moreover, EPA's existing ocean dumping criteria concerning whether there is a need for open-water

disposal, see 40 CFR 227.15 and 227.16, coupled with the new site use restrictions applicable to the WLDS, CLDS, and ELDS, see 40 CFR 228.15(b)(4)-(6), will ensure that the open-water disposal option is used only when the material is found to be ***87827** suitable and no practicable alternatives to open-water disposal are available.

EPA cannot and should not base a decision not to designate an environmentally appropriate disposal site on as of yet unidentified upland management options that might or might not materialize in the future for all the dredged material that needs to be managed. Such an approach would pose an irresponsible threat to safe navigation and the related recreational, commercial, public safety, and national defense activities that depend on it. If, upon EPA designation of the ELDS, there is no actual need for the site (i.e., practicable alternatives are available for every dredging project), then dredged material will not be placed there, as the practicable alternatives will be used instead.

Contrary to the views in Governor Cuomo's letter, the joint comment letter from the NYSDOS and NYSDEC expressed recognition of both the need for dredging to support water-dependent activities and navigation infrastructure and "the importance of providing stakeholders with a range of options for management of dredged material in LIS . . . ." Also contrary to the views expressed in the Governor's letter, the NYSDOS/NYSDEC letter emphasizes the State of New York's commitment to "working with all partners to secure a path forward for achievable, measurable reductions in open water disposal over time . . . ," and noted that the state had

demonstrated this commitment by NYSDOS's recent concurrence with EPA's amended Final Rule designating the CLDS and WLDS, "which includes updated policies and procedures intended to meet this goal, and is subject to the additional restrictions agreed to by all Agencies involved." The state agencies' letter further pointed out that the "[t]he proposed rule for eastern LIS contains the same restrictions as those contained within the Final Rule for CLDS and WLDS, with the same ultimate goal of the reduction in open water disposal over time." EPA agrees with NYSDOS and NYSDEC that the site use restrictions for the CLDS, WLDS, and ELDS are well designed to pursue and achieve the shared long-term goal of reducing or eliminating the open-water disposal of dredged material in Long Island Sound. At the same time, these restrictions do not obviate the need to designate an appropriate open-water disposal site in the eastern region of the Sound to provide an environmentally sound disposal option for material that cannot be managed in some other way. While the Governor states opposition and an intent to sue over any site being designated in the eastern region of the Sound, the NYSDOS/NYSDEC letter instead supports designating both the NBDS and the NLDS (as a "remediation site") to provide disposal options in the eastern Sound. EPA agrees that a disposal site should be designated in the eastern Sound, but concludes that designating the reconstituted ELDS is preferable to designating the NBDS and NLDS.

With regard to the Governor's concerns about the capacity at the CLDS, WLDS, and RISDS, see

Response 1B3 above.

Comment 1B5. Among those supporting the designation of ELDS, a number of commenters suggested revisions to the boundaries of the site for a variety of reasons. Some suggested modifying the northern boundary to avoid burial of rocky, hard-bottom areas that may provide relatively higher quality fish habitat, while others suggested moving the eastern boundary of the proposed ELDS to remove any portion of the site from the submarine transit corridor into the Thames River. Comments from NYSDOS and NYSDEC recommend buffer zones be established around bedrock and archeological areas and included in the Site Management and Monitoring Plan (SMMP) for the ELDS.

Response 1B5. EPA agrees with the comments to modify the disposal site boundaries to avoid the bedrock and boulder areas and the submarine transit corridor. As discussed in detail above in Section V, EPA is designating the ELDS site with modifications to the boundaries. EPA has redrawn the boundaries of the ELDS to exclude both the rocky, hard-bottom area in the north central portion of the site, and another smaller rocky area in the southwestern corner of the site. Disposal in the ELDS near those areas will be carefully managed, including establishing a 100-meter buffer, to avoid any adverse impacts to these important habitat features. EPA also has shifted the eastern boundary of the ELDS to the west to remove it entirely from the submarine transit corridor. The eastern boundary of the ELDS site is now .367 nmi west of the corridor. This shift of the site also has moved it

entirely out of New York waters.

Comment 1B6. USACE provided comments supporting designation of the Cornfield Shoals Disposal Site (CSDS). The USACE would like a cost-effective open-water alternative for the Connecticut River dredging center, and it states that the availability of the CSDS would help extend the useful life of the CLDS and ELDS by reducing reliance on those sites for placement of materials suitable for CSDS. Another commenter recommends designation of the CSDS to continue its role as a dispersal site for clean, sandy material in order to "take some pressure off" while supporting the designation of NBDS, both in lieu of ELDS. NYSDOS and NYSDEC opposed designation of CSDS because of the dispersive nature of the site.

EPA received a joint letter from NYSDOS and NYSDEC that commented that there isn't really a need for a site in eastern Long Island Sound based on historic disposal amounts and capacity at other existing sites like the CLDS, but recognized that some stakeholders in the region need one, so they recommend designation of the NBDS. They further recommended designation of the NLDS as a "remediation site." EPA received comments from others expressing concern that designation of the NBDS would contribute to cumulative impacts to Niantic Bay, which is already stressed by the thermal discharge from the Millstone Nuclear Power Station. CTDEEP, while expressing support for ELDS, also indicated that NBDS, in combination with ELDS, is a viable option if adequate management practices are in place at the site to ensure containment of dredged materials. Another

commenter reluctantly supported designating NBDS as the lesser of evils, while still other commenters opposed designation of the NLDS and wanted that site closed. EPA also received comments stating it should have given more consideration to designating a site outside Long Island Sound, including in deep open-ocean waters off Rhode Island and off the continental shelf.

Response 1B6. While EPA did determine for the Proposed Rule that the CSDS meets the site selection criteria and could be designated in combination with one of the other alternatives, and did seek comments on that position, EPA ultimately decided not to designate the CSDS. EPA agrees that the site is dispersive and lies within a high energy area, which makes the site difficult to manage and monitor. Further, use of this site would need to be limited to receiving material such as sand, which EPA feels can and should typically be used for beneficial uses, instead, such as beach nourishment. Finally, EPA has concluded that designating a single site is preferable to designating multiple sites because dredged material placement would be concentrated in one area and site management and monitoring demands would be reduced. EPA also has concluded that the ELDS will provide an adequate open-water disposal option by itself, while the CSDS would be insufficient by itself ***87828** because of the restrictions for site use that EPA would place on it.

Regarding the request to designate the NBDS, based on the dredging needs assessment conducted by the USACE for the DMMP, and the subsequent, more refined dredged material disposal capacity needs

analysis by the USACE, EPA is confident that the ELDS is sufficient by itself to meet all the open-water disposal needs of the eastern Long Island Sound region and EPA prefers to designate a single site to serve the region. Therefore, there is no need to designate the NBDS, too. Moreover, designating a second site would entail additional monitoring and management work and expense that can be avoided. Finally, had EPA decided to designate the NBDS, it would only have designated the containment portion of the site to ensure containment of the dredged material, which does not provide enough capacity to meet the projected need. The question of whether designating the NBDS would cause adverse cumulative impacts on the ecology of Niantic Bay when viewed together with effects of the Millstone Nuclear Power Station thermal discharge is now moot because EPA is not designating the NBDS. With regard to consideration of sites outside of Long Island Sound, as discussed in Chapters 3, 4, and 5 in the DSEIS and in the Proposed Rule, EPA considered a wide range of alternatives, including sites in Block Island Sound and on the continental shelf, before deciding to propose designation of the ELDS. The sites in Block Island Sound had a combination of significant marine habitats and strong tidal currents, and were relatively small or were located at a comparatively long distance from the dredging centers in the region. EPA's evaluation also determined that the long distances and travel times between the dredging locations in eastern Long Island Sound and the continental shelf posed significant environmental, operational, safety, and financial concerns, rendering such options unreasonable.

Finally, with regard to the suggestion that the NLDS be designated as a "remediation site," EPA disagrees. Long-term monitoring of the disposal mounds at the NLDS, and surveys conducted in 2013 at all the alternative sites, indicate a healthy and diverse benthic community and no evidence of levels of contamination that would require some sort of "remediation," even if it could be determined what type of remediation would be appropriate for a site in relatively deep water. The ecological parameters and phyla data indicate that, overall, the NLDS has relatively good species diversity and is not dominated by just a few species. These data were consistent with observations at off-site locations outside of the NLDS, although the species richness was slightly lower at the off-site stations (FSEIS Section 4.9.3 and Table 4-11). Toxicity testing conducted in 2013 indicated no potential toxicity at the NLDS or other alternative sites (FSEIS Section 4.6.3 and (Table 4-9). Finally, the majority of the NLDS is already near capacity, with much of the site already at depths that would prevent further placement of dredged material. EPA is not designating the NLDS and that site will close by operation of law on December 23, 2016.

Comment 1B7. NYSDOS and NYDDEC opined that there were deficiencies in the DSEIS, such as an inadequate alternatives analysis, the absence of comprehensive biological monitoring, and an inadequate cumulative impact assessment. They also suggested that comments they had provided earlier on draft sections of the DSEIS regarding physical oceanography and biological studies were not reflected in the final reports. They also

expressed concern about the lack of information about the effectiveness of capping plans at the NLDS.

Response 1B7. EPA finds the alternatives analysis, biological monitoring, and cumulative impact assessment were all more than adequate. The alternatives analysis included active and historic sites, as well as some other potential sites that had never been used before in eastern Long Island Sound, Block Island Sound, and off the continental shelf south of Long Island. EPA also considered use of the CLDS, WLDS, and/or the RISDS to serve the eastern region of the Sound. In addition, and as informed by the USACE's DMMP, EPA considered beneficial use options and other non-open-water options such as confined disposal cells (CDFs) or facilities (CDFs).

EPA's cumulative impact assessment is based on over 40 years of monitoring data on chemistry, toxicity, bioaccumulation, benthic health, and bathymetry to assess physical and biological changes at the NLDS and CSDS sites. It also was based on an evaluation of the potential effects of designating the ELDS, NBDS, CSDS, or other site alternatives. Given that EPA has not found significant adverse effects from past disposal at the NLDS or CSDS, and does not anticipate significant adverse effects from the future placement of suitable material at the ELDS, it is not surprising that EPA did not find significant adverse cumulative impacts from the proposed action. EPA also considered issues such as the cumulative effect on bottom depths that would result from future disposal at the proposed disposal sites.

EPA and the USACE will continue to manage and monitor all Long Island Sound disposal sites and will request input from the state agencies if there is evidence of any adverse impacts. If necessary, EPA and the USACE will modify the SMMPs for any site at which impacts have been identified, and would do so in consultation the states of New York and Connecticut and other interested parties, as appropriate.

With respect to addressing comments received on various draft reports and documents during the development of the DSEIS, EPA did take all comments into consideration and in some cases modified those documents accordingly. In other cases, EPA may have decided that modifications were not warranted based on the comments submitted. EPA solicited input throughout the development of the DSEIS through a "cooperating agency workgroup," of which NYSDOS and NYSDEC were regular participants, and from the public through an extensive public involvement program. Agency and public input received during the three-and-a-half-year process was reflected in the DSEIS text or in the appendices or both. Regarding the idea of "capping" disposal mounds at the NLDS with new, clean dredged material, as discussed in Response 1B7 above, EPA does not see any reason to pursue this approach. Extensive long-term monitoring of the NLDS and surveys conducted in 2013 for the DSEIS have documented a healthy benthic community at the site, with no toxicity in the sediment.

Comment 1B8. Some of the commenters who support the Proposed Rule believe that the site use

restrictions accompanying the site designation that establish, among other things, standards and procedures for identifying and utilizing alternatives to open-water disposal, will help achieve the goal of reducing or eliminating open-water disposal of dredged material wherever practicable. These commenters support the goal of reducing open-water placement of dredged material in the waters of Long Island Sound, but believe that it is not feasible or practicable at this time to handle all dredged material at upland locations or at already designated dredged material disposal sites. Some of those opposing the designation recommended upland placement and beneficial use of dredged material, rather than disposing of it at open-water sites. One commenter suggested "warehousing" material for future use in response to sea level rise, ***87829** another suggested consideration of on-barge dewatering as a tool to facilitate upland placement of dredged materials, and another commenter suggested the alternative of the creation of islands near their sources.

Joint comments from NYSDOS and NYSDEC expressed commitment to "working with all partners to secure a path forward for achievable, measurable reductions in open water disposal over time . . . ," and noted that the state had demonstrated this commitment by NYSDOS's recent concurrence with EPA's amended Final Rule designating the Central and Western Long Island Sound Disposal Sites, "which includes updated policies and procedures intended to help meet this goal, and is subject to the additional restrictions agreed to by all Agencies involved." The state

departments' letter further pointed out that the "[t]he proposed rule for eastern LIS contains the same restrictions as those contained within the Final Rule for CLDS and WLDS, with the same ultimate goal of the reduction in open water disposal over time."

Response 1B8. EPA agrees with the comment that the standards and procedures in the Final Rule will support the goal of eliminating or reducing open-water disposal. EPA also agrees that relying solely on upland management alternatives for all dredged material from the eastern region of the Sound is not feasible at this time. Such alternatives will, however, likely be feasible for some of that material. For example, sandy material is commonly used for beach and nearshore bar nourishment at the present time and the standards in the Final Rule expect that sandy material will continue to be used beneficially. In addition, it would be impracticable to rely on distant open-water sites outside the eastern region of the Sound, or on contained in-water disposal, for all dredged material from the eastern Sound. See 40 CFR 227.15 and 227.16(b).

Ultimately, decisions about how particular dredged material will be managed will be made in individual project-specific reviews under the MPRSA and/or the CWA, with additional overview and coordination provided by the Long Island Sound Steering Committee and Regional Dredging Team (RDT), as described in the site use restrictions. The Steering Committee and RDT have a number of important roles specified in the site use for the ELDS, including the identification and piloting of beneficial use alternatives, identifying possible resources to

support those alternatives, and eliminating regulatory barriers, as appropriate. EPA expects that the Steering Committee and 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. The process of continually seeking new alternative uses for dredged material will provide the opportunity to evaluate approaches not yet fully developed, such as the "warehousing" suggestion. EPA views on-barge dewatering as a technique that, while expensive, has promise and should be explored and further evaluated by the Steering Committee and RDT. Ultimately, it could be become a useful technique for dewatering dredged material to prepare it for management using methods other than open-water disposal. Managing dredged material by using it to create islands was evaluated in the DMMP. The concept of creating islands in waters of the United States raises numerous issues (e.g., environmental, water quality, regulatory) and any proposal of this type would need to go through a very involved regulatory process and would have to meet all legal requirements. This is something the Steering Committee and the RDT can consider in the future if a proposal is developed.

EPA agrees with the NY departments that the new site use restrictions, agreed upon by the interested state and federal agencies and inserted into the CLDS/WLDS regulations, include standards and procedures to secure a path forward for achievable, measurable reductions in open-water disposal over time. EPA also agrees that these same restrictions

are now also being applied to the ELDS. In EPA's view, it makes sense to treat all regions of Long Island Sound the same in this regard.

Comment 1B9. EPA received a number of comments concerning potential impacts on aquatic species including fish, lobsters and oysters. Some expressed concern that the DSEIS: (1) Incorrectly portrays eastern Long Island Sound as "a barren desert with barely any fish or shellfish species," based in part on what they characterized as an inadequate data collection effort; (2) "glosses over" the fact that parts of the area are federally-designated Essential Fish Habitat (EFH); and (3) minimizes the potential impacts of dredged material disposal on "struggling lobster populations." Another commenter noted that the NLDS is adjacent to Fisher's Island, NY, where oyster harvesting has been a way of life for centuries, and the threat to water quality posed by an expansion of open-water dumping at this site translates directly to a loss of important seafood jobs.

Response 1B9. With respect to comments about EPA's mischaracterization of eastern Long Island Sound in terms of biological productivity, there was extensive documentation in the DSEIS and its supporting technical reports supporting the conclusion that, while this region is generally a highly productive and diverse ecosystem, the area in which the ELDS is sited is less so. Compared with some of the hard-bottom, bedrock and boulder areas in other parts of the region, the seafloor in the ELDS is relatively flat and sandy, without the sort of structure that typically supports a large diversity

of fish or shellfish. At the same time, EPA has excluded two areas from the ELDS that do include the type of hard-bottom, bedrock and boulder conditions that tend to provide relatively better marine habitat. As for concerns about the data on fishing activity, EPA made an extensive effort to encourage as many fisherman as possible to respond to the survey in order to provide information that was as accurate as possible for analysis. The survey was made available for 37 days and, as noted in the DSEIS, it was distributed via multiple media avenues. Of 440 respondents, only 229 surveys provided sufficient information (at least five questions answered), and very few provided location-specific information as to where they fished. Of the 229 respondents, only six percent indicated they fished near dredged material disposal sites (one percent regularly and five percent occasionally). There is no shellfishing in this area, and the closest shellfish aquaculture operation is several miles west of the ELDS and closer to shore.

EPA did not gloss over the existence of EFH in the vicinity of the ELDS. As required by the Magnuson-Stevens Fisheries Conservation and Management Act, EPA coordinated with the NOAA National Marine Fisheries Service (NMFS) to determine whether its proposal to designate the ELDS would cause adverse impacts to EFH. NMFS concurred with EPA's determination that the designation of the ELDS would not adversely affect EFH. The coordination process is fully documented in the DSEIS.

EPA assessed lobster abundance in the DSEIS and

found that alternative sites do not contain preferred habitat for lobsters. Prior to 1999, lobsters were very abundant throughout Long Island Sound, and particularly in the western and central regions. However since the major lobster die-off in 1999, lobsters are far less abundant through the Sound, and found primarily in the deeper waters of the central basin and The ***87830** Race. The 1999 lobster die-off prompted millions of dollars in research over the past 16 years, the results of which have led scientists and resource managers to believe that the phenomenon was caused by a combination of factors, including increased water temperatures, low dissolved oxygen levels (hypoxia), a parasitic disease (paramoeba), and possibly pesticide runoff. Researchers have not cited dredged material disposal as a possible factor in the die-off.

EPA does not agree that designating the ELDS will threaten oystering and the way-of-life of residents of Fisher's Island, NY, or cause the loss of jobs in the seafood industry. The boundaries of the ELDS have been revised so that it is farther from Fisher's Island, entirely outside of the NLDS, and entirely outside of New York State waters. EPA's evaluation of the ELDS indicates that designation of the site will not cause significant adverse effects to water quality or aquatic organisms or their habitat. As a result, the site designation will not cause lost jobs in the seafood industry. To the contrary, designation of the ELDS may assist the local seafood industry. Fishing vessels require adequate navigation channels and berthing areas, which are maintained as a result of dredging. Designation of the ELDS should facilitate needed dredging by providing an

open-water disposal option for use when practicable alternative management methods are not available.

Comment 1B10. Some of those opposing the Proposed Rule stated that the dredged material is toxic and should not be placed in the waters of Long Island Sound, and requested remediation of such dredged material. Commenters questioned the use of older data to support the evaluation of dredged material for its suitability for open-water disposal. Some commenters noted concern with the introduction of nitrogen from dredged material into the system and requested that EPA estimate the quantity of nitrogen that would be added to the system from dredged material over the next 30 years. EPA also received comments regarding concern due to metal or organic contaminant concentrations in sediment and benthic organism tissues, elevated breast cancer rates in East Lyme, and closed shellfish harvesting areas following rainfall. Some commenters suggested that the CTDEEP Remediation Standard Regulations should be followed for disposal of dredged material in Long Island Sound.

Response 1B10. EPA strongly disagrees with the suggestion that toxic sediments will be disposed of at the ELDS. Neither the existing laws and regulations nor the Final Rule would allow the disposal of toxic material at the sites. Rigorous physical, chemical, and biological testing and analysis of sediments is conducted prior to any authorization to dredge. The MPRSA and EPA's ocean dumping regulations provide that sediments that do not pass these tests are considered “unsuitable” and shall not be disposed of at the site.

EPA believes concerns about the disposal of toxic sediments at the NLDS and other Long Island Sound disposal sites also have been addressed by the USACE's DAMOS program, which has collected data at these sites 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. These reports indicate that toxic sediments are not being placed at open-water disposal sites. Moreover, 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. Monitoring at the NLDS has verified that past management practices have been successful in adequately controlling any potential adverse impacts to water quality and benthic habitat.

Furthermore, water and sediment quality have improved in Long Island Sound as a result of improvements in the control of point source and non-point source pollutant discharges to the Sound and its tributaries. At the same time, dredging and dredged material management are carefully controlled by federal and state agencies to optimize environmental results using tools such as "environmental windows" that preclude dredging when sensitive aquatic organisms in the vicinity of dredging operations would be at an increased risk of being harmed, CAD cells or CDFs that sequester unsuitable dredged material, and beneficial use projects that avoid open-water disposal of dredged

material that can be better put to an alternative use (e.g., using sand for beach nourishment). This management approach is reflected in the site use restrictions for ELDS that are intended to reduce or eliminate the open-water disposal of dredged material into Long Island Sound by promoting and facilitating the use of available practicable alternatives to such open-water disposal.

Potential risks associated with the bioaccumulation of chemicals from sediments at the alternative sites were evaluated by comparing contaminant concentrations in tissues of test organisms to Federal Drug Administration (FDA) Action/Tolerance Levels for an assessment of potential human health impacts and to Ecological Effect Values for an assessment of ecological impacts. Ecological Effects Values represent tissue contaminant concentrations believed to be safe for aquatic organisms, generally derived from the final chronic value of USEPA water quality criteria. The FDA Action/Tolerance Levels and Ecological Effect Values are commonly used by USEPA and USACE in the dredging program to assess risk. This evaluation considers that tissue contaminant concentrations that do not exceed FDA Action/Tolerance Levels or Ecological Effect Values do not result in a potential human health or ecological risk. There is no evidence in the current literature or other data evaluated by EPA to support a causative link between any elevated cancer rates that may exist in East Lyme and dredged material disposal in Long Island Sound.

Shellfish bed closures are typically a result of bacterial contamination from untreated or poorly

treated sanitary wastewater, stormwater runoff, marine biotoxins, or elevated water temperatures. There is no evidence that shellfish harvesting in Long Island Sound, most of which is from aquaculture operations conducted in open waters off the coast, is, or will be, affected by dredged material disposal at the ELDS.

Regarding comments about older studies referenced in the DSEIS, such as those conducted in support of the 2004 EIS that supported the designation of the CLDS and WLDS, EPA used the best available literature during the development of the DSEIS. Some of this material was older and some was more recent. EPA also has included as part of the FSEIS relevant data from more recent studies (such as fisheries data) that were not available at the time the DSEIS was published. In all cases, EPA evaluated whether the data was relevant and appropriate for addressing whatever issue was at hand. While some parameters may change constantly, others remain consistent for long periods of time. Typically, older data were supplemented with newer data, or juxtaposed to newer data, to help depict trends and patterns in the study area.

As to the concern about dredged material disposal in Long Island Sound contributing to nitrogen loading in these waters, EPA notes that nitrogen loading is a concern due to its potential to help fuel excessive algae levels, which could be one potential driver of hypoxia in western Long Island Sound. In Chapter 5.2.1 of the DSEIS, however, EPA ***87831** discussed the relative insignificance of nitrogen loading from dredged material disposal. The USACE also addressed the issue in Section 3.5.2 of 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.

Finally, EPA disagrees with the request to follow the CTDEEP Remediation Standard Regulations (RSRs). The RSRs are not applicable to dredged material from marine waters placed at open-water disposal sites. Rather, they "identify the technical standards for the remediation of environmental pollution at hazardous waste sites and other properties that have been subject to a spill, release or discharge of hazardous wastes or hazardous substances." The MPRSA and Ocean Dumping Regulations limit the potential for adverse environmental impacts associated with dredged material disposal by requiring that the dredged material from each proposed dredging project be subject to sediment testing requirements. Suitability is determined by analyzing the sediments proposed for dredging for their physical characteristics as well as for toxicity and bioaccumulation. If it is determined that the sediment is unsuitable for open-water disposal—that is, that it may unreasonably degrade or endanger human health or the marine environment—it cannot be placed at disposal sites designated under the MPRSA.

Comment 1B11. EPA received comments from the Shinnecock Tribal Nation noting the tribe's longstanding reliance on the waters of Long Island Sound for "food, travel and spiritual renewal." The Shinnecock have high regard for these waters and, as a steward for this resource, feel a shared

responsibility to protect it and to speak for other life forms that rely on it but cannot speak for themselves. The Shinnecock's comments note that work is beginning to investigate whether "submerged paleo cultural landscapes" exist that would indicate that the tribe's ancestors lived farther offshore than currently understood. The tribe expresses concern that dredged material placement at an open-water site could further bury any evidence of such sites. The tribe also expresses concern over how long it takes aquatic organisms to recover from open-water placement of dredged material and whether such placement at a designated site will adversely affect whales. Finally, the Shinnecock note that their concern over water pollution is related to their historic use of Long Island Sound as a travel route, which they still use for canoe journeys.

Response 1B11. EPA acknowledges and respects the Shinnecock Tribal Nation's stewardship, concern, and reliance upon the waters of Long Island Sound. As tasked by Congress under the CWA and MPRSA, EPA also is a steward of Long Island Sound with a mission of protecting its physical, chemical, and biological integrity, and protecting human and ecological health from harm that could result from the disposal of material into these waters. As a result, EPA believes that its goals align well with the environmental interests of the Shinnecock Tribal Nation.

With regard to the possibility that dredged material disposal might further bury submerged evidence of settlements of the Shinnecock's ancestors, EPA notes that it is currently unaware of any specific

reason to believe that such submerged evidence may exist at the ELDS or the other site alternatives. In evaluating site alternatives, EPA considered the site selection criteria in EPA's regulations, which include whether “any significant natural or cultural features of historical importance” may exist “at or in close proximity to” the disposal sites. See 40 CFR 228.6(a)(11). EPA's consideration of this criterion dovetailed with its consultation with the State Historic Preservation Officers of both Connecticut and New York, as well as its consultation with the Shinnecock Indian Nation. In addition, EPA conducted side-scan sonar survey work to look for possible historic resources in the area of the disposal sites and none of this work identified any archaeological or historical artifacts of cultural significance. If later investigations identify the presence of submerged artifacts of cultural importance to the Shinnecock Indian Nation, EPA will consult with the tribe regarding how to respond appropriately in terms of the future use and management of the site.

As discussed in detail elsewhere in the preamble, no significant adverse effects will occur to water quality, habitat value, or marine organisms, as a result of using the ELDS as a dredged material disposal site. With regard to the concern expressed about possible impacts to whales, EPA evaluated the potential for the site designation to affect endangered species, including whales, and concluded that adverse effects to whales or their critical habitat were unlikely to result from the site designation. The National Marine Fisheries Service concurred with EPA's conclusion.

Finally, regarding the Shinnecock using the waters of Long Island Sound for canoe journeys, nothing about the designation of the ELDS should interfere with or preclude such journeys. First, the dredging (and therefore dredged material disposal) season is restricted to avoid the warmer weather months for ecological reasons, but this also ensures that dredging traffic and disposal is less likely to interfere with other boating activities that tend to be occur during warmer weather. Second, any dredged material disposal would be concentrated in one offshore area as a result of designating the ELDS. This would tend to minimize any conflicts with non-dredging-related navigation. Finally, multiple types of navigational activities (e.g., recreational, commercial, military) have coexisted with dredged material disposal-related navigation for years in Long Island Sound and EPA expects that this will continue after designation of the ELDS.

Comment 1B12. EPA received a number of very specific and detailed comments on aspects of the studies and findings in the DSEIS and its appendices. Subjects included the physical oceanography study in Appendix C, physical energy and hydrodynamics, sediments, and tidal energy projects, among others.

Response 1B12. EPA's detailed responses to these comments are contained in the Response to Comments document that is included in the FSEIS as Appendix J and placed in the public docket and on the Web site identified in the ADDRESSES section of this document.

VII. Changes From Proposed Rule

In response to public comment, as previously described, EPA has made certain adjustments to the boundaries of the ELDS as it was proposed. These adjustments have reduced the size of the ELDS from approximately 1 x 2 nm to approximately 1 x 1.5 nm (and an area of 1.3 nmi[FN2]), and the capacity of the site from 27 mcy to approximately 20 mcy. The specific boundary adjustments and the reasons for them have been discussed above and are further discussed below.

EPA also has decided not to designate the NBDS or CSDS. In the Proposed Rule, EPA did not propose to designate either of these two sites, but did request public comment on whether either or both ought to be designated in addition to, or instead of, the ELDS. EPA received some public comments favoring designation of the NBDS or CSDS, and other comments opposing the designation of either site. Some commenters favored designation of the ELDS, while others commented that no ***87832** designated disposal site was needed in the eastern portion of the Sound. After considering all these comments, EPA decided to designate only the ELDS. This decision was based primarily on the Agency's determination that one site is sufficient to meet the dredging needs of the eastern Long Island Sound region, and that the ELDS is the best site when evaluated in light of the site selection criteria in the Ocean Dumping Regulations. EPA also received public comments that support this decision.

The Final Rule for the ELDS, as with the Proposed Rule, incorporates by reference the site use

restrictions, including the standards and procedures, contained in the final amended site designation rule for the Central and Western Long Island Sound dredged material disposal sites. These restrictions are further described in Section IX ("Restrictions").

VIII. Compliance With Statutory and Regulatory Authorities

EPA has conducted the dredged material disposal site designation process consistent with the requirements of the MPRSA, NEPA, CZMA, the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and any other applicable legal requirements.

A. Marine Protection, Research, and Sanctuaries Act

Section 102(c) of the MPRSA, as amended, 33 U.S.C. 1412(c), et seq., gives the Administrator of EPA authority to designate sites where ocean disposal of dredged material may be permitted. See also 33 U.S.C. 1413(b) and 40 CFR 228.4(e). Neither statute nor regulation specifically limits how long an EPA-designated disposal site may be used. Thus, EPA site designations can be for an indefinite term and are generally thought of as long-term designations. EPA may, however, place various restrictions or limits on the use of a site based on the site's capacity to accommodate dredged material or other environmental concerns. See 33 U.S.C. 1412(c).

Section 103(b) of the MPRSA, 33 U.S.C. 1413(b), provides that any ocean disposal of dredged

material should occur at EPA- designated sites to the maximum extent feasible. In the absence of an available EPA-designated site, however, the USACE is authorized to "select" appropriate disposal sites. There are currently no EPA-designated dredged material disposal sites in the eastern portion of Long Island Sound. There are two active USACE-selected sites in that region, the NLDS and CSDS, but neither will be available after December 23, 2016, when their Congressionally-authorized term of use expires.

The Ocean Dumping Regulations, see generally 40 CFR subchapter H, prescribe general and specific criteria at 40 CFR 228.5 and 228.6, respectively, to guide EPA's choice of disposal sites for final designation. Ocean dumping sites designated on a final basis are promulgated by EPA at 40 CFR 228.15. See 40 CFR 228.4(e)(1). Section 102(c) of the MPRSA, 33 U.S.C. 1412(c), and 40 CFR 228.3 also establish requirements for EPA's ongoing management and monitoring, in conjunction with the USACE, of disposal sites designated by EPA. This enables EPA to ensure that unacceptable, adverse environmental impacts do not occur from the placement of dredged material at designated sites. Examples of site management and monitoring measures employed by EPA and the USACE include the following: Regulating the times, rates, and methods of disposal, as well as the quantities and types of material that may be disposed; conducting pre- and post-disposal monitoring of sites; conducting disposal site evaluation studies; and, if warranted, recommending modification of site use and/or designation conditions and restrictions. See

also 40 CFR 228.7, 228.8, 228.9.

A disposal site designation by EPA does not actually authorize the disposal of particular dredged material at that site. It only makes the site available as a possible management option if various other conditions are met first. Disposal of dredged material at a designated site must first be authorized by the USACE under MPRSA section 103(b), subject to EPA review under MPRSA 103(c). USACE authorization can only be granted if: (1) It is determined that there is a need for open-water disposal for that project (i.e., that there are no practicable alternatives to such disposal that would cause less harm to the environment); and (2) the dredged material is found suitable for open-water disposal by satisfying the applicable environmental criteria specified in EPA's regulations at 40 CFR part 227. See 40 CFR 227.1(b), 227.2, 227.3, 227.5, 227.6 and 227.16. An authorization for disposal also must satisfy other applicable legal requirements, such as those under the ESA, the MSFCMA, the CWA (including any applicable state water quality standards), NEPA, and the CZMA. The text below discusses EPA's evaluation of the ELDS for this Final Rule using the applicable site selection criteria from EPA's MPRSA regulations. It also discusses the Agency's compliance with site management and monitoring requirements.

EPA's evaluation considered whether there was a need to designate one or more disposal sites for long-term dredged material disposal, including an assessment of whether other dredged material management methods could reasonably be judged to obviate the need for such designations. From this

evaluation, EPA concluded that one or more open-water disposal sites were needed. EPA then assessed whether sites were available that would satisfy the applicable environmental criteria to support a site designation under MPRSA section 102(c). In deciding to designate the ELDS, as specified in this Final Rule, EPA complied with all applicable procedural requirements and substantive criteria under the MPRSA and EPA regulations.

1. Procedural Requirements

MPRSA sections 102(c) and 103(b) indicate that EPA may designate ocean disposal sites for dredged material. EPA regulations at 40 CFR 228.4(e) specify that dredged material disposal sites will be "designated by EPA promulgation in this [40 CFR] part 228 . . . ." EPA regulations at 40 CFR 228.6(b) direct that if an EIS is prepared by EPA to assess the proposed designation of one or more disposal sites, it should include the results of an environmental evaluation of the proposed disposal site(s). In addition, the Draft SEIS (DSEIS) should be presented to the public along with a proposed rule for the proposed disposal site designation(s), and a Final SEIS (FSEIS) should be provided at the time of final rulemaking for the site designation.

EPA has complied with all procedural requirements. The Agency prepared a thorough environmental evaluation of the site proposed for designation and other alternative sites and courses of action (including the option of not designating an open-water disposal site). This evaluation was first presented in a DSEIS (and related documents) and a Proposed Rule for promulgation of the disposal

sites. EPA published the Proposed Rule and a notice of availability of the DSEIS (81 FR 24748) for a 60-day public comment period on April 27, 2016, and subsequently extended the comment period by 21 days (to July 18, 2016) to give the public additional time to comment on the proposed site designation. By this Final Rule, EPA is now completing the designation of the ELDS by promulgation in 40 CFR part 228.

Finally, MPRSA sections 102(c)(3) and (4) dictate that EPA must, in ***87833** conjunction with the USACE, develop a site management plan for each dredged material disposal site it proposes to designate. MPRSA section 102(c)(3) also states that in the course of developing such management plans, EPA and the USACE must provide an opportunity for public comment. EPA and the USACE have met this obligation by publishing for public review and comment a Draft SMMP for the ELDS. The Draft SMMP was published with the DSEIS (as Appendix I) and the proposed rule on April 27, 2016. After considering public comments regarding the SMMP, EPA and the USACE are publishing the Final SMMP for the ELDS as Appendix I of the FSEIS.

2. Disposal Site Selection Criteria

EPA regulations under the MPRSA identify four general criteria and 11 specific criteria for evaluating locations for the potential designation of dredged material disposal sites. See 40 CFR 228.4(e), 228.5 and 228.6. EPA's evaluation of the ELDS with respect to the four general and 11 specific criteria was discussed in the DSEIS and the Proposed Rule and is further discussed in detail in

the FSEIS and supporting documents and is summarized below.

a. General Criteria (40 CFR 228.5)

EPA has determined that the ELDS satisfies the four general criteria specified in 40 CFR 228.5. This is discussed in Chapter 5 and summarized in Table 5-9, "Summary of Impacts for Action and No Action Alternatives of the FSEIS."

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

EPA's evaluation determined that use of the ELDS—as modified in this Final Rule in response to public comments and further evaluation—would cause minimal interference with the aquatic activities identified in this criterion. The site is not located in shipping lanes or any other region of heavy commercial or recreational navigation. In addition, the site is not located in an area that is important for commercial or recreational fishing or shellfish harvesting. Analysis of this data indicated that use of the site would have minimal potential for interfering with other existing or ongoing uses of the marine environment in and around the ELDS, including lobster harvesting or fishing activities. In addition, the nearby NLDS has been used for dredged material disposal for many years; not only has this activity not significantly interfered with the uses identified in this criterion, but mariners in the area are accustomed to dealing with the presence of a dredged material disposal site. With the

adjustment to the eastern boundary of the ELDS, EPA is even more confident that the site will not pose a hazard to navigation. Finally, time- of-year restrictions (also known as "environmental windows") imposed to protect fishery resources will typically limit dredged material disposal activities to the months of October through April, thus further minimizing any possibility of interference with the various activities specified in this criterion.

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

EPA's analysis concludes that the ELDS, as adjusted for this Final Rule, satisfies this criterion. First, the site is a significant distance from any beach, shoreline, marine sanctuary (in fact, there are no federally-designated marine sanctuaries in Long Island Sound), or known geographically limited fishery or shellfishery. Second, the site will be used only for the disposal of dredged material determined to be suitable for open-water disposal by application of the MPRSA's ocean dumping criteria. See 40 CFR part 227. These criteria include provisions related to water quality and account for initial mixing. See 40 CFR 227.4, 227.5(d), 227.6(b) and (c), 227.13(c), 227.27, and 227.29. Data evaluated during development of the FSEIS, including data from monitoring conducted during

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

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

EPA has determined, based on the information presented in the FSEIS, that the ELDS, in its final configuration, is sufficiently limited in size to allow for the identification and control of any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-term or cumulative impacts. To put things in perspective, the size of the ELDS is approximately 1.3 nmi[FN2], which is just 0.003 (0.03 percent) of the approximately 370 nmi[FN2] surface area of the eastern Long Island Sound region, and just 0.001 (less than one-tenth of one-percent) of the approximately 1300 nmi[FN2] surface area of the entire Long Island Sound. The designation of just this one site reduces the overall number of active disposal sites in Long Island Sound from four to three. The long history of

dredged material disposal site monitoring in New England through the USACE's Disposal Area Monitoring System (DAMOS), and specifically at active and historic dredged material disposal sites in Long Island Sound, provides ample evidence that these surveillance and monitoring programs are effective at determining physical, chemical, and biological impacts at dredged material disposal sites such as the ELDS.

The boundaries of the ELDS are identified by specific coordinates provided in Table 5-11 of the FSEIS, and the use of precision navigation equipment in both dredged material disposal operations and monitoring efforts will enable accurate disposal operations to be conducted, and also will contribute to effective management and monitoring of the sites. Detailed plans for the management and monitoring of the ELDS are described in the SMMP (Appendix I of the FSEIS). Finally, as discussed herein and in the FSEIS, EPA has tailored the boundaries of the ELDS, and site management protocols, in light of site characteristics such as local currents and bottom features, so that the area and boundaries of the sites are optimized for environmentally sound dredged material disposal operations.

iv. EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used (40 CFR 228.5(e)).

EPA evaluated sites beyond the edge of the continental shelf and historical disposal sites in Long Island Sound as part of the alternatives

analysis conducted for the FSEIS. The continental shelf extends about 60 nmi seaward from Montauk Point, New ***87834** York, and a site located on the continental slope would result in a transit of approximately 80 nmi from New London. This evaluation determined that the long distances and travel times between the dredging locations in eastern Long Island Sound and the continental shelf posed significant environmental, operational, safety, and financial concerns, rendering such options unreasonable and not practicable. Environmental concerns include increased risk of encountering endangered species during transit, increased fuel consumption and air emissions, and greater potential for accidents in transit that could lead to dredged material being dumped in unintended areas.

As described in Section V ("Disposal Site Description"), while the ELDS, as modified, does not include any areas that have been used historically for dredged material disposal, its eastern boundary is the western boundary of the historically used NLDS. Thus, the modified site is in the general vicinity of the historically used NLDS. To the extent that the ELDS boundaries have been adjusted from those described in the Proposed Rule to include only adjacent areas outside of the existing site, EPA has concluded that these adjustments will be environmentally beneficial, as discussed in the FSEIS. For example, rather than propose designation of part of the existing NLDS, the eastern half of which is at capacity and nearing depths that could lead to scouring of the sediment by surface currents and storms, EPA's final

designation of ELDS encompasses two areas (formerly NL-Wb and NL-Wa) immediately to the west of the NLDS. Moving the site to the west is consistent with public comments urging that the originally proposed ELDS be moved to the west, farther from the New London Harbor approach lane and submarine transit corridor in that area of the Sound. It is also consistent with public comments that favored sites that were further from New York state waters. These two adjacent areas have been determined to be suitable for use as containment areas by physical oceanographic modeling. Long-term monitoring of the adjacent NLDS has shown minimal adverse impacts to the marine environment and rapid recovery of the benthic community in the disposal mounds. Similarly, adverse impacts are not expected to result from use of the new ELDS. While there are other historically used disposal sites in eastern Long Island Sound, the analysis in the FSEIS and summarized herein concludes that the ELDS is the preferable location. Thus, designation of the ELDS would be consistent with this criterion.

b. Specific Criteria (40 CFR 228.6)

In addition to the four general criteria discussed above, 40 CFR 228.6(a) lists eleven specific factors to be used in evaluating the impact of using a site for dredged material disposal under the MPRSA. Compliance with the eleven specific criteria is discussed

below. It is also discussed in detail in Chapter 5 and summarized in Table 5-13, "Summary of Impacts at the Alternative Sites," of the FSEIS.

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

Water depths at the ELDS range from approximately 59 feet (18 m) in the north to 100 feet (30 m) in the south. As described above, the closest points of land to the site are Harkness Memorial State Park in Waterford, Connecticut, approximately 1.1 nmi to the north, and Fishers Island, New York, approximately 2.3 nmi to the east. Based on analyses in the FSEIS, EPA has concluded that the ELDS's geographical position (i.e., location), water depth, and bottom topography (i.e., bathymetry), along with the absence of strong bottom currents at the site, will result in containment of dredged material within site boundaries. As described in Section V ("Disposal Site Description"), and in the above discussion of compliance with general criteria iii and iv (40 CFR 228.5(c) and (d)), the ELDS also is located far enough from shore and lies in deep enough water to avoid adverse impacts to the coastline.

Because the ELDS is a containment area, dredged material placed there is expected to remain within the site and not affect adjacent seafloor areas. Long-term monitoring of the NLDS and other disposal sites in Long Island Sound supports that determination. Any short-term impacts during dredged material placement, such as burial of benthic organisms or temporarily increasing the

turbidity in the water column within the disposal site, will be localized at the site. As explained farther below in this analysis and in the FSEIS, although dredged material disposal will cause these localized, short-term effects, these effects are not expected to result in significant short-term or long-term adverse impacts to the environment.

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

EPA considered the ELDS, as modified for this Final Rule, in relation to breeding, spawning, nursery, feeding, and passage areas for adult and juvenile phases (i.e., life stages) of living resources in Long Island Sound. From this analysis, EPA concluded that, while disposal of suitable dredged material at the ELDS would cause some short-term, localized effects, overall it would not cause adverse effects to the habitat functions and living resources specified in the above criterion.

The ELDS does not encompass or infringe upon any breeding, spawning, nursery, feeding or passage area of particular or heightened importance for juvenile or adult living resources. That said, EPA has noted that in the north-central area of the ELDS as delineated in the Proposed Rule, there is a hard-bottom area with rocky outcroppings that appears likely to constitute high quality habitat for fish and other aquatic organisms, and there is a similar hard bottom area in the extreme southwestern corner of the ELDS. As a result, EPA has redrawn the northern and southern boundaries of the ELDS to

avoid these particular areas.

Generally, there are three primary ways that dredged material disposal could potentially adversely affect marine resources. First, disposal can cause physical impacts by injuring or burying less mobile fish, shellfish, and benthic organisms, as well as their eggs and larvae. Second, tug and barge traffic transporting the dredged material to a disposal site could possibly collide or otherwise interfere with marine mammals and reptiles. Third, if contaminants in the dredged material are taken in by aquatic organisms, these contaminants could potentially bioaccumulate through the food chain. However, EPA and the other federal and state agencies that regulate dredging and dredged material disposal impose requirements that prevent or greatly limit the potential for these types of impacts to occur.

For example, the agencies impose "environmental windows," or time-of-year restrictions, for both dredging and dredged material disposal. This type of restriction has been a standard practice for more than a decade in Long Island Sound, and New England generally, and is incorporated in USACE permits and authorizations in response to consultation with federal and state natural resource agencies (e.g., the National Marine Fisheries Service (NMFS)). Dredging, and corresponding dredged material disposal in Long Island Sound, is generally limited to the period between October 1 and April 30 to avoid time periods of possibly ***87835** heightened threat to aquatic organisms. Indeed, environmental windows are often set depending on the location of specific dredging

projects in relation to certain fish and shellfish species. For example, dredging in nearshore areas where winter flounder spawning occurs is generally prohibited between February 1 and April 1; dredging that may interfere with anadromous fish runs is generally prohibited between April 1 and May 15; and dredging that may adversely affect shellfish is prohibited between June 1 and September 30. These environmental windows limiting when dredging can occur also, in effect, restrict periods when dredged material disposal could occur.

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

Dredged material disposal will, however, have some short-term, localized impacts to fish, shellfish, and

benthic organisms, such as clams and worms, that are present at a disposal site (or in the water column directly above the site) during a disposal event. The sediment plume may entrain and smother some fish in the water column, and may bury some fish, shellfish, and other marine organisms on the sea floor. It also may result in a short-term loss of forage habitat in the immediate disposal area, but the DAMOS program has documented the recolonization of disposal mounds by benthic infauna within 1-3 years after disposal, and this pattern would be expected at the sites evaluated in the FSEIS. As discussed in the FSEIS (section 5.2.2), over time, disposal mounds recover and develop abundant and diverse biological communities that are healthy and able to support species typically found in the ambient surroundings. Some organisms may burrow deeply into sediments, often up to 20 inches, and are more likely to survive a burial event.

The MPRSA regulations further limit the potential for adverse environmental impacts associated with dredged material disposal by requiring that the dredged material from each proposed dredging project be subject to the MPRSA sediment testing requirements, set forth at 40 CFR 227.6, to determine the material's suitability for open-water disposal. Such suitability is determined by analyzing the sediments proposed for dredging for their physical characteristics as well as for toxicity and bioaccumulation. In addition, the regulatory agencies quantify the risk to human health that would result from consuming marine organisms exposed to the dredged material and its associated

contaminants using a risk assessment model. If it is determined that the sediment is unsuitable for open-water disposal—that is, that it may unreasonably degrade or endanger human health or the marine environment—it cannot be placed at disposal sites designated under the MPRSA. See 40 CFR 227.6. In light of these strict controls, EPA does not anticipate significant effects on marine organisms from dredged material disposal at the sites under evaluation.

EPA recognizes that dredged material disposal causes some short-term, localized adverse effects to marine organisms in the immediate vicinity of each disposal event. Dredged material disposal would be limited, however, to suitable material at the one site (see above regarding compliance with general criteria (40 CFR 228.5(e)), and only during the several colder-weather months of the year. As a result, EPA concludes that designating the ELDS would not cause significant, unacceptable or unreasonable adverse impacts to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases. Moreover, there is no evidence that designating the ELDS would have significant long-term effects on benthic processes or habitat conditions.

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

EPA's analysis concludes that the ELDS satisfies this criterion. The ELDS is far enough away from beaches, parks, wildlife refuges, and other areas of special concern to prevent adverse impacts to these amenities. Also, as previously noted, there are no

marine sanctuaries in Long Island Sound. The ELDS is approximately 2.3 nmi from the closest public beach in New York, on the western shore of Fishers Island, and approximately 1.1 nmi from the beach at Harkness Memorial State Park in Waterford, Connecticut. Given that the ELDS is a containment site, no material placed at the site would be expected to move from the site to these amenity areas. As noted above, any temporary perturbations in water quality or other environmental conditions at the site during initial mixing from disposal operations will be limited to the immediate area of the site and will not reach any beach, parks, wildlife refuges, or other areas of special concern.

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

The ELDS is being designated to receive only suitable dredged material; disposal of other types of material will not be allowed. The MPRSA and EPA regulations expressly prohibit open water disposal of certain other types of material (e.g., industrial waste, sewage sludge, chemical warfare agents, and insufficiently characterized materials) (33 U.S.C. 1414b; 40 CFR 227.5).

The typical composition of dredged material to be disposed at the sites is expected to range from predominantly "clay-silt" to "mostly sand." This expectation is based on historical data from dredging projects in the eastern region of Long Island Sound. For federal dredging projects and

private projects generating more 25,000 cubic yards of dredged material, EPA and the USACE will conduct sediment suitability determinations applying the criteria for testing and evaluating dredged material under 40 CFR part 227, and further guidance in the "Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters" (EPA, 2004). Dredged material must satisfy these suitability criteria before it can be authorized for disposal under the MPRSA. In accordance with MPRSA § 106(f), private dredging projects generating up to 25,000 cubic yards will continue to be regulated under CWA section 404.

Dredged material to be placed at the ELDS would be transported by either government or private contractor hopper dredges or oceangoing bottom-dump barges ("scows") towed by a towing vessel (e.g., tugboat). Both types of equipment release the material at or very near the surface, which is the standard operating procedure for this activity. The disposal of this material will occur at specific coordinates marked by buoys, and will be placed so as to concentrate material from each ***87836** disposal project. This concentrated placement is expected to help minimize bottom impacts to benthic organisms. In addition, there are no plans to pack or package dredged material prior to disposal.

As previously discussed, the USACE's DMMP projected that dredging in eastern Long Island Sound will generate approximately 22.6 million cubic yards (mcy) of dredged material over the next 30 years, including 17.9 mcy from Connecticut ports and

harbors and 4.7 mcy from ports and harbors in New York. Of the total amount of 22.6 mcy, approximately 13.5 mcy are projected to be fine-grained sediment that meets MPRSA and CWA standards for aquatic disposal (i.e., "suitable" material), and 9.1 mcy are projected to be course-grained sand that also meets MPRSA and CWA standards for aquatic disposal (i.e., also "suitable" material).

As discussed above in Section VI ("Summary of Public Comments and EPA's Responses"), EPA asked the USACE to conduct another analysis to further refine the actual disposal capacity needed as compared with the original dredging needs estimate, taking into consideration EPA's designation of only one site, past dredging experience, and other factors, such as the potential for future improvement dredging projects and extreme storm events, and accounting for consolidation of dredged material in the disposal site. The USACE's disposal capacity analysis determined that the necessary capacity was approximately 20 mcy, which will be just met by the capacity of the ELDS. For all of these reasons, no significant adverse impacts are expected to be associated with the types and quantities of dredged material that may be disposed at the sites.

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

Monitoring and surveillance will be feasible at the ELDS. The site is conducive to monitoring because it is a containment site and material placed at the site is expected to stay there. The ELDS is readily accessible for sediment grab, bathymetric, and side-

scan sonar surveys. The nearby NLDS has been successfully monitored by the USACE over the past 35 years under the DAMOS program. Monitoring of the ELDS would be carried out under the DAMOS program in accordance with the current approved Site Management and Monitoring Plan (SMMP) for the site. In conjunction with the Proposed Rule, EPA and the USACE developed a draft SMMP and published it for public review and comment. The agencies have now developed a final SMMP in connection with this Final Rule. The final SMMP for the ELDS is included as Appendix I of the FSEIS.

The SMMP is subject to review and updating at least once every ten years, if necessary, and may be subject to additional revisions based on the results of site monitoring and other new information. Any such revisions will be closely coordinated with other federal and state resource management agencies and stakeholders during the review and approval process and will become final only when approved by EPA, in conjunction with the USACE. See 33 U.S.C. 1413 (c)(3).

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

Although the interactions of bathymetry, wind-generated waves, and river and ocean currents in Long Island Sound are complex, EPA has conducted a rigorous assessment of bottom stress, hydrodynamic processes, and storm-driven wave action at the ELDS. The assessment included data

collection and modeling of disposal of dredged material under a variety of conditions. The assessment concluded that the area that encompasses both the ELDS and NLDS has the least amount of bottom stress compared with the other sites in the eastern Long Island Sound region that were assessed. This supports EPA's conclusion that the ELDS provides for the greatest stability of disposal mounds and is the optimal location for a containment site. See e.g., 40 CFR 228.15(b)(4)(vi)(L)). Consistent with this, past monitoring during disposal operations at the NLDS (in the vicinity of the ELDS) revealed minimal drift of sediment out of the disposal site area as it passed through the water column. EPA expects the same result at the ELDS.

Disposal site monitoring has confirmed that peak wave-induced bottom current velocities are not sufficient to cause significant erosion of dredged material placed at the ELDS. As noted above, physical oceanographic monitoring and modeling has indicated that the ELDS is a depositional location that collects, rather than disperses, sediment. As a result, EPA has determined that the dispersal, horizontal transport, and vertical mixing characteristics, as well as the current velocities and directions at the ELDS, all support designating it as a long-term dredged material disposal site.

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

As previously described in Section V (“Disposal Site Description”), the ELDS is west of, and adjacent to,

the NLDS, which has received approximately 8.9 mcy (6.7 million m[FN3]) of dredged material since 1955. The NLDS was used regularly until the early 2000s and is still an active site, but it has not been used frequently in recent years and it will no longer be available for use after December 23, 2016.

Until the passage of the CWA in 1972, dredged material disposal was not a heavily regulated activity. Since 1972, open-water disposal in Long Island Sound has been subject to the sediment testing and alternatives analysis provisions of section 404 of the CWA. With passage of the Ambro Amendment in 1980 (which was further amended in 1990), 33 U.S.C. 1416(f), dredged material disposal from all federal projects and non-federal projects generating more than 25,000 cubic yards of material became subject to the requirements of the MPRSA in addition to CWA section 404. These increasingly stringent regulatory requirements for dredged material disposal, combined with other CWA requirements that have reduced the level of pollutants being discharged into the Nation's waterways, have contributed to a steady, measurable improvement in the quality of material that has been allowed to be placed at the NLDS over the past 40 years.

The NLDS has been used since the early 1980s pursuant to the USACE's short-term site selection authority under section 103(b) of the MPRSA (33 U.S.C. 1413(b)). In EPA's view, the close proximity of the NLDS to the ELDS, coupled with past use of the NLDS, generally makes the ELDS preferable for designation, as compared to more pristine sites that have either not been used or were used in the more

distant past. See 40 CFR 228.5(e). Using a site in the vicinity of an existing site, rather than using sites in areas completely unaffected by dredged material in the past, will help to concentrate, rather than spread, the footprint of dredged material disposal on the seafloor of Long Island Sound.

While the effects of placing suitable dredged material at a disposal site are primarily limited to short-term physical effects, such as burying benthic organisms in the location where the material is placed, EPA regards it to be preferable to concentrate such effects in particular areas and leave other areas untouched as much as possible.

That said, EPA's evaluation of data and modeling results indicates that past disposal operations at the NLDS have not resulted in unacceptable or ***87837** unreasonable environmental degradation, and that there should be no such adverse effects in the future from the projected use of the ELDS. As part of this conclusion, discussed in detail in Section 5.7 of the FSEIS, EPA found that there should be no significant adverse cumulative environmental effects from using the ELDS on a long-term basis for dredged material disposal in compliance with all applicable regulatory requirements regarding sediment quality and site usage.

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

In evaluating whether disposal activity at the site could interfere with any of the uses described above,

EPA considered both the effects of placing dredged material on the bottom of the Sound at the ELDS and any effects from vessel traffic associated with transporting the dredged material to the disposal site. From this evaluation, EPA concluded there would be no unacceptable or unreasonable adverse effects on the considerations noted in this criterion. Some of the factors listed in this criterion have already been discussed above due to the overlap of this criterion with aspects of certain other criteria. Nevertheless, EPA will address each point below.

As previously discussed, and in response to public comment, the eastern boundary of the ELDS has been shifted westward to move it further from the submarine transit corridor into the Thames River. The eastern boundary of the ELDS is 0.467 nmi west of the western boundary of the New London Harbor approach lane and submarine transit corridor, which will further reduce any potential for conflicts between use of the disposal site and submarine and deep draft commercial marine traffic. Vessel traffic generated by disposal activity is expected to be similar to that which has occurred over the past 20-30 years, which has not interfered with other shipping activity. Moreover, research by EPA and the USACE concluded that after disposal at the ELDS, resulting water depths will be sufficient to permit navigation in the area without interference. By providing an open-water alternative for dredged material disposal in the absence of environmentally preferable, practicable alternatives, the sites are likely to improve and facilitate navigation in many of the harbors, bays, rivers and channels around eastern Long Island Sound.

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

There are four main reasons that EPA concluded that no unacceptable adverse effects would occur from placing dredged material at the ELDS. First, as discussed above, any contaminants in material permitted for disposal—having satisfied the dredged material criteria in the regulations that restrict any toxicity and bioaccumulation—will not have any significant adverse effects on fish, shellfish, or other aquatic organisms. Moreover, because the ELDS is a containment area, dredged material disposed at the site is expected to remain there.

Second, as also discussed above, the disposal site does not encompass any especially important, sensitive, or limited habitat for the Sound's fish and shellfish, such as key spawning or nursery habitat for species of finfish. That said, as explained farther above, EPA has redrawn the boundary of the ELDS

to avoid a rocky area that could provide particularly good habitat for fish, even though it is not an area that has received any special designation for such purposes.

Third, while EPA found that a small number of demersal fish (e.g., winter flounder), shellfish (e.g., clams and lobsters), benthic organisms (e.g., worms), and zooplankton and phytoplankton could be lost due to the physical effects of disposal (e.g., burial of organisms on the seafloor by dredged material and entrainment of plankton in the water column by dredged material upon its release from a disposal barge), EPA also determined that these minor, temporary adverse effects would be neither unreasonable nor unacceptable. This determination was based on EPA's conclusion that the numbers of organisms potentially affected represent only a minuscule percentage of those in eastern Long Island Sound, and on DAMOS monitoring that consistently documents the rapid recovery of the benthic community in an area that has received dredged material. In addition, any physical effects will be further limited by the relatively few months in which disposal activities could be permitted by the environmental window (or time-of-year) restrictions.

Fourth, EPA has determined that vessel traffic associated with dredged material disposal will not have any unreasonable or unacceptable adverse effects on fishing. As explained above, environmental window restrictions will limit any disposal to the period between October 1 and April 30, and often to fewer months depending on species-specific restrictions for each dredging project, each

year. Moreover, due to the seasonal nature of recreational boating and commercial shipping, there is generally far less vessel traffic in the colder-weather months when disposal would occur.

There currently are no mineral extraction activities or desalinization facilities in the eastern Long Island Sound region with which disposal activity could potentially interfere. Energy transmission pipelines and cables are located near the site, but none are within the boundaries of the ELDS.

No finfish aquaculture currently takes place in Long Island Sound, and the only form of shellfish culture in the area, oyster production, occurs in nearshore locations far enough away from the ELDS that it should not be impacted in any manner by this proposed action.

Finally, the ELDS is not in an area of special scientific importance; in fact, areas with such characteristics were screened out very early in the alternatives screening process. Accordingly, depositing dredged material at the ELDS will not interfere with any of the activities described in this criterion or other legitimate uses of Long Island Sound.

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

EPA's analysis of existing water quality and ecological conditions at the ELDS in light of available data, trend assessments and baseline surveys indicates that disposal at the site will not cause unacceptable or unreasonable adverse

environmental effects. Considerations related to water quality and various ecological factors (e.g., sediment quality, benthic organisms, fish and shellfish) have already been discussed above in relation to other site selection criteria, and are discussed in ***87838** detail in the FSEIS and supporting documents. In considering this criterion, EPA took into account existing water quality and sediment quality data collected at the disposal sites, including from the USACE's DAMOS site monitoring program, as well as water quality data from the Connecticut Department of Energy and Environmental Protection's (CTDEEP) Long Island Sound Water Quality Monitoring Program. As discussed herein, EPA has determined that placement of suitable dredged material at the ELDS should not cause any significant adverse environmental effects to water quality or to ecological conditions at the disposal sites. EPA and the USACE have prepared a SMMP for the ELDS to guide future monitoring of site conditions (FSEIS Appendix I).

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

Monitoring at disposal sites in Long Island Sound over the past 35 years has shown no recruitment of nuisance (invasive, non- native) species that are attributable to dredged material disposal. There is no reason to expect this to change, but monitoring will continue to look for any such impacts. EPA and the USACE will continue to monitor the ELDS and other EPA-designated sites under their respective SMMPs, which include a "management focus" on "changes in composition and numbers of pelagic, demersal, or benthic biota at or near the disposal sites" (Section 6.1.5 of the SMMP, Appendix I of the FSEIS).

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

There are no natural or cultural features of historical importance located within or in close proximity to the ELDS. There is, however, one shipwreck located within the ELDS near the southeastern corner the site, just inside its eastern boundary. As discussed in the FSEIS, a review of submerged vessel reports in the NOAA and Connecticut State Historic Preservation Office (CT SHPO) shipwreck databases indicates that there is one charted shipwreck located within the ELDS, near its eastern boundary. This wreck also was identified by EPA's side-scan sonar survey. This shipwreck is not, however, considered to be of historical importance.

EPA coordinated with Indian tribes in Connecticut, Rhode Island, and New York throughout the development of the FSEIS, and the tribes did not

identify any important natural, cultural, spiritual, or historical features or areas within the ELDS. At the same time, the Shinnecock Indian Nation commented to EPA that investigations are underway to determine whether "submerged paleo cultural landscapes" might exist that would indicate that the tribe's ancestors lived farther offshore than currently understood. In this regard, the tribe expresses concern that dredged material placement at an open-water site could further bury any evidence of such sites. As discussed above and in the FSEIS, EPA is currently not aware of any evidence suggesting that such submerged artifacts may exist at the ELDS. If such evidence emerges in the future, EPA will further consult with the Shinnecock Indian Nation about whether any adjustments to the site boundaries, site management requirements, or site use restrictions would be appropriate.

In summary, one shipwreck is located just inside the eastern boundary of the ELDS, but the wreck is not considered to be of historical significance. Nevertheless, any impacts to that wreck from dredged material disposal will be minimized by establishing a 164-foot (50 m) avoidance buffer surrounding the shipwreck as well as appropriate site management, which accommodates both the minimum buffer of 30 m recommended by the CT SHPO, and the 40-50 m minimum buffer applied by the NY OPRHP.

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

The ELDS will be subject to specific management

requirements to ensure that unacceptable adverse environmental impacts do not occur. Examples of these requirements include: (1) Restricting the use of the sites to the disposal of dredged material that has been determined to be suitable for ocean disposal following MPRSA and/or CWA requirements in accordance with the provisions of MPRSA section 106(f), as well as to material from waters in the vicinity of the disposal sites; (2) monitoring the disposal sites and their associated reference sites, which are not used for dredged material disposal, to assess potential impacts to the marine environment by providing a point of comparison to an area unaffected by dredged material disposal; and (3) retaining the right to limit or close these sites to further disposal activity if monitoring or other information reveals evidence of unacceptable adverse impacts to the marine environment. As mentioned above, dredged material disposal will not be allowed when weather and sea conditions could interfere with safe, effective placement of any dredged material at a designated site. In addition, although not technically a site management requirement, disposal activity at the sites will generally be limited to the period between October 1 and April 30, but often less, depending on environmental windows, to protect certain species, as described above.

EPA and the USACE have managed and monitored dredged material disposal activities at disposal sites in Long Island Sound since the early 1980s. Site monitoring has been conducted under the USACE's DAMOS disposal site monitoring program. In

accordance with the requirements of MPRSA section 102(c) and 40 CFR 228.3, EPA and the USACE have developed a SMMP for the ELDS, which is incorporated as Appendix I of the FSEIS. The SMMP describes in detail the specific management and monitoring requirements for the ELDS.

B. National Environmental Policy Act

As EPA explained in the preamble to the Proposed Rule, 81 FR 24760 (April 27, 2016), EPA disposal site designation evaluations conducted under the MPRSA have been determined to be "functionally equivalent" to NEPA reviews and, as a result, are not subject to NEPA analysis requirements as a matter of law. Nevertheless, as a matter of policy, EPA voluntarily uses NEPA procedures when evaluating the potential designation of ocean dumping sites. See 63 FR 58045 (Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents, October 29, 1998).

EPA is the agency authorized by the MPRSA to designate dredged material disposal sites and is responsible for the site designation decision and the NEPA analysis supporting it. As discussed in detail in the preamble to the Proposed Rule, 81 FR 24761, EPA used a third-party contracting approach so that funding from the state of Connecticut could be applied to the support the site designation studies and the development of the FSEIS. See 40 CFR 1506.5. Because EPA is ultimately responsible for the FSEIS, the Agency worked closely with the state of Connecticut to select the contractors and then maintained close involvement with production

of the SEIS and control over its analyses and conclusions. The U.S. Navy also contributed to the site designation process by funding

***87839** biological and other environmental studies in support of the FSEIS. The Navy, with extensive input from EPA and CTDEEP, used its contractor Tetra Tech based on its expertise in biological resources studies and risk assessment.

The USACE was a "cooperating agency" in the development of the FSEIS because of its knowledge concerning the region's dredging needs, its technical expertise in monitoring dredged material disposal sites and assessing the environmental effects of dredging and dredged material disposal, its history in the regulation of dredged material disposal in Long Island Sound and elsewhere, and its ongoing legal role in regulating dredging, dredged material disposal, and the management and monitoring of disposal sites. Other cooperating agencies were NMFS, CTDEEP, CT DOT, New York Department of State (NYSDOS), New York Department of Environmental Conservation (NYSDEC), and Rhode Island Coastal Resources Management Council (RICRMC). To take advantage of expertise of other entities, and to promote strong inter-agency communications, EPA also coordinated with the U.S. Fish and Wildlife Service; the Mashantucket (Western) Pequot Tribal Nation, Mohegan Tribe, Eastern Pequot Tribal Nation, and Paucatuck Eastern Pequot Indians (in Connecticut); the Narragansett Indian Tribe (in Rhode Island); the Shinnecock Indian Nation (in New York); and, as previously discussed, the CT SHPO and NY OPRHP. Throughout the SEIS development process,

EPA communicated with the cooperating federal and state agencies and tribes to keep them apprised of progress on the project and to solicit input.

Consistent with its voluntary NEPA policy, EPA has undertaken NEPA analyses as part of its decision-making process for the designation of the ELDS. EPA published a Notice of Intent to prepare an EIS on October 16, 2012, invited other federal and state agencies to participate as cooperating or coordinating agencies, defined a "Zone of Siting Feasibility" in cooperation with the cooperating agencies, held public meetings regarding the scope of issues to be addressed by the SEIS, and published a DSEIS for public review and comment. The DSEIS, entitled, "Draft Supplemental Environmental Impact Statement for the Designation of Dredged Material Disposal Site(s) in Eastern Long Island Sound, Connecticut and New York," assesses and compares the effects of designating alternative dredged material disposal sites in eastern Long Island Sound. EPA's SEIS also evaluated various alternative approaches to managing dredging needs, including the "no action" alternative (i.e., the alternative of not designating any open-water disposal sites). See 40 CFR 1502.14. The DSEIS was considered supplemental because it updated and built upon the analyses that were conducted for the 2005 Long Island Sound Environmental Impact Statement that supported the designation of the Central and Western Long Island Sound disposal sites.

EPA released the DSEIS for a 60-day public comment period on April 27, 2016, and subsequently extended the comment period for 21 days, until July

18, 2016. EPA held four public hearings during the comment period: Two (afternoon and evening) on May 24 in Riverhead and Mattituck, NY, and two on May 25 in Groton, CT. As previously noted, EPA received extensive public comment, both in support of, and in opposition to, EPA's proposed action as described in the DSEIS and proposed rule.

After considering the public comments received, EPA conducted additional analysis and has now published an FSEIS in conjunction with, and as part of the support for, publication of this Final Rule designating the ELDS. EPA's FSEIS includes additional discussion and analysis pertaining to EPA's final site designation, including discussion and analysis supporting EPA's decision to adjust the boundaries of the ELDS as they were delineated in the Proposed Rule. Appendix J of the FSEIS includes all the public comments EPA received on the DSEIS and Proposed Rule, and provides a summary of those comments and EPA responses to those comments. EPA also has summarized the more significant comments and EPA's responses to them in Section VI of the preamble to this Final Rule.

C. Coastal Zone Management Act

Based on the evaluations presented in the FSEIS and supporting documents, and a review of the federally approved coastal zone programs and policies of Connecticut, New York, and Rhode Island, EPA determined that designation of the ELDS for open-water dredged material disposal under the MPRSA will be fully consistent with, or consistent to the maximum extent practicable with, the enforceable policies of the approved coastal zone

management programs of the three states. EPA provided a written determination to that effect to the NYSDOS (on July 20, 2016), to CTDEEP (on July 29, 2016), and to the RICRMC (on July 28, 2016), respectively.

The specific policies of each state's coastal zone management program are discussed in detail in the determinations noted above, but in a general sense, there are several broad reasons why designation of the ELDS is consistent with the applicable, enforceable policies of the three states' coastal zone programs. First, the designation is not expected to cause any significant adverse impacts to the marine environment, coastal resources, or uses of the coastal zone. Indeed, EPA expects the designation to benefit coastal uses involving navigation and berthing of vessels by facilitating needed dredging, and to benefit the environment by limiting any open-water dredged material disposal to a small number of environmentally appropriate sites designated by EPA, rather than at a potential proliferation of USACE-selected sites. Second, designation of the site does not actually authorize the disposal of any dredged material at the sites. Any proposal to dispose dredged material from a particular project at a designated site will be subject to case-specific evaluation and be allowed only if: (a) The material satisfies the sediment quality requirements of the MPRSA and the CWA; (b) no practicable alternative method of management with less adverse environmental impact is available; and (c) the disposal complies with the site restrictions for the site. These restrictions are described and discussed in the next

section of the preamble and are designed to reduce or eliminate dredged material disposal in Long Island Sound. Third, the designated disposal site will be managed and monitored pursuant to a SMMP and if adverse impacts are identified, use of the sites will be modified to reduce or eliminate those impacts. Such modification could further restrict, or even terminate, use of the sites, if appropriate. See 40 CFR 228.3, 228.11.

On August 9, 2016, the RICRMC sent EPA a letter concurring with EPA's CZMA determination for Rhode Island. Similarly, on September 26, 2016, CTDEEP, which administers Connecticut's coastal zone management program, sent EPA a letter concurring with EPA's CZMA determination for Connecticut.

On October 3, 2016, EPA received a letter from the NYSDOS objecting to EPA's designation of the ELDS on the basis of its view that either EPA had provided insufficient information to support a CZMA consistency determination or, based on the information provided, the action was inconsistent with the enforceable policies of New York's Coastal Management Program (CMP).

***87840** After giving careful consideration to the issues raised by NYSDOS, EPA continues to hold the view that designation of the ELDS, as specified herein, is consistent to the maximum extent practicable with the enforceable policies of New York's CMP. EPA also believes that the site use restrictions that have been made applicable to the ELDS provide enhanced assurance of such consistency.

D. Endangered Species Act

The ESA requires consultation with NMFS and/or USFWS to adequately address potential impacts to threatened and endangered species that may occur at the proposed dredged material disposal site from any proposal to dispose dredged material. EPA initiated consultations regarding the proposed ELDS with both the NMFS and USFWS, concurrent with the public comment period for the DSEIS. This consultation process is fully documented in the FSEIS. EPA provided the NMFS and USFWS with its conclusion that the proposed designation of the ELDS was not likely to adversely affect any federally listed endangered or threatened species, or designated critical habitat of any such species.

On August 11, 2016, USFWS sent an email message concurring with EPA's proposed action, stating that the designation of the ELDS, "will have no effect on federally listed species under the jurisdiction of the U.S. Fish and Wildlife Service and that any effects from activities associated with the disposal of dredged material at this location will be consulted individually under section 7 of the ESA," and that, "(f)urther consultation . . . is not necessary unless there is new information relative to listed species presence or there are changes to the project."

On August 12, 2016, NMFS also concurred with EPA's "conclusion that the proposed action is not likely to adversely affect the ESA-listed species under our jurisdiction and will have no effect on critical habitat since the action does not overlap with any proposed/designation (sic) critical habitat

under our jurisdiction," and that, ". . . no further consultation . . . is required." Copies of all consultation and coordination correspondence are provided in Appendices A-11 of the FSEIS.

E. Magnuson-Stevens Fishery Conservation and Management Act

The MSFCMA requires federal agencies to coordinate with NMFS regarding any action they authorize, fund, or undertake that may adversely affect essential fish habitat (EFH). EPA initiated coordination with NMFS on June 30, 2016, by submitting an EFH assessment in compliance with the Act. This coordination addressed the potential for the designation of any of the alternative disposal sites being evaluated to adversely affect EFH. In a letter dated August 12, 2016, NMFS concurred with EPA's determination that the designation of the ELDS would not adversely affect EFH. The letter stated, in part, "We concur with your determination that by excluding the boulder areas located in the south and northwest corners of the proposed disposal site, and with the incorporation of your specific management practices that include a 200-foot buffer zone from the boulder areas, the proposed designation will result in no more than minimal adverse impacts to designated EFH." The coordination process is fully documented in the FSEIS.

IX. Restrictions

As described in the Proposed Rule, EPA is restricting the use of the ELDS in the same manner that it has restricted use of the CLDS and WLDS. On July 7, 2016, EPA published in the Federal

Register (81 FR 44220) a final rule to amend the 2005 rule that designated the CLDS and WLDS, to establish new restrictions on the use of those sites to support the goal of reducing or eliminating open-water disposal in Long Island Sound. The restrictions include standards and procedures to promote the development and use of practicable alternatives to open-water disposal, including establishment of an interagency "Steering Committee" and "Regional Dredging Team" that will play important roles in implementation of the rule. The site use restrictions for the CLDS are detailed in 40 CFR 228.15(b)(4)(vi) and are incorporated for the WLDS by the cross-references in 40 CFR 228.15(b)(4)(vi) and (b)(5)(vi). Similarly, EPA is applying to the ELDS the same restrictions as are applied to the CLDS and WLDS by including simple cross-references to those restrictions in the new ELDS regulations at 40 CFR 228.15(b)(4) and (b)(6)(vi).

The restrictions incorporate standards and procedures for the use of the Eastern, Central and Western disposal sites consistent with the recommendations of the Long Island Sound DMMP. The DMMP identifies a wide range of alternatives to open-water disposal and recommends standards and procedures to help determine whether and which of these alternatives should be pursued for particular dredging projects. The DMMP addresses dredging and dredged material management issues for the entire Long Island Sound region, including the eastern portion of the Sound. Therefore, EPA concludes that it makes sense to apply site use restrictions based on the DMMP to the ELDS as

well as to the CLDS and WLDS. EPA also received public comments in support of applying the site use restrictions to all Long Island Sound disposal sites.

The standards included in the restrictions are described in the Proposed Rule and address the disposition of sandy material, suitable fine-grained material and unsuitable fine-grained materials. See 81 FR 24764. See also 81 FR 44229 (40 CFR 228.15(b) (4)(vi)(C)(3)(i)-(iii)). Also included are expectations of continued federal, state and local efforts at source reduction (i.e., reducing sediment entering waterways). EPA did not receive any comments on the standards and has not modified them in the Final Rule.

The restrictions augment the recommended procedures in the DMMP, and in the Proposed Rule, by establishing 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. Such other parties 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. The Steering Committee will provide policy-level direction to the Long Island Sound Regional Dredging Team (RDT). 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 develop accurate methods to track the placement of dredged material, with due consideration for annual fluctuations. The stepped objectives should ***87841** incorporate an adaptive management approach while striving for continuous improvement.

The restrictions provide that when tracking progress, the Steering Committee should recognize that exceptional circumstances may result in delays 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 Long Island Sound 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 restrictions also provide that the Steering Committee may utilize the RDT, as appropriate, to carry out the tasks assigned to it. The Steering Committee, with the support of the 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.

As described in the Proposed Rule, see 81 FR 24765, the restrictions establish the Long Island Sound RDT. See also 81 FR 44229-44230 (40 CFR 228.15(b)(4)(vi)(E) and (F)). The purpose of the RDT reflects its role and relationship to the Steering Committee. The purpose of the RDT is to: (1) Review dredging projects and report to USACE on its review within 30 days of receipt of project information; (2) assist the Steering Committee in the tasks described above; (3) serve as a forum for continuing exploration of new beneficial use alternatives, matching available beneficial use alternatives with dredging projects; (4) exploring cost-sharing opportunities and promoting opportunities for beneficial use of clean, parent marine sediments (that underlie surficial sediments and are not exposed to pollution) often generated in the development of Confined Aquatic Disposal cells; and (5) assist the USACE and EPA in continuing long-term efforts to monitor dredging impacts in Long Island Sound. The membership of the RDT will comprise representatives from the states of Connecticut and New York, EPA, USACE, and, as appropriate, other federal and state agencies. State participation on the RDT is voluntary. The geographic scope of the RDT, as well as details for the structure and process of the RDT, are unchanged from the Proposed Rule.

Finally, the restrictions provide that 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 of the use of the sites.

X. Supporting Documents

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

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

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

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

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

6. EPA/USACE. 1991. Evaluation of Dredged Material Proposed for Ocean Disposal Testing Manual. U.S. Environmental Protection Agency, Washington, DC, and U.S. Army Corps of Engineers, Washington, DC. EPA-503/8-91/001. February 1991.

7. Long Island Sound Study. 2015. Comprehensive Conservation and Management Plan for Long Island Sound. Long Island Sound Management Conference. September 2015.

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

9. USACE NAE. 2016. Final Long Island Sound Dredged Material Management Plan and Final Programmatic Environmental Impact Statement—Connecticut, Rhode Island and New York. U.S. Army Corps of Engineers, New England District. December 2015.

10. EPA Region 1. 2016. Draft Supplemental Environmental Impact Statement for the Designation of Dredged Material Disposal Site(s) in

Eastern Long Island Sound, Connecticut and New York. U.S. Environmental Protection Agency, Region 1, Boston, MA. April 2016.

11. USACE NAE. 2016a. Memorandum from USACE New England District to EPA Region 1 with updated dredging and disposal capacity needs for Eastern Long Island Sound. U.S. Army Corps of Engineers, New England District. September 2016.

12. USACE NAE. 2016b. Memorandum from USACE New England District to EPA Region 1 with detailed cost estimates for dredged material disposal at different disposal sites in Long Island Sound. U.S. Army Corps of Engineers, New England District. September 2016.

XI. 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 therefore was 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 will primarily create requirements to be followed by regulatory agencies rather than small entities, and will create requirements ***87842** (i.e., the standards and procedures) intended to help ensure satisfaction of 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. Through the Steering Committee and RDT process, however, this action will provide a vehicle for facilitating the interaction and communication of interested federal and state agencies concerned with regulating dredged material disposal in Long Island Sound.

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 coordinated with all Indian Tribal Governments in the vicinity of the proposed action and consulted with the Shinnecock Tribal Nation 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 concludes that this action will not have a disproportionate adverse human health or environmental effect 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 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 and the ocean dumping regulations, the rule is designed to promote the reduction or elimination of open-water disposal of dredged material in Long Island Sound, and, at the same time, to ensure that any such disposal that occurs will be conducted in an environmentally sound manner.

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, 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; [and] (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 Final Rule will afford additional protection to the waters of Long Island Sound and the organisms that inhabit them. Building on the existing protections of the MPRSA and the ocean dumping regulations, the rule is designed to promote the reduction or elimination of open-water disposal of dredged material in Long Island Sound even as it facilitates necessary dredging.

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 30 days after date of publication.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: November 4, 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.

***87843 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.

40 CFR § 228.15

2. Section 228.15 is amended by revising paragraph (b)(4)(vi) introductory text and adding paragraph (b)(6) to read as follows: 40 CFR § 228.15

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(b) * * *

(4) * * *

(vi) Restrictions: The designation in this paragraph (b)(4) sets forth conditions for the use of the Central Long Island Sound (CLDS), Western Long Island Sound (WLDS) and Eastern Long Island Sound (ELDS) 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:

* * * * *

(6) Eastern Long Island Sound Dredged Material Disposal Site (ELDS).

(i) Location: Corner Coordinates (NAD83) 41°15.81' N., 72°05.23' W.; 41°16.81' N., 72°05.23' W.; 41°16.81' N., 72°07.22' W.;

41°15.97' N., 72°07.22' W.; 41°15.81' N., 72°06.58' W.

(ii) Size: A 1 x 1.5 nautical mile irregularly-shaped polygon, with an area of 1.3 square nautical miles (nmi[FN2]) due to the exclusion of bedrock areas. North-central bedrock area corner coordinates (NAD83) are: 41°16.34' N., 72°05.89' W.; 41°16.81' N., 72°05.89' W.; 41°16.81' N., 72°06.44' W.; 41°16.22' N., 72°06.11' W.

(iii) Depth: Ranges from 59 to 100 feet (18 m to 30 m).

(iv) Primary use: Dredged material disposal.

(v) Period of use: Continuing use.

(vi) Restrictions: See paragraphs (b)(4)(vi)(A) through (N) of this section.

* * * * *

[FR Doc. 2016-27546 Filed 12-5-16; 8:45 am]

BILLING CODE 6560-50-P

End of Document

Town of Southold

Local Waterfront Revitalization Program

LWRP

Adopted:

Town of Southold Town Board, November 30, 2004

Approved:

NYS Secretary of State, Randy Daniels, June 21, 2005

Concurred:

U.S. Office of Ocean and Coastal Resource Management, November 2, 2005

Amended LWRP

Adopted:

Town of Southold Town Board, June 23, 2011

Approved:

NYS Secretary of State, Cesar Perales, February 25, 2014

Concurred:

U.S. Office of Ocean and Coastal Resource Management, July 24, 2014

This Local Waterfront Revitalization Program (LWRP) has been prepared and approved in accordance with provisions of the Waterfront Revitalization of Coastal Areas and Inland Waterways Act (Executive Law, Article 42) and its implementing Regulations (19 NYCRR 601). Federal concurrence on the incorporation of this Local Waterfront Revitalization Program into the New York State Coastal Management Program as a routine program change has been obtained in accordance with provisions of the U.S. Coastal Zone Management Act of 1972 (p.L. 92-583), as amended, and its implementing regulations (15 CFR 923). The preparation of this program was financially aided by a federal grant from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, under the Coastal Zone Management Act of 1972, as amended. [Federal Grant No. NA-82-AA-D-CZ068.] The New York State Coastal Management Program and the preparation of Local Waterfront Revitalization Programs are administered by the New York State Department of State, Office of Planning and Development, One Commerce Plaza, 99 Washington Avenue, Suite 1010, Albany, New York 12231-0001.

SCOTT A. RUSSELL
SUPERVISOR

TOWN OF SOUTHOLD
SUFFOLK COUNTY, NEW YORK

Town Hall, 53095 Route 25
P.O. Box 1179
Southold, New York 11971-0959
Fax (631) 765-1823
Telephone (631) 765-1889

OFFICE OF THE SUPERVISOR
TOWN OF SOUTHOLD

June 23, 2011

Mr. Kevin Millington
New York State Department of State
Division of Coastal Resources
99 Washington Avenue, Suite 1010
Albany, NY 12231-0001

RE: Town of Southold LWRP

Dear Mr. Millington:

I am pleased to report that the Town Board adopted the Amendment to the Town of Southold Local Waterfront Revitalization Program (LWRP) at its meeting on June 21, 2011. Enclosed is a copy of the adoption resolution for the LWRP. I have also enclosed a copy of the Negative Declaration for the LWRP.

The Town of Southold hereby requests approval of the LWRP by the Secretary of State.

Very truly yours,

/s/Scott A. Russell
Scott A. Russell

Supervisor

SAR/lk
Enclosures
cc: Martin D. Finnegan, Town Attorney
Ms. Elizabeth A. Neville, Town Clerk

RESOLUTION 2011-465

ADOPTED

DOC ID: 6952

THIS IS TO CERTIFY THAT THE FOLLOWING RESOLUTION NO. 2011-465 WAS ADOPTED AT THE REGULAR MEETING OF THE SOUTHOLD TOWN BOARD ON JUNE 21, 2011:

WHEREAS, the Town of Southold has amended the Town's Local Waterfront Revitalization Program by amending the Town's Waterfront Consistency Review Law in cooperation with the New York State Department of State in accordance with the provisions of Executive Law, Article 42; and

WHEREAS, the Town of Southold has amended the Town's Local Waterfront Revitalization Program to reflect changes made to the maps and narratives for the State's Significant Coastal Fish and Wildlife Habitats within the Town's Local Waterfront Revitalization Area; and

WHEREAS, the Town Board, as lead agency, has prepared and evaluated an Environmental Assessment Form concerning the action of adopting the Local Waterfront Revitalization Program Amendment in accordance with the requirements of the State Environmental Quality Review Act and Part 617 of the implementing regulations of Article 8 of the New York State Environmental Conservation Law, and determined that there will be no anticipated adverse impacts upon natural,

institutional, economic, developmental, and social resources of the Town, and have, therefore, prepared and filed a Negative Declaration on February 1, 2011.

NOW, THEREFORE, BE IT RESOLVED that the **Local Waterfront Revitalization Program Amendment for the Town of Southold is adopted by the Town Board and the Supervisor is authorized to submit the LWRP to the New York State Secretary of State for approval, pursuant to the Waterfront Revitalization of Coastal Areas and Inland Waterways Act.**

/s/Elizabeth A. Neville
Elizabeth A. Neville
Southold Town Clerk

RESULT: ADOPTED [UNANIMOUS]
MOVER: Christopher Talbot, Councilman
SECONDER: Louisa P. Evans, Justice
AYES: Ruland, Orlando, Talbot, Krupski Jr., Evans, Russell

JOSHUA Y. HORTON
SUPERVISOR

TOWN OF SOUTHOLD
SUFFOLK COUNTY, NEW YORK

Town Hall, 53095 Route 25
P.O. Box 1179
Southold, New York 11971-0959
Fax (631) 765-1823
Telephone (631) 765-1889

OFFICE OF THE SUPERVISOR
TOWN OF SOUTHOLD

December 7, 2004

Hon. Randy A. Daniels, Secretary of
State New York State Department of State
41 State Street
Albany, NY 12231-0001

Dear Secretary Daniels:

I am pleased to report that the Town Board of the Town of Southold formally adopted the Town of Southold Local Waterfront Revitalization Program (LWRP) on November 30, 2004. These actions were taken after having completed all environmental review procedures in accordance with the State Environmental Quality Review Act and having addressed review comments received pursuant to Article 42 of the NYS Executive Law. Attached is a copy of the resolution passed by the Town Board of the Town of Southold i'n adopting the LWRP. In addition, copy of the final LWRP document that was adopted is enclosed.

As the Supervisor for the Town of Southold and on behalf of the entire Town Board, I respectfully request your consideration and approval of the Town of

Southold Local Waterfront Revitalization Program pursuant to Article 42 of the NYS Executive Law.

Very truly yours,

/s/Joshua Y. Horton
Joshua Y. Horton
Supervisor

JYH/lk
Enclosure

DEPARTMENT OF
STATE COASTAL
PROGRAMS
DEC 13 2004
RECEIVED

Elizabeth A. Neville
Southold Town Clerk

TOWN OF SOUTHOLD
SUFFOLK COUNTY, NEW YORK

Town Hall, 53095 Main Road
P.O. Box 1179 Southold, New York 11971
Fax (631) 765-6145
Telephone (631) 765-1800
southoldtown.northfork.net

OFFICE OF THE TOWN CLERK
TOWN OF SOUTHOLD

THIS IS TO CERTIFY THAT THE FOLLOWING RESOLUTION NO. 835 OF 2004 WAS ADOPTED AT THE REGULAR MEETING OF THE SOUTHOLD TOWN BOARD ON NOVEMBER 30, 2004:

WHEREAS, the Town of Southold initiated preparation of a Local Waterfront Revitalization Program in cooperation with the New York State Department of State, pursuant to Article 42 of the Executive Law; and

WHEREAS, the Town of Southold prepared a Draft Local Waterfront Revitalization Program (DLWRP); and

WHEREAS, a Full Environmental Assessment Form was prepared and considered for the DLWRP in accordance with the requirements of Part 617 of the implementing regulations for Article 8 of the Environmental Conservation Law; and

WHEREAS, a Negative Declaration was subsequently issued by the Town Board as Lead Agency on September 25, 2001, in accordance with the requirements of Part 617 of the implementing regulations for Article 8 of the Environmental Conservation Law; and

WHEREAS, the Supervisor of the Town of Southold submitted the DLWRP to the New York State Secretary of State for review in April 2003, pursuant to Article 42 of the NYS Executive Law; and

WHEREAS, the Secretary of State completed the review of the DLWRP, pursuant to Article 42 of the NYS Executive Law and the DLWRP was circulated by the Department of State to appropriate local, county, state and federal agencies in accordance with Article 42 of the NYS Executive Law; and

WHEREAS, modifications were made to the Draft Local Waterfront Revitalization Program in response to comments received;

NOW, THEREFORE, BE IT **RESOLVED,** by the Town Board of the Town of Southold that **the Town of Southold Local Waterfront Revitalization Proeram is hereby approved and adopted.**

BE IT FURTHER RESOLVED, that the Town Board of the Town of Southold hereby directs tht: Supervisor of the Town to formally transmit the adopted LWRP to the New York State Secretary of State for approval pursuant to Article 42 of the NYS Executive Law-the Waterfront Revitalization of Coastal Areas and Inland Waterways Act.

/s/Elizabeth A. Neville
Elizabeth A. Neville
Southold Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE

ANDREW M. CUOMO
GOVERNOR

CESAR A. PERALES
SECRETARY OF STATE

February 25, 2014

Honorable Scott A. Russell
Supervisor
Town of Southold
53095 Route 25
P.O. Box 1179
Southold, NY 11971

Dear Supervisor Russell:

I am pleased to inform you that I have approved the amendment to the Town of Southold Local Waterfront Revitalization Program, pursuant to the Waterfront Revitalization of Coastal Areas and Inland Waterways Act. Everyone who participated in the preparation of this program is to be commended for developing a comprehensive management program that promotes the balanced preservation, enhancement, and utilization of the valuable local waterfront resources along the Peconic Estuary, Long Island Sound, Gardiners Bay, and Block Island Sound.

I am notifying State agencies that I have approved your Local Waterfront Revitalization Program (LWRP) amendment and advising them that their activities must be undertaken in a manner consistent, to the maximum extent practicable, with the program.

The approved amended LWRP will be available on the

website of the Department of State, at http://www.dos.ny.gov/opd/programs/WFRevitalization/LWRP status.html.

If you have any questions, please contact Renee Parsons of the Office of Planning and Development, at (518) 473-2479.

Sincerely,

/s/Cesar A. Perales
Cesar A. Perales
Secretary of State

TATE OF NEW YORK
DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231-0001

GEORGE E. PATAKI
GOVERNOR

RANDY A. DANIELS
SECRETARY OF STATE

June 21, 2005

Honorable Joshua Y. Horton
Supervisor
Town of Southold
PO Box 1179
Southold, NY 11971

Dear Supervisor Horton:

I am pleased to inform you that I have approved the Town of Southold Local Waterfront Revitalization Program (LWRP), pursuant to the Waterfront Revitalization of Coastal Areas and Inland Waterways Act. Everyone who participated in the preparation of this program is to be commended for developing a comprehensive intermunicipal management program that promotes the balanced preservation, enhancement, and utilization of the Town's valuable resources.

I am notifying state agencies that I have approved your LWRP and am advising them that their activities must be undertaken in a manner consistent, to the maximum extent practicable , with the program.

I look forward to working with you as you endeavor to revitalize and protect your waterfront.

Sincerely,

/s/Randy A. Daniels
Randy A. Daniels
Secretary of State

RAD:mo\gn

UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

JUL 24 2014

Mr. Steve Ridler
State of New Yark
Department of State
One Commerce Plaza
99 Washington Ave.
Albany, NY 12231

Dear Mr. Ridler:

Thank you for the New York Department of State's March 19, 2014, request that changes to the Town of Southold Local Waterfront Revitalization Program (LWRP) be incorporated into the New York Coastal Management Program. You requested that the changes described below be incorporated as routine program changes (RPCs), pursuant to Coastal Zone Management Act (CZMA) regulations at 15 C.F.R. part 923, subpart H, and Office of Ocean and Coastal Resource Management (OCRM) Program Change Guidance (July 1996). OCRM received the request on March 25, 2014, and OCRM's decision deadline was extended to July 24, 2014.

Based on our review of your submission, we concur that the changes are RPCs and we approve the incorporation of the changes as non- enforceable policies of the New York Coastal Management

Program. Public notice of this approval must be published pursuant to 15 C.F.R. § 923.84(b)(4) and OCRM's Addendum to the July 1996 Program Change Guidance (November 2013). Please include in the public notice the list of changes provided in this letter, and please send a copy of the notice to OCRM.

CHANGES APPROVED

See enclosed list of the changes incorporated into the New York Coastal Management Program.

QUALIFICATIONS

Although Section VI has not been revised, OCRM' s review of this RPC finds inaccuracies in Section VI with regard to CZMA federal consistency requirements and their application. As such, nothing in Section VI may be relied upon in the state's exercise of CZMA review authority. As discussed with New York's Department of State, OCRM will work with the state to correct the deficiencies found.

While the Southold LWRP makes no changes to its enforceable policies, which were previously approved by OCRM, Policy 13 and its sub-policies contain language similar to policies that OCRM disapproved for the Town of Wheat field and previously disapproved in 2012 for the Town of Hamburg LWRP. For future RPCs, the state should note the need to revise the Southold policies and those of other LWRP's containing issues similar to those described above.

States may not incorporate enforceable policies by reference. If an approved enforceable policy refers to another regulation, policy, standard, guidance, or other such requirement or document (hereinafter

"referenced policy"), the referenced policy it self must be submitted to and approved by OCRM as an enforceable policy in order to be applied under the federal consistency review provisions of the CZMA. Therefore, no requirement or document referenced in Southold's enforceable policies may be applied for federal consistency unless that requirement or document has separately been approved by OCRM.

PUBLIC AND FEDERAL AGENCY COMMENTS

OCRM received no comments on this RPC submission.

Thank you for your cooperation in this review. Please contact Glynnis Roberts at (301) 563- 7102, if you have any questions.

Sincerely,

/s/Joelle Gore
Joelle Gore, Acting Chief
Coastal Programs Division

Enclosure(s): Policies Approved and Incorporated into the New York State Coastal Management Program

Enclosure to OCRM's July 24, 2014, Approval of the Incorporation of Changes to the New York Coastal Management Program			
Changes marked with an asterisk (*) arc incorporated into the New York Coastal Management Program, but do not contain enforceable policies that can be used for Federal Consistency.			
Name/Description of State or Local Law/Regulation/Policy/Program Authority	State/Local Legal Citation	Date Adopted by State	Date Effective in State
ADDED:		mm/dd/yyyy	mm/dd/yyyy
Addition of Local Law No. 15 (2009), "A Local Law in relation to Amendments to the Minor Exempt Actions List of the Waterfront Consistency Review **Law."**	• LRWP Section V (F) (Local Law No. 15 (2009), amending Chapter 268 of the Code of the Town of Southold)	02/25/2014	02/25/2014
Addition of	• Section	02/25/2	02/25/2

Amended Chapter 268 of the Code of the Town of Southold (Waterfront Consistency Review Law)	V (F) - Chapter 268 of the Code of the Town of Southold	014	014
Addition of Appendix A, Significant Coastal Fish and Wildlife Habitats (SCFWHs) Narratives	• Appendix A	02/25/2014	02/25/2014
MODIFIED:			
Revisions to the list of NYS SCFWHs found within the Town of Southold (Ecological Complexes of Statewide Significance)	• Section II (E)	02/25/2014	02/25/2014
Revisions to SCFWHs: • Reach I to reflect updated information and site description • Reach 2 to reflect updated information on restoration efforts and public access	• Section II (J)	02/25/2014	02/25/2014

• Reach 5 for information on bird populations and shell fishing • Reach 6 to reflect updated site description and information on natural resources • Reach 7 for information on animal resources and restricted activities • Reach 8 for information on restricted activities • Reach 10 to reflect addition of sites, updated site description, information on natural resources, restricted activities and impact assessment			
Revisions to Reach 10 site description	• Section II (K)	02/25/2014	02/25/2014
Revisions lo Policy 6.2 explanatory text to reflect revised SCFWH site names	• Section III - Policy 6.2 explanatory text	02/25/2014	02/2512014
Minor edits	• Section	02/25/2	02/25/2

	II and Section V	014	014
Changes marked with an asterisk (*) arc incorporated into the New York Coastal Management Program, but do not contain enforceable policies that can be used for Federal Consistency.			

UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

NOV -2 2005

Mr. George R. Stafford
Director, Division of Coastal Resources
New York Department of State
41 State Street
Albany, New York 12231

Dear Mr. Stafford,

Thank you for the July 8, 2005, request to incorporate the Town of Southold Local Waterfront Revitalization Program (LWRP) into the New York Coastal Management Program (NYCMP) as a Routine Program Change (RPC) pursuant to Coastal Zone Management Act (CZMA) regulations at 15 C.F.R. part 923, subpart Hand Office of Ocean and Coastal Resource Management (OCRM) Program Change Guidance (July 1996). We did not receive any comments on your request.

Based on our review of your submission, we concur that the submitted enforceable policies for the Town of Southold LWRP are RPCs and OCRM approves them as enforceable policies of the NYSCMP. This approval assumes you will make no further changes to the document in addition to the ones submitted. The enforceable policies incorporated into the NYCMP include Policies 1-13

in the Town of Southold LWRP, Section III, pages 1-68.

In addition, the Town of Southold LWRP includes a boundary change to the NYCMP coastal boundary to encompass areas that have land and water uses that could have a direct and significant affect on (or are affected by) the coastal waters of the State of New York. The boundary change is minor in scope and represents further detailing of the NYCMP coastal boundary and is not a substantial change. OCRM approves the modified coastal boundary.

POLICIES APPROVED

The following Town of Southold LWRP enforceable policies modify the enforceable policies previously approved by OCRM under the Long Island Sound Coastal Management Program (LISCMP): 1, 2, 3, 3.1, 4.2, 4.6, 5, 5.1, 5.2, 6, 6.1, 7, 7.3, 8, 9, 9.1, 9.2, 9.3, 10, 10.l(a), 10.l(b), 10.2, 10.3, 10.4, 10.5, 10.6, 11, 11.2, 11.3, 12, 12.1, and 12.4

The following Town of Southold LWRP enforceable policies are new enforceable policies not previously approved under the LISCMP: 9.5.

The following Town of Southold LWRP enforceable policies are the same as the corresponding previously approved LISCMP enforceable policies: 2.1, 2.2, 2.3, 4, 4.1, 4.3, 4.4, 4.5, 5.3, 5.4, 5.5, 6.2, 6.3, 6.4, 7.1, 7.2, 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 9.4, 11.1, 11.4, 11.5, 11.6, 12.2, 12.3, 13, 13.1, 13.2, 13.3, 13.4, and 13.5

Federal consistency will apply to the approved changes only after you publish notice of this approval pursuant to 15 C.F.R. §923.84(b)(4)(i)(C).

Please provide our office with a copy of the public notice of this approval.

Should you have any questions, please call Carleigh-Trappe at (301)-713-3155, extension 165

Sincerely,

/s/John King
John King, Chief
Coastal Programs Division

cc: Carleigh Trappe

SECTION III – LOCAL WATERFRONT REVITALIZATION POLICIES

Section III presents the *waterfront revitalization policies* and their associated standards that are to be used in guiding appropriate development and actions for the Town of Southold. They consider the economic, environmental, and cultural characteristics of Southold. The policies are comprehensive, and reflect existing laws and authority regarding development and environmental protection, including that of the Peconic Estuary Program's Comprehensive Coastal Management Plan. Taken together, these policies and their associated standards are used to determine the appropriate balance between economic development and preservation that will permit beneficial use of and prevent adverse effects on Southold's coastal resources.

The waterfront revitalization policies of the Town of Southold are a local refinement of the *Long Island Sound Regional Coastal Management Program Policies* that apply throughout the Long Island Sound region. These policy statements implement the State's 44 coastal policies as far as they are applicable within the Town of Southold. Each *policy statement* is followed by a brief explanation of the situation in Southold and the intent of the policy. This is followed by a set of policy standards. The policies are organized under four headings: *developed coast; natural coast; public coast; and working coast.* Upon adoption of the Town of Southold LWRP, the policies will become the basis for consistency determinations made by local, state and federal agencies for

actions affecting Southold's coastal area.

The following is a categorized list of the Town of Southold LWRP policies:

DEVELOPED COAST POLICIES

Policy 1 Foster a pattern of development in the Town of Southold that enhances community character, preserves open space, makes efficient use of infrastructure, makes beneficial use of a coastal location, and minimizes adverse effects of development.

Policy 2 Preserve historic resources of the Town of Southold.

Policy 3 Enhance visual quality and protect scenic resources throughout the Town of Southold.

NATURAL COAST POLICIES

Policy 4 Minimize loss of life, structures, and natural resources from flooding and erosion. Policy 5 Protect and improve water quality and supply in the Town of Southold.

Policy 6 Protect and restore the quality and function of the Town of Southold's ecosystem.

Policy 7 Protect and improve air quality in the Town of Southold.

Policy 8 Minimize environmental degradation in the Town of Southold from solid waste and hazardous substances and wastes.

PUBLIC COAST POLICIES

Policy 9 Provide for public access to, and recreational use of, coastal waters, public lands, and public resources of the Town of Southold.

B. Design channel construction and maintenance to protect and enhance natural protective features and prevent destabilization of adjacent areas.

C. Use clean dredged material as beach nourishment whenever the grain size of the dredged material is the same size or slightly larger than the grain size of the potential recipient beach.

5.4 Ensure that expenditure of public funds for flooding and erosion control projects results in a public benefit.

Give priority in expenditure of public funds to actions which protect public health and safety; mitigate flooding and erosion problems caused by previous human intervention; protect areas of intensive development; and protect substantial public investment in land, infrastructure, and facilities.

A. Expenditure of public funds for flooding or erosion control projects:

1. is limited to those circumstances where public benefits exceed public costs

2. is prohibited for the exclusive purpose of flooding or erosion protection for private development, with the exception of work done by an erosion control district,

B. Factors to be used in determining public benefit attributable to the proposed flood or erosion control measure include:

1. economic benefits derived from protection of public infrastructure and investment and protection of water-dependent commerce, or
2. protection of significant natural resources and maintenance or restoration of coastal processes, or
3. integrity of natural protective features, or
4. extent of public infrastructure investment, or
5. extent of existing or potential public use

5.5 The siting and design of projects involving substantial public expenditure should factor in the trend of rising sea levels.

Policy 5 Protect and improve water quality and supply in the Town of Southold.

The purpose of this policy is to protect the quality and quantity of water in the Town of Southold. Quality considerations include both point source and non-point source pollution management so that existing and potential sources of groundwater contamination are either removed or reduced significantly. The primary quantity consideration is the maintenance of an adequate supply of potable water in the Town to supply the

projected demand from residential and agricultural uses.

Historically, the Town of Southold has relied upon its groundwater resources to supply its drinking water needs. The Town's groundwater is its sole source of drinking and irrigation water, a fact that is recognized by its designation by the State of New York as a Special Groundwater Protection Area in 1992. This resource is fed by precipitation that filters through highly permeable soils. For that reason, land uses, residential, commercial and agricultural, can have a significant impact on the quantity and quality of potable drinking water.

Professional opinions about the estimated quantity of groundwater vary depending on which set of assumptions is used. A significant portion of the groundwater resource has been impacted negatively by either nitrogen or organic chemicals, thus necessitating treatment before being used for human consumption. Much of this contamination can be traced to commonly accepted agricultural practices that predated our understanding of the permeability of the agricultural soils and the unsuitability of some fertilization and pesticide application practices for soils which overlay a sole-source aquifer.

Given that the Town has adopted a strong policy and course of action to maintain the land and support base of its agricultural industry, a balance must be struck whereby the public health is protected. This situation suggested a conservative approach to water supply

management and watershed protection; outlined in the Town of Southold's *Water Supply Management & Watershed Protection Strategy.* The *WSM&WPS* was endorsed by the Town Board in June of 2000, and its goals and objectives have been incorporated throughout the LWRP. The Goals and Objectives of the WSM&WPS are listed below:

Goals

1) To protect and preserve a healthful drinking water supply sufficient to serve the existing future residents of the Town, while maintaining and enhancing the natural resources and quality of life in the town.

2) To provide public drinking water to existing residents and businesses in need without precipitating uncontrolled growth.

3) To manage future growth to ensure a sustainable drinking water supply from the Southold Township sole source aquifer.

4) To preserve the town's farming blocks in order to protect farming operations, limit the need for additional drinking water in these areas, and provide, through agricultural best management practices, a continual improvement to the groundwater quality in the area.

5) To conserve drinking water supplies by reducing wasteful water use.

6) To integrate land conservation, agricultural activities, and development control to preserve a sustainable balance between water recharge and drinking water use.

7) To constructively protect the Town's sole source aquifer from contamination by inappropriate land use practices.

Objectives

1) Develop land management and zoning strategies:

- To prevent inappropriate land uses or practices from occurring within designated groundwater protection areas;
- To guild development in order to minimize its impact on the groundwater aquifer;
- To scale development to a level which respects the limitations of water supply.

2) Develop strategies to mitigate or remove existing threats to designated groundwater protection areas, or mitigate possible deterioration to drinking water quality, especially in private wells.

3) Promote and guild compact, orderly growth into areas where sustainable drinking water supplies exist.

4) Preserve and protect groundwater

recharge areas in and around existing and planned drinking water supply well-heads.

5) Accommodate growth and change within the Town which: respects the geographical and geological limitations to the drinking water supply; does not damage the groundwater aquifer; does not, by cumulative impact, destroy the fundamental economic base, environmental character and unique way of life which make up the quality of life in the Township of Southold.

(Source: Town of Southold Water Supply Management & Watershed Protection Strategy. Charles J. Voorhis, Nelson, Pope & Voorhis, LLC and Valerie Scopaz, Town of Southold Planning Board/Department, June 2000, p.3, Section 1.4)

In addition, the Town of Southold recognizes the importance of maintaining high water quality in its surface waters. Impairments to its salt and fresh waters from careless land practices, stormwater runoff, malfunctioning on-site wastewater treatment systems and boater pollution are the main concerns. The Town also is concerned about water quality impairments to Long Island Sound near the outfall pipe from the Village of Greenport's Sewage Treatment Plant. The Town's goals are to maintain high water quality and reduce incidences of degraded water quality in order to maintain environmental health of its marine ecosystems and the aesthetic quality

of unpolluted waters.

Significant strides have been taken in reducing the impacts of point and non-point sources of pollution, yet the Town's water resources remain at risk. Today's challenges focus on resolving the remaining pollution problems, particularly those associated with non-point sources, and protecting and restoring the natural resources of the valuable ecological complexes and aquatic ecosystems within and adjacent to the Town of Southold. The Town of Southold has identified the need for the preparation of Watershed Management Plans for the main creeks and waterbodies in Southold. Such plans would help mitigate the impacts of these impairments within the watersheds and result in improvements to water quality. *Sections IIJ.* and *IIK.* discussed these concerns in more detail.

Finally, the Town of Southold recognizes that it is an integral part of the Peconic Estuary. The Town is an active participant in the *Peconic Estuary Program*.

Policy Standards

5.1 Prohibit direct or indirect discharges that would cause or contribute to contravention of water quality standards.

A. Restore the Town of Southold's water quality by limiting major sources of surface water quality impairment.

1. Limit nitrogen loadings from wastewater treatment facilities to

levels at or below levels occurring in 1990.

2. Reduce nitrogen discharges sufficient to achieve dissolved oxygen levels that would limit the occurrence of hypoxia.

3. Remediate existing contaminated sediment and limit the introduction of new contaminated sediment in order to reduce loading of toxic materials into surface waters.

B. Prevent point source discharges into Southold's coastal waters and manage or avoid land and water uses that would:

1. exceed applicable effluent limitations, or

2. cause or contribute to contravention of water quality classification and use standards, or

3. adversely affect receiving water quality, or

4. violate a vessel no-discharge zone.

5. be contrary to Phase III of the Long Island Sound Study's Nitrogen Reduction Plan which calls for a 58.5% Sound-wide reduction in nitrogen levels.

C. Ensure effective treatment of sanitary sewage and industrial discharges by:

1. maintaining efficient operation of sewage and industrial treatment facilities
2. providing, at a minimum, effective secondary treatment of sanitary sewage and where discharge to the groundwater is warranted, requiring sufficient treatment of sanitary sewage to avoid negative impacts to the sole source aquifer
3. modifying existing sewage treatment facilities to provide improved nitrogen removal capacity
4. incorporating treatment beyond secondary, as feasible, particularly focusing on nitrogen removal, as part of new or expanded wastewater treatment plant design
5. reducing demand on treatment facilities
6. reducing the loadings of toxic materials into waters by including limits on toxic metals as part of wastewater treatment plant effluent permits
7. reducing or eliminating combined sewer overflows
8. providing and managing on-site disposal systems:

a. use on-site disposal systems only when impractical to connect with public sewer systems,

b. protect surface and groundwater against contamination from pathogens and excessive nutrient loading by keeping septic effluent separated from groundwater and by providing adequate treatment of septic effluent,

c. encourage the evaluation and implementation of alternative or innovative on-site sanitary waste systems to remediate on-site systems that currently do not adequately treat or separate effluent,

d. encourage the use of alternative or innovative on-site sanitary waste systems where development or redevelopment of grandfathered parcels would otherwise increase the level of negative impacts on ground or surface waters, including wetlands.

5.2 Minimize non-point pollution of coastal waters and manage activities causing non- point pollution.

A. Minimize non-point pollution of coastal waters using the following approaches, which are presented in order of priority.

1. Avoid non-point pollution by limiting non-point sources.

   a. Reduce or eliminate introduction of materials which may contribute to non-point pollution.

   b. Avoid activities which would increase off-site stormwater runoff and transport of pollutants.

   c. Control and manage stormwater runoff to:

      - minimize transport of pollutants
      - restore sites to emulate natural stormwater runoff conditions where degraded stormwater runoff conditions exist
      - achieve no net increase of runoff where unimpaired stormwater runoff conditions exist

   d. Retain or establish

vegetation to maintain or provide:

- soil stabilization
- filtering capacity in riparian and littoral zones

e. Preserve natural hydrologic conditions.

- Maintain natural surface water flow characteristics.
- Retain natural watercourses and drainage systems where present.
- Where natural drainage systems are absent or incapable of handling the anticipated runoff demands:
    - develop open vegetated drainage systems as the preferred approach and design these systems to include long and indirect flow paths and to decrease peak runoff flows
        - use closed

drainage systems only where site constraints and stormwater flow demands make open water systems infeasible

2. Reduce pollutant loads to coastal waters by managing unavoidable non- point sources and by using appropriate best management practices as determined by site characteristics, design standards, operational conditions, and maintenance programs.

B. *Reduce non-point source pollution using specific management measures appropriate to specific land use or pollution source categories.* Management measures that apply to specific land use or pollution sources are considered in *Section II.* These management measures are to be applied within the context of the prioritized approach of avoidance, reduction, and management presented in the previous policy section. Further information on specific management measures is contained in *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (U.S. EPA, 840-B- 92-002).

Where agricultural practices are concerned, the Town advocates those best management methods developed in conjunction with the U.S. Soil Conservation Service and the Cornell University Cooperative Extension in Riverhead

5.3 Protect and enhance quality of coastal waters.

A. Protect water quality based on an evaluation of physical factors (pH, dissolved oxygen, dissolved solids, nutrients, odor, color and turbidity), health factors (pathogens, chemical contaminants, and toxicity), and aesthetic factors (oils, floatables, refuse, and suspended solids).

B. Minimize disturbance of streams and creeks including their bed and banks in order to prevent erosion of soil, increased turbidity, and irregular variation in velocity, temperature, and level of water.

C. Protect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material.

5.4 Limit the potential for adverse impacts of watershed development on water quality and quantity.

A. Protect water quality by ensuring that proposed expansion or intensification of existing watershed development results in:

1. protection of areas that provide important water quality benefits
2. maintenance of natural characteristics of drainage systems, and
3. protection of areas that are particularly susceptible to erosion and sediment loss

B. Limit the individual impacts associated with development to prevent cumulative water quality impacts which would lead to a failure to meet water quality standards.

5.5 Protect and conserve the quality and quantity of potable water.

A. Prevent contamination of potable waters by limiting discharges of pollutants to maintain water quality according to water quality classification, and limiting, discouraging or prohibiting land use practices that are likely to contribute to contravention of surface and groundwater quality classifications for potable water supplies.

B. Prevent depletion of existing potable water supplies by limiting saltwater intrusion in aquifers and estuaries, through conservation methods or restrictions on water supply use and withdrawals, and by allowing for recharge of potable aquifers.

C. Limit cumulative impact of development on groundwater recharge areas to ensure replenishment of potable groundwater supplies.

Policy 6 Protect and restore the quality and function of the Town of Southold ecosystem.

The Town of Southold is a complex ecosystem consisting of physical (non-living) and biological (living) components and their interactions. The physical components include the open waters and embayments of Long Island Sound, the Peconic Bays, Shelter Island Sound, Gardiners Bay, Fishers Island Sound and Block Island Sound, as well as coastal lowlands, headlands, bluffs, adjacent upland areas, small offshore islands, and soils. These features continue to develop and change through the action of tides and offshore currents, and through weathering by precipitation and surface runoff. The biological components include the plants and animals that make up a wide range of ecological communities in and around the Town of Southold.

Certain natural resources that are important for their contribution to the quality and biological

diversity of the Town's ecosystem have been specifically identified by the State of New York for protection. These natural resources include regulated tidal and freshwater wetlands; designated Significant Coastal Fish and Wildlife Habitats; and rare, threatened, and endangered species. In addition to specifically identified discrete natural resources, the quality of the Town's ecosystem also depends on more common, broadly distributed natural resources, such as the extent of forest cover, the population of overwintering songbirds, or benthic communities. These more common natural resources collectively affect the quality and biological diversity of the Sound ecosystem.

The role of the Southold Town Board of Trustees in the protection and management of the Town's ecosystem, particularly as it relates to surface waters is recognized by the Town. The policy standards noted below recognize that federal and state legislation governing the protection, management and restoration of the environment are not always sufficiently restrictive to protect local resources. Where the Town and its Board of Trustees have implemented protective measures that exceed that of federal and state regulations, local regulations and standards should be complied with.

Policy Standards

6.1 Protect and restore ecological quality throughout the Town of Southold.

A. Avoid adverse changes to the Long Island Sound and the Peconic Bay ecosystems that

would result from impairment of ecological quality as indicated by:

1. *Physical loss of ecological components*
   Physical loss is often the most obvious natural resource impairment to identify. It usually results from discrete actions, such as filling or excavating a wetland or clearing an upland forest community prior to development.

2. *Degradation of ecological components*
   Degradation occurs as an adverse change in ecological quality, either as a direct loss originating within the resource area or as an indirect loss originating from nearby activities. Degradation usually occurs over a more extended period of time than physical loss and may be indicated by increased siltation, changes in community composition, or evidence of pollution.

3. *Functional loss of ecological components*
   Functional loss can be indicated by a decrease in abundance of fish or wildlife, often resulting from a behavioral or physiological avoidance response. Behavioral avoidance can be due

to disruptive uses that do not necessarily result in physical changes, but may be related to introduction of recreational activities or predators. Timing of activities can often be critical in determining whether a functional loss is likely to occur. Functional loss can also be manifested in physical terms, such as changes in hydrology.

B. Protect and restore ecological quality by adhering to the following measures.

1. Maintain values associated with natural ecological communities. Each natural ecological community has associated values which contribute to the ecological quality of the Town of Southold. These values should be assessed on a case-by-case basis.

2. Retain and add indigenous plants to maintain and restore values of natural ecological communities.

    a. Protect existing indigenous plants from loss or disturbance to the extent practical.

    b. Include use of suitable indigenous plants in the landscaping plans for new development and in

redevelopment projects where loss or disturbance of existing indigenous plants could not be prevented during construction.

3. Avoid fragmentation of ecological communities and maintain corridors to facilitate the free exchange of biological resources within and among communities.

    a. Each individual resource area should be maintained as a complete contiguous areas to protect the area's natural resource values. Specifically, actions that would fragment the ecological community into separate ecological islands should be avoided.

    b. Where fragmentation of ecological communities has already occurred, the adverse effects of fragmentation can be mitigated by maintaining or providing connecting corridors to allow exchange of biological resources.

4. Maintain ecological integrity of particular locales by maintaining structural and functional

attributes, including normal variability, to provide for self-sustaining systems.

5. Avoid permanent adverse change to ecological processes.

C. Reduce adverse impacts on ecological quality due to development.

1. Reduce adverse effects of existing development.
2. Mitigate impacts of new development.

6.2 Protect and restore Significant Coastal Fish and Wildlife Habitats.

The Town of Southold is rich in habitats that support diverse and often large wildlife populations, many of which are of commercial or recreational value. The importance of these habitats has been recognized through the state designation of twenty-one Significant Coastal Fish and Wildlife Habitats in Southold:

Reach 1 Mattituck Inlet Wetlands and Beaches

Reach 2 Goldsmith Inlet and Beach

Reach 5 Orient Harbor
Long Beach Bay
Plum Gut
Great Gull Island

Reach 6 Hashamomuck Pond

Conkling Point
Port of Egypt Island
Pipes Cove Creek and Moores Drain

Reach 7 Jockey Creek Spoil Area
Cedar Beach Point
Corey Creek
Richmond Creek and Beach

Reach 8 Little Creek and Beach
Cutchogue Harbor Wetlands
Robins Island

Reach 9 Downs Creek

Reach 10 The Race
Fishers Island Beaches, Pine Islands and Shallows
Dumpling Islands and Flat Hammock

These habitats cover the full range of habitats typical on the East End of Long Island and include dunes, beaches, wetlands, islands and open water. The Town of Southold recognizes the importance of protecting and enhancing these wetlands and habitats.

All of these habitats have experienced and continue to experience human disturbance. This includes the effects of bulkheading, filling and dredging, removal of vegetation, adjacent land uses, and recreational activities and facilities, such as fishing, hunting and boating and the associated marina and boat launch facilities. These

impacts do not have to destroy or impair the natural resources of the habitats. In addition to avoiding incompatible use of the habitats and adjacent land, many management measures can be taken to ensure that negative impacts do not occur.

A. *Protect Significant Coastal Fish and Wildlife Habitat values from uses or activities that would:*

1. Destroy habitat values associated with the designated habitat through:

    a. direct physical alteration, disturbance, or pollution, or

    b. indirect effects of actions, which would result in a loss of habitat.

2. Significantly impair the viability of the designated habitat beyond the tolerance range of important fish or wildlife species which rely on the habitat values found within the designated area through:

    a. degradation of existing habitat elements,

    b. change in environmental conditions,

    c. functional loss of habitat

values, or

d. adverse alteration of physical, biological, or chemical characteristics.

The habitat impairment test presented in this section must be met for any activity that is subject to consistency review under federal and state laws. If the proposed action is subject to consistency review, then the habitat protection policy applies, whether the proposed action is to occur within or outside the designated area.

Definitions

Habitat destruction is defined as the loss of fish or wildlife use through direct physical alteration, disturbance, or pollution of a designated area or through the indirect effects of these actions on a designated area. Habitat destruction may be indicated by changes in vegetation, substrate, or hydrology, or by increases in runoff, erosion, sedimentation or pollutants.

Significant impairment is defined as reduction in vital resources (e.g., food, shelter, living space) or change in environmental conditions (e.g., temperature, substrate, salinity) beyond the tolerance range of important species of fish or wildlife that rely on the habitat values found

within the designated area. Indicators of a significantly impaired habitat focus on ecological alterations and may include, but are not limited to, reduced carrying capacity, changes in community structure (e.g. food chain relationships, species diversity, etc), reduced productivity and/or increased incidence of disease and mortality.

The *tolerance range* of a species of fish or wildlife has been defined as the physiological range of conditions beyond which a species will not survive at all. In this document, the term is used to describe the ecological range of conditions that supports the specie's population or has the potential to support a restored population, where practical. Two indicators that the tolerance range of a species has been exceeded are the loss of individuals through an increase in emigration and an increase in death rate. An abrupt increase in death rate may occur as an environmental factor falls beyond a tolerance limit (a range has both upper and lower limits). Many environmental factors, however, do not have a sharply defined tolerance limit, but produce increasing emigration or death rates with

increasing departure from conditions that are optimal for the species.

The range of parameters that should be considered in applying the habitat impairment test include, but are not limited to, the following:

1. physical parameters, such as living space, circulation, flushing rates, tidal amplitude, turbidity, water temperature, depth (including loss of littoral zone), morphology, substrate type, vegetation, structure, erosion and sedimentation rates

2. biological parameters, such as community structure, food chain relationships, species diversity, predator/prey relationships, population size, mortality rates, reproductive rates, meristic features, behavioral patterns and migratory patterns, and

3. chemical parameters, such as dissolved oxygen, carbon dioxide, acidity, dissolved solids, nutrients, organics, salinity, and pollutants (heavy metals, toxics and hazardous materials)

B. Where destruction or significant impairment of habitat values cannot be avoided, minimize potential impacts of land use or development through appropriate mitigation. Use

mitigation measures that are likely to result in the least environmentally damaging feasible alternative.

Mitigation includes:

1. Avoidance of potential adverse impacts, including:
    a. avoiding ecologically sensitive areas,
    b. scheduling activities to avoid vulnerable periods in life cycles or the creation of unfavorable environmental conditions,
    c. preventing fragmentation of intact habitat areas.
2. Minimization of unavoidable potential adverse impacts, including:
    a. reducing scale or intensity of use or development,
    b. designing projects to result in the least amount of potential adverse impact,
    c. choosing alternative actions or methods that would lessen potential impact.
3. Specific measures designed to protect habitat values from impacts that cannot be sufficiently avoided or minimized to prevent

habitat destruction or significant habitat impairment, and

4. Specific protective measures included in the narratives for each designated Significant Coastal Fish and Wildlife Habitat area.

C. Wherever practical, restore Significant Coastal Fish and Wildlife Habitats so as to foster their continued existence as natural systems by:

1. Reconstructing lost physical conditions to maximize habitat values,
2. Adjusting adversely altered chemical characteristics to emulate natural conditions, and
3. Manipulating biological characteristics to emulate natural conditions through re-introduction of indigenous flora and fauna.

6.3 Protect and restore tidal and freshwater wetlands.

Wetlands within the Town of Southold are critical natural resources that provide benefits including: open space, habitat for fish and wildlife, water quality enhancement, flooding and erosion protection, scenic value, and opportunities for environmental education. Over the

years, many wetland areas have been lost or impaired by degradation or functional loss. Wetlands and their benefits are also dependent upon the condition of adjacent lands which provide buffers between wetlands and surrounding uses. Large areas of adjacent lands that previously provided a buffer for wetlands have been physically lost to development or functionally lost through changes in land use, including inappropriate or incompatible landscaping. These losses and impairments to the wetlands and their functions cumulatively have impacted the Town of Southold's ecosystem.

Protecting and improving the remaining tidal and freshwater wetlands and restoring lost or impaired wetlands are the most appropriate ways to achieve an increase in quality and quantity of wetlands. Historical losses and alterations, which have occurred in many locations in Southold, present numerous opportunities for restoration. In addition to protecting and improving the Town's wetlands, adjacent lands that provide buffers to wetlands must be maintained and enhanced, and where appropriate, re-established. These buffers are necessary to ensure the long term viability of the Town's wetlands. Where these lands are in private ownership, educating residential owners as to the long-term benefits of compatible land use and landscaping techniques will be

essential to maintaining the ecological health of some wetland areas.

The Town recognizes the value of wetlands to its ecosystem, its economy and its aesthetic character. It also recognizes that federal and state regulations concerning wetlands do not fully cover local conditions, and in some cases, are less restrictive than local regulations. The Town Board of Trustees has local expertise in the management of the Town's wetlands and in this capacity espouses a "no net loss" of wetlands policy, as espoused by the New York State Department of Environmental Conservation. The NYSDEC Habitat Protection staff has indicated that "the creation of new freshwater wetlands as a compensatory mitigation measure would only be approved under the most unusual of circumstances and only in response to a pressing social need. They are unlikely to allow projects of this type in state regulated wetlands. Wetlands created through mitigation projects are often of a lesser quality than the existing wetlands that are being destroyed. Natural wetlands are created due to specific topographic geologic, and hydrogeologic conditions that are very difficult to properly recreate." (Letter of December 15, 2003 from Sherri Aicher, Environmental Analyst, Division of Environmental Permits, Region One, New York State Department of Environmental Conservation, to Stephen Ridler, New York

State Department of State, Division of Coastal Resources.) The following policy standards recognize that local expertise and judgement must be given priority.

A. Comply with statutory and regulatory requirements of the Southold Town Board of Trustees laws and regulations for all Andros Patent and other lands under their jurisdiction

1. Comply with Trustee regulations and recommendations as set forth in Trustee permit conditions.

B. Comply with statutory and regulatory requirements of the State's wetland laws.

1. Comply with regulatory requirements of the Stream Protection Act for the excavation or placement of fill in all wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state, and that are inundated at mean high water level or tide.
2. Comply with the regulatory requirements of the Freshwater Wetlands Act for the protection of mapped freshwater wetlands.
3. Comply with the regulatory requirements of the Tidal Wetlands Act for the protection

of mapped tidal wetlands including coastal fresh marsh; intertidal marsh; coastal shoals, bars and flats; high marsh or salt meadow; littoral zones; and formerly connected tidal wetlands.

C. Prevent the net loss of vegetated wetlands according to the following measures. Use the measure resulting in the least environmentally damaging practicable alternative.

1. Avoid placement of fill in or excavation of vegetated wetlands:
    a. Choose alternative sites which would not result in adverse impacts on wetlands.
    b. Reduce scale or intensity of development to avoid excavation or fill.
    c. Choose design alternatives which would avoid excavation or fill.
2. Minimize adverse impacts resulting from unavoidable fill, excavation, or other activities by:
    a. reducing scale or intensity of use in order to limit incursion into wetland areas

b. designing projects to result in the least degree of adverse wetland impacts

3. Provide compensatory mitigation for adverse impacts which may result from unavoidable fill, excavation or other activities remaining after all appropriate and practicable minimization has been accomplished.

    a. Restore former wetlands or create new tidal wetlands according to the following priorities:

        (i) restore former wetlands or create new tidal wetlands in areas adjacent or contiguous to the site

        (ii) where restoration of former wetlands in areas adjacent or contiguous to the site is not appropriate or practicable, restore former wetlands in close physical proximity and in the same watershed, to the extent possible

        (iii) where restoration of former tidal wetlands is not appropriate or

practicable, create new tidal wetlands in suitable locations as determined by sediment, exposure, shoreline characteristics, and water regime; include consideration of loss of resource values which may exist at the mitigation site

b. Creation of new non-tidal freshwater wetlands is generally not suitable for compensatory mitigation for loss of natural wetland.

c. Where wetlands are restored or tidal wetlands created:

(i) Provide equivalent or greater area of mitigation wetland. Base the actual area of wetland provided on the following factors: characteristics of the mitigation site, proposed wetland creation or restoration methods and designs, and quality of the wetland restored or

created relative to the wetland lost.

(ii) Provide equivalent or greater value or benefit to that of the wetland area lost, as defined by class of freshwater wetland, as ranked in 6 NYCRR Part 664 or, tidal wetland zones, as described in 6 NYCRR Part 661.

(iii) A lesser area of mitigation wetland may be allowed in cases where the mitigation wetland and its benefits would clearly be a greater value than the wetland lost.

(iv) Guarantee success of the compensatory mitigation. Wetland mitigation is considered successful if functional attributes of the wetland have been reached and maintained, including a plant density which approaches the design density.

(a) Carry out mitigation in accord with a compensatory plan which details wetland creation or restoration measures. Base compensatory plans on establishment of a natural, self-regulating wetland.

(b) Monitor and report on progress of the wetland mitigation according to a prescribed plan.

(c) Provide a suitable performance bond or other surety instrument guaranteed to an appropriate agency or organization to assure successful completion of the

mitigation.

d. When a series of small, unavoidable wetland losses requires mitigation, combine mitigation projects to create larger contiguous wetland areas whenever the resulting ecological value would be greater than that achieved through pursuing discrete, separate efforts.

e. Protect wetland functions and associated benefits regardless of the availability of compensatory mitigation.

(i) Do not fill, excavate, or dredge vegetated wetland areas which:

(a) support endangered or threatened species of plants or animals

(b) have not been subjected to significant impairment, or

(c) are part of a natural resource management

area, including refuges, sanctuaries, reserves, or areas designated as Significant Coastal Fish and Wildlife Habitats, based on wetland values.

(ii) Do not fill, excavate, or dredge vegetated wetland areas when the wetland loss would result in significant impairment of the remaining wetland area.

(iii) Retain functions and benefits associated with vegetated and non-vegetated wetlands.

D. Provide adequate buffers between wetlands and adjacent or nearby uses and activities in order to ensure protection of the wetland's character, quality, values, and functions. The adequacy of the buffer depends on the following factors:

1. Potential for adverse effects associated with the use. Uses such as those involving

hazardous materials, on-site sewage disposal, or mineral extraction have high potential for adverse effects and may require substantial buffer.

2. The nature and importance of the wetland and its benefits. Substantial buffers may be necessary to avoid adverse effects from adjacent or nearby uses based on the nature of the land use and the characteristics of the affected wetland.

3. Direction and flow of surface water between a use and adjacent or nearby wetland. Buffer widths may be reduced in areas where drainage patterns normally do not lead directly to the wetland and where adverse affects on the wetland, other than those due to runoff, are not likely.

4. Buffer width necessary to achieve a high particulate filtration efficiency of surface runoff as determined by vegetative cover type, soil characteristics, and slope of land.

5. Other management measures or design alternatives to protect wetlands from adverse effects where site constraints do not

allow sufficient buffer width.

E. *Maintain buffers to ensure that adverse effects of adjacent or nearby development are avoided:*

1. Maintain buffers to achieve a high filtration efficiency of surface runoff.
2. Avoid permanent or unnecessary disturbance within buffer areas.
3. Maintain existing indigenous vegetation within buffer areas.

F. *Restore tidal wetlands and freshwater wetlands, wherever practical, to foster their continued existence as natural systems by:*

1. reconstructing lost physical conditions to maximize wetland values,
2. adjusting altered chemical characteristics to emulate natural conditions,
3. manipulating biological characteristics to emulate natural conditions through re-introduction of indigenous flora and fauna, and
4. protecting lands adjacent to wetlands from alterations so as to maximize natural buffers

to wetlands.

6.4 Protect vulnerable fish, wildlife, and plant species, and rare ecological communities.

The Town of Southold hosts a rich array of ecologically important living resources. Although many living resources provide important ecological values, this section specifically addresses those ecologically important living resources whose loss would clearly result in permanent adverse changes to the Town of Southold ecosystem. The ecologically important living resources addressed here are: vulnerable fish and wildlife species, vulnerable plant species, and rare ecological communities.

Certain human activities already have resulted in impairments to ecologically important resources, causing permanent adverse changes to the Town's ecological complexes. Additional impairments to these resources would result in further adverse changes to the Town's ecological complexes. Protection of ecologically important living resources may include alteration of a proposed activity or other measures to avoid adverse impacts on the potentially affected species.

This section establishes standards for the identification and protection of vulnerable fish and wildlife species based on the State

of New York's endangered animal species lists, and for vulnerable plant species based on the endangered plant species lists. It also provides standards for protection of rare ecological communities as defined under the *Natural Heritage Program's* community types.

A. Protect vulnerable fish and wildlife species.

1. Vulnerable fish and wildlife species are those listed in regulation 6 NYCRR Part 182.5 as Endangered Species, Threatened Species, and Special Concern Species.

2. Review existing species records and field survey proposed development sites, at the appropriate times, for the presence of listed species or conditions that meet their habitat requirements.

3. Protect habitat of listed species identified through field surveys or other methods during all stages of their life cycles.

B. Protect vulnerable plant species.

1. Vulnerable species are those listed in regulation 6 NYCRR Part 193.3 as Endangered Species, Threatened Species,

Exploitable Vulnerable Species, and Rare Species.

2. Review existing species records and field survey proposed development sites, at the appropriate times, for the presence of listed species or conditions that meet their habitat requirements.

3. Protect habitat identified by the occurrence of a listed species during all stages of their life cycles.

C. Protect rare ecological communities.

1. Rare ecological communities to be protected include:

   a. communities that qualify for a *Heritage State Rank* of **S1** or **S2**; and

   b. communities that qualify for both a *Heritage State Rank* of **S3**, **S4** or **S5**; and an *Element Occurrence Rank* of **A**. (See The Natural Coast for an explanation of *Heritage State Ranks*).

2. Review existing ecological community records and field survey sites potentially

affected by proposed development for the presence of rare ecological communities.

3. Protect rare ecological communities. Use appropriate design and development of land and water uses that will integrate or be compatible with the identified ecological community.

4. Use the most up-to-date information available on the structure and the function of rare ecological communities as a factor in determining open space requirements of a project.

Policy 7 Protect and improve air quality in the Town of Southold.

This policy provides for protection of the Town of Southold from air pollution generated within the coastal area or from outside the coastal area that adversely affects coastal air quality. The air quality within the Town of Southold is considered to be within federal regulatory standards. Since the Town does not have any heavy industry and only one small asphalt plant, air pollution from stationery sources is not a current threat. Further, the Town's zoning code does not permit the introduction of new heavy industries. The most likely short-term sources of air pollution will come from the expansion of existing or the

creation of new power generation plants and from escalating levels of automobile use. Open air burning is not permitted. The town's solid waste management facility is being operated in accordance with all applicable federal and state regulations.

Policy Standards

7.1 Control or abate existing and prevent new air pollution.

A. *Limit pollution resulting from new or existing stationary air contamination sources consistent with:*

1. attainment or maintenance of any applicable ambient air quality standard,
2. applicable New Source Performance Standards,
3. applicable control strategy of the State Implementation Plan, and
4. applicable Prevention of Significant Deterioration requirements.

B. *Recycle or salvage air contaminants using best available air cleaning technologies.*

A strategy to recycle certain of these contaminants has already been implemented at the Town Recycling Center in Cutchogue, where all appliances containing refrigerants

are properly emptied and recycled by a trained, licensed technician.

C. Limit pollution resulting from vehicle or vessel movement or operation, including actions which directly or indirectly change transportation uses or operation resulting in increased pollution.

The Town Planner and the Town's Transportation Commission have been working in conjunction with regional, state and county agencies for the past several years to encourage the use of alternative forms of transportation to the automobile. Greater use of intermodal forms of transportation and bicycle trails are two of the alternatives that have been extensively promoted within the Town. Further, the Town Board has reduced strip zoning by changing its zoning pattern to result in more centralized business zoning in traditional business centers where joint parking lots and pedestrian corridors can reduce automobile traffic and encourage pedestrian access.

D. Restrict emissions or air contaminants to the outdoor atmosphere that are potentially injurious or which unreasonably

interfere with enjoyment of life or property.

Open burning of leaves or trash is a potential source of such emissions. It is banned by a combination of state and local laws. Since some open burning still is occurring, the Town will promote public awareness of the hazards posed by such activity and will continue to enforce its laws restricting and/or prohibiting the practice.

It should be noted here that the Plum Island Animal Disease Center is a federal agency located on a federal reservation, hence exempt from this local ordinance. The burning of brush for the purposes of security and emergency services access on Plum Island takes place in accordance with State permits.

E. Limit new facility or stationary source emissions of acid deposition precursors consistent with achieving final control target levels for wet sulfur deposition in sensitive receptor areas, and meeting New Source Performance Standards for the emissions of oxides of nitrogen.

Potential sources of oxides of nitrogen (NOX) pollutants include automobiles, trucks and power plants. Such pollutants tend to

contribute to the formation of ground level smog, to which the many open fields throughout the Town may prove particularly susceptible.

7.2 Limit discharges of atmospheric radioactive material to a level that is as low as practicable.

Presently the Town is not aware of any discharges of atmospheric radioactive material within the Town borders. However, the Town is greatly concerned about atmospheric radiation that may be discharged from the nuclear power plant at Millstone, Connecticut and blown into the Town by prevailing winds.

7.3 Limit sources of atmospheric deposition of pollutants to the Town of Southold, particularly from nitrogen sources.

Steps taken to deal with NOX pollutants as described in *Section 8.1 E.* above, contribute to attainment of this policy goal.

Policy 8 Minimize environmental degradation in Town of Southold from solid waste and hazardous substances and wastes.

The intent of this policy is to protect people from sources of contamination and to protect the coastal resources of the Town of Southold from degradation through proper control and management of wastes and hazardous materials. Attention is also required to identify and address sources of soil and water contamination resulting from landfill and hazardous waste sites and in-

place sediment contamination in the Town of Southold.

Policy Standards

8.1 Manage solid waste to protect public health and control pollution.

A. Plan for proper and effective solid waste disposal prior to undertaking major development or activities generating solid wastes.

The environmental review portion of the Town's Site Plan application process permits the Town to assess the potential solid waste disposal needs of proposed new development or activity.

B. Manage solid waste by:

1. reducing the amount of solid waste generated,
2. reusing or recycling material,
3. using approved methods endorsed by the NYSDEC to dispose of solid waste that is not otherwise being reused or recycled.

The sole public solid waste management facility in Town, the Disposal and Recycling Center in Cutchogue, currently operates in accordance with these standards. The "Town Bag" garbage disposal

system promotes waste reduction and increased recycling rates. The Town maintains, and plans to expand, a full- scale yard waste composting facility. When completed, this facility will be able to process the Town's entire yard waste stream, which is fully one-third of the overall waste stream. The compost currently produced has already found local markets that contribute to the replenishment of organic matter in local soils and should help reduce the reliance of agricultural producers on chemical fertilizers and herbicides. In the long run, this will contribute to a reduction in stormwater runoff of chemical fertilizers and herbicides into the Town's ground and surface waters.

C. Prevent the discharge of solid wastes into the environment by using proper handling, management, and transportation practices.

The Town's solid waste transfer facility in Cutchogue already operates in compliance with the State Department of Environmental Conservation's Part 360 Regulations that mandate such controls through its permit provisions. The operational practices of existing, locally permitted, *privately owned* solid waste management facilities

should be reviewed for adherence to these principles. In additional, the same principles will be included in the Town's permit provisions for any privately owned facilities that are opened in the future.

D. Operate solid waste management facilities to prevent or reduce water, air, and noise pollution and other conditions harmful to the public health.

The Town's solid waste transfer facility (known as the Disposal and Recycling Center) in Cutchogue already operates in compliance with the State Department of Environmental Conservation's Part 360 Regulations which mandate such controls through its permit provisions. Additionally, the operational practices of existing, locally permitted, *privately owned* solid waste management facilities should be reviewed for adherence to these principles. In additional, the same principles will be included in the Town's permit provisions for any privately owned facilities that are opened in the future.

8.2 Manage hazardous wastes to protect public health and control pollution.

A. Manage hazardous waste in accordance with the following

priorities:

1. eliminate or reduce generation of hazardous wastes to the maximum extent practical,
2. recover, reuse, or recycle remaining hazardous wastes to the maximum extent practical,
3. use detoxification, treatment, or destruction technologies to dispose of hazardous wastes that cannot be reduced, recovered, reused, or recycled,
4. phase-out land disposal of industrial hazardous wastes.

B. Ensure maximum public safety through proper management of industrial hazardous waste treatment, storage, and disposal.

At its Disposal and Recycling Center, the Town of Southold operates a household hazardous waste (HHW) disposal program under the State Department of Environmental Conservation's (DEC) Part 360 Regulations. The Center accepts residentially generated HHW of local residents free of charge. Hazardous materials are removed for proper disposal by a contractor under permit from the State DEC. This facility has been in operation since

1986, when Southold became the first municipality in New York State to offer this service. This year, 2000, due to reduced inventory of HHW, the town switched to a bi-monthly HHW drop-off schedule. This program continues to be well-utilized, safe and economical way to remove hazardous materials from the sanitary waste stream.

C. Remediate inactive hazardous waste disposal sites. Future use of a site should determine the appropriate level of remediation.

The Town's Site Plan application process will uncover inactive hazardous waste disposal sites. Remediation efforts will be specified during the environmental review of those sites prior to development or redevelopment.

8.3 Protect the environment from degradation due to toxic pollutants and substances hazardous to the environment and public health.

A. Prevent release of toxic pollutants or substances hazardous to the environment that would have a deleterious effect on fish and wildlife resources.

The Town's Site Plan application process will determine whether proposed land use activities will

involve toxic substances. Protection measures to prevent their release to the environment, particularly fish and wildlife resources, will be determined during the environmental review.

Further, the dredging of toxic material from underwater lands and the deposition of such material shall be conducted in the most mitigative manner possible so as not to endanger fish and wildlife resources, in either the short or long term.

B. Prevent environmental degradation due to persistent toxic pollutants by:

1. limiting discharge of bio-accumulative substances,

2. avoiding re-suspension of toxic pollutants and hazardous substances and wastes, and avoiding reentry of bio-accumulative substances into the food chain from existing sources.

C. Prevent and control environmental pollution due to radioactive materials.

D. Protect public health, public and private property, and fish and wildlife from inappropriate use of pesticides.

1. Limit use of pesticides to effectively target actual pest

populations as indicated through integrated pest management methods.

2. Prevent direct or indirect entry of pesticides into waterways.

3. Minimize exposure of people, fish, and wildlife to pesticides.

Through its Water Supply Management and Watershed Protection Strategy, the Town proposes to work with Cornell Cooperative Extension and the Suffolk County Department of Health Services to develop public education programs, as well as best-management practice standards for agricultural and residential property owners.

E. Take appropriate action to correct all unregulated releases of substances hazardous to the environment.

8.4 Prevent and remediate discharge of petroleum products.

A. Minimize adverse impacts from potential oil spills by appropriate siting of petroleum offshore loading facilities.

Petroleum offshore loading facilities are not a permitted use within the Town. There is a State-licensed Major Oil Storage Facility located at

the Plum Island Animal Disease Center (PIADC), which is a federal reservation. This site is exempt from Town zoning regulations and is operated in accordance with federal and state permits and regulations; thus is not considered equivalent to a commercial petroleum offshore loading facility.

B. Demonstrate that adequate plans for prevention and control of petroleum discharges are in place at any major petroleum-related facility.

There are no major petroleum storage or transfer facilities located within the Town other than the State-licensed Major Oil Storage facility at PIADC.

C. Prevent discharges of petroleum products by following methods approved for handling and storage of petroleum products and using approved design and maintenance principles for storage facilities.

All home heating fuel and underground gasoline storage tanks and fuel tanks at marinas are regulated by the State and the County under applicable federal, state and county regulations.

D. Clean up and remove any petroleum discharge giving first priority to minimizing environmental damage.

8.5 Transport solid waste and hazardous substances and waste in a manner which protects the safety, well-being, and general welfare of the public; the environmental resources of the state; and the continued use of transportation facilities.

The transport of solid waste and hazardous substances from all sites within or through the Town shall be conducted in a manner respective of public safety and security issues.

8.6 Site solid and hazardous waste facilities to avoid potential degradation of coastal resources.

A. Solid and hazardous waste facilities should not be located within the coastal area unless there is a demonstrated need for waterborne transport of waste materials and substances.

B. If the need for a coastal location is demonstrated, preclude impairment of coastal resources from solid and hazardous waste facilities by siting these facilities so that they are not located in or would not adversely affect:

1. agricultural lands,
2. natural protective feature areas,
3. surface waters, primary water supply, or principal (sole-source)

aquifers

4. designated Significant Coastal Fish and Wildlife Habitats,

5. habitats critical to vulnerable fish and wildlife species, vulnerable plant species, and rare ecological communities,

6. wetlands.

Note: The Town's only public solid waste management facility is operated within applicable regulatory standards. New, private-owned solid waste management facilities will be reviewed for compliance with Policy 9.6 prior to the issuance of local permits to construct and operate.

PUBLIC COAST POLICIES

Policy 9 Provide for public access to, and recreational use of, coastal waters, public lands, and public resources of the Town of Southold.

The Town of Southold has numerous access points to its shoreline and waterfront recreation facilities. The main objective of the Town is to improve these facilities, providing increased public access to the shoreline and waterfront recreation facilities for residents and visitors. In addition to these improvements the Town has identified opportunities to increase public access to the shoreline, and to waterfront recreation

facilities, as well as to link existing and proposed access and recreation sites within the Town. Southold will take the necessary steps to maximize the appropriate use of the waterfront to ensure public access in a manner that will not adversely impact sensitive natural resources.

In some parts of Southold, physical and visual access by the public to coastal lands and waters is limited. Problems in accessing or viewing the coast are further heightened by the limited degree of access and of recreational opportunities that are available to local residents. In addition, private waterfront development has made parts of the coast physically and visually inaccessible. In some places, opportunities to provide additional public access have been diminished or lost altogether. With the current trend toward redevelopment of waterfront lots with larger structures, there have been cases of reduced visual accessibility due to the loss of vantage points or outright blockage of views. In some places, access along public trust lands of the shore has been impeded by the construction of long docks, and groins between private property and the public shore.

This aside, Southold's shoreline has the potential to offer a continuous right of access along the shore. Given the increase in shoreline development, the opportunity to walk the shoreline of the Long Island Sound and the Peconic Estuary is a valuable public asset. It remains, however, an unrealized asset because the right of continuous access is useless without the ability to get to the shore and, once on the

shore, to walk unfettered. As noted earlier, there are stretches of Southold's shoreline where the public's rights in the foreshore have been constrained, and

B. Limit public access and recreational activities where uncontrolled public use would lead to impairment of natural resources.

1. Establish appropriate seasonal limitations on access and recreation in order to minimize adverse impacts on fish and wildlife species.

2. Provide stewardship that is capable of controlling anticipated adverse impacts before providing public access.

3. Physically limit or avoid provision of public access to natural resource areas whose principal values are based on the lack of human disturbance.

4. Provide educational, interpretive, research, and passive uses of natural resources through appropriate design and control of public access and recreation.

C. Provide public access for fish and wildlife resource related activities, including fishing and hunting,

provided that the level of access would not result in a loss of resources necessary to continue supporting these uses.

D. Provide access using methods and structures that maintain and protect open space areas associated with natural resources. Determine the extent of visual and physical impairment by structures extending through these open space areas based on:

1. the value of the open space as indicated by un-fragmented size or mass of the wetland or other natural resources, distance to navigable water, and wetland value.
2. the size, length, and design of proposed structures.

WORKING COAST POLICIES

Policy 10 Protect Southold's water-dependent uses and promote siting of new water- dependent uses in suitable locations.

Maritime activity in Southold traditionally has been concentrated in the harbors, inlets and creeks. As noted earlier, Policy 1 promotes a continuation of this traditional pattern of maritime activity, supporting the economic base, maintaining the maritime character of the Town, and avoiding disturbance of the remaining

natural shoreline and water areas. It also recognized that Mattituck Inlet and Creek, identified by the state as a regional Maritime Center, Mill Creek and the Village of Greenport are the primary focus of maritime activity within the Town of Southold. The intent of this policy is to protect existing water-dependent commercial, industrial, and recreational uses and to enhance the economic viability of water-dependent uses by ensuring adequate provision of infrastructure for water-dependent uses and their efficient operation. This is relevant to Southold because other important concentrations of water-dependent uses are located at Orient Point, Orient hamlet, Gull Pond, Mill Creek/Budds Pond, Town/Jockey Creek, New Suffolk, James Creek and West Harbor.

Commercial fishing and shellfishing are a prominent water-dependent use and these uses are addressed separately in Policy 3.

Policy Standards

10.1 (a) Protect existing water-dependent uses.

The term *Water-dependent use* means a business or other activity which can only be conducted in, on, over, or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water. Existing uses should be maintained and enhanced where possible and appropriate.

10.1 (b) Improve the economic viability of water-dependent uses by allowing for non-water dependent accessory and multiple uses, particularly water enhanced and maritime support services where sufficient upland exists.

The term *water-enhanced use* means a use or activity which does not require a location adjacent to coastal waters, but whose location on the waterfront adds to the public use and enjoyment of the water's edge. Water-enhanced uses are primarily recreational, cultural, retail, or entertainment in nature. These uses may be necessary for the successful financial operation and viability of *water-dependent uses*.

Marine I and II zoning districts have been identified within the Town's harbors, inlets and creeks. These locations are illustrated on *Map II-6*. These specific areas are where new water-dependent or water-enhanced uses will be accommodated or where existing uses will be permitted to expand within limits.

Currently the Town's Zoning Code permits a range of land uses within the Marine districts. Most of the uses are commercial in nature, but some are residential, recreational or institutional. While most of the uses are water-

enhanced, only some are water-dependent. The primary differences between the Marine I and II districts lie with the types of uses permitted within each zone. (The complete listing of uses permitted in Marine I and II is listed in Table 1 on the next two pages.) Marine II is more intensive than Marine I. It permits more water-enhanced uses as well as a greater intensity of water-dependent development. For this reason, most Marine II sites are located directly on Peconic Bay or near the mouth of tidal creeks where flushing action is strong and where supporting infrastructure is available. The one exception to this rule is in Mattituck Creek on Long Island Sound (Reach 1) which contains Marine II zoning at the head of the Creek.

The Town's marine zoning will be examined to further define those uses that are water-dependent and their appropriate location relative to the Bay and the Sound. It has been suggested that the mix of permitted uses be reviewed to see if a more supportive mix of accessory uses appropriate to water-dependent uses should be added. Key factors in this review will be the capability of public infrastructure to support the revised mix and desired intensity of development. This capability review will include an

analysis of transportation, water, sewage and other services to support the water-dependent and enhanced mix.

Table 1

The following types of water-dependent and water-enhanced uses are permitted or permitted by special exception in Marine Zones I and II:

Marine I

Permitted Uses:

1. One (1) One-family detached dwelling per single and separate lot of record in existence as of the date of adoption of this local law.
2. Marinas for the docking, mooring and accommodation of recreational or commercial boats, including the sale of fuel and oil primarily for the use of boats accommodated in such marinas.
3. Boat docks, slips, piers or wharves for pleasure or fishing trips or for vessels engaged in fishery or shellfishery.
4. Boat yard for building, storing, repairing, renting, selling or servicing boats which may include the following as an accessory use: office for the sale of marine equipment or products, dockside facilities for dispensing of fuel and where pumpout stations are provided restroom and laundry facilities to serve overnight patrons.
5. Boat and marine engine repair and

sales and display, yacht broker, marine insurance broker.

6. Buildings, structures and uses owned or operated by the Town of Southold, School Districts, Park Districts and Fire districts.

7. Retail sale or rental of fishing, diving, bathing supplies and equipment if accessory to marina or boat yard of ships loft or chandlery.

Special Exception Uses:

1. Beach club, yacht club or boat club including uses accessory to them such as swimming pools, tennis courts, and racquetball facilities.

2. Mariculture or aquaculture or research and development.

Marine II

Permitted Uses:

1. One (1) one-family detached dwelling per single and separate lot of record in existence as of the date of adoption of this local law.

2. Marinas for the docking, mooring and accommodation of recreational or commercial boats, including the sale of fuel and oil primarily for the use of boats accommodated in such marina.

3. Boat docks, slips, piers or wharves for charter boats carrying passengers on excursions, pleasure or fishing trips or

for vessels engaged in fishery or shellfishery.

4. Beach club, yacht club or boat club including uses accessory to them such as swimming pools, tennis courts, racquetball facilities.

5. Boat yard for building, storing, repairing, renting, selling or servicing boats which may include the following as an accessory use: office for the sale of marine equipment or products, dockside facilities for dispensing of fuel and where pumpout stations are provided, restroom and laundry facilities to serve overnight patrons.

6. Mariculture or aquaculture operations or research and development.

7. Boat and marine engine repair and sales and display, yacht broker, marine insurance broker.

8. Buildings, structures and uses owned or operated by the Town of Southold, School Districts, Park Districts and Fire Districts.

9. Retail sale of rental of fishing, diving, bathing supplies and equipment if accessory to marine or boat yard of ships loft or chandlery.

Special Exception Uses:

1. Restaurants excluding outdoor counter service, drive-ins or curb service

establishments. Such prohibition shall not prevent service at tables on a covered or uncovered terrace or porch incidental to a restaurant.

2. Ferry Terminal

3. Transient hotels or motels subject to the following Conditions:

   (a) The minimum area for such use shall be not less than three acres.

   (b) The number of guest rooms permitted in the hotel or motel shall be determined by: the proportion of the site utilized for such use, and the availability of public water and sewer. The maximum number of guest units shall be one unit per (4,000) square feet of land with public water and sewer.

4. Fish processing plant.

A. Avoid actions which would displace, adversely impact, or interfere with existing water-dependent uses.

Due to the limited amount of marine zoned property, the Town's policy is to promote maximum and efficient use of those properties without creating undue negative environmental impacts on the coastal environment.

B. Encourage water-enhanced uses where they are compatible with surrounding development and are designed to make beneficial use of their coastal location.

To ensure that water-enhanced uses make beneficial use of a coastal location, they should be sited and designed to:

1. be compatible with surrounding development,
2. reflect the unique qualities of a coastal location through appropriate design and orientation,
3. attract people to or near the waterfront and provide opportunities for public access,
4. provide public views to or from the water ,
5. minimize consumption of waterfront land,
6. not displace or interfere with the operation of water-dependent uses,
7. not cause significant adverse impacts to community character, the transportation network and surrounding land and water resources.

10.2 Promote Mattituck Inlet and Creek, Mill Creek and the Village of Greenport as the most suitable locations for water-dependent uses within the Town of Southold.

Mattituck Inlet and Creek, identified by the state as a regional Maritime Center, and the Village of Greenport are the primary focus of maritime activity within the Town of Southold. Give water-dependent development precedence over other types of development at suitably zoned waterfront sites within Mattituck Inlet and Creek and the Village of Greenport.

A. *Ensure that public actions enable Mattituck Inlet, Mill Creek and the Village of Greenport to continue to function as centers of water-dependent uses.*

B. *Protect and enhance the economic, physical, cultural, and environmental attributes which make up the character of Mattituck Inlet and Creek, Mill Creek and the Village of Greenport.*

10.3 Allow for continuation and development of water-dependent uses within the existing concentration of maritime activity in harbors, inlets and creeks.

In addition to Mattituck Inlet and Creek and the Village of Greenport, important

concentrations of water-dependent uses are located at Orient Point, Orient hamlet, Gull Pond, Mill Creek/Budds Pond, Town/Jockey Creek, New Suffolk, James Creek and West Harbor. Individual marinas and other water-dependent uses are located outside of the concentrations of maritime activity.

A. Ensure that public actions enable these harbors, inlets and creeks to continue to function as concentrations of water-dependent uses.

B. Protect and enhance the economic, physical, cultural, and environmental attributes which make up the character of these harbors, inlets and creeks.

10.4 Minimize adverse impacts of new and expanding water-dependent uses and provide for their safe operation.

A. Limit the potential for adverse impacts associated with development of a new water-dependent use by promoting the location of new development at appropriate sites. Appropriate sites include:

1. sites which have been previously developed,
2. sites which require minimal physical alteration to accommodate development,

3. sites that already possess public infrastructure or locational characteristics that would support a water-dependent use.

B. Avoid development of new water-dependent uses at sites that are located outside of the traditional concentrations of water-dependent uses or at sites that exhibit important natural resource values or where the proposed use will cause significant adverse affects on community character, surrounding land and water uses, or scenic quality.

C. Site marinas, yacht clubs, boat yards, and other boating facilities in suitable locations.

The Town of Southold has identified the traditional concentrations of maritime activity located in the harbors, creeks and inlets, as the most appropriate locations for the development and expansion of marinas, yacht clubs, boat yards, and other boating facilities. These sites are zoned for these uses: either Marine I or II. In general, the necessary infrastructure and services to support these uses already exists in these areas, and due to the general level of previous development of these areas, the

potential for significant adverse impact on the remaining natural resources is likely to be less than in other locations. Siting maritime uses outside of MI and MII zoning districts increases the potential for adverse impacts on coastal resources.

Note: As used in this document, the term "boating facility" means a business or accessory use that provides docking for six or more boats and encompasses 4,000 square feet or greater of surface waters, as measured by the outermost perimeter of the dock.

1. a. seek to minimize adverse impacts on coastal resources by siting new marinas, yacht clubs, boat yards, and other boating facilities only in areas identified as appropriate for water- dependent uses;

   b. avoid siting new marinas, yacht clubs, boat yards, and other boating facilities outside of the areas identified as appropriate for water-dependent uses.

2. Use the following standards in the siting of new and the

expansion of existing marinas, yacht clubs, boat yards, and other boating facilities:

a. upland space for parking, storage and support facilities is sufficient,

b. waterside and landside access is adequate,

c. nearshore depth is adequate,

d. wetlands, shellfish beds, or fish spawning grounds would not be adversely affected,

e. water quality classifications are compatible,

f. in-water dredging and maintenance dredging is minimized,

g. basin morphometry or other means ensures adequate water circulation,

h. on-site stormwater retention and filtration is ensured, along with rinse water from boat washdown pads.

3. Ensure that new or expanding marinas:

a. consider marine services and boat repair, when feasible, to meet a range of boating needs,

b. do not displace or impair the operation of existing water-dependent transportation, industry, or commerce,

c. do not encroach upon navigation channels, channel buffer areas, or public mooring areas,

d. incorporate public access to the shore through provisions, such as including access from the upland, boat ramps, and transient boat mooring,

e. limit discharge of sewage by providing pump out facilities unless the State's Clean Vessel Act plan indicates that adequate pumpout facilities exist.

D. Maintain existing ferry services to Fishers Island and to Orient Point.

Within certain parameters, the existing ferry services to Fishers Island and Orient Point should be maintained. The ferry service to Fishers Island provides the only

access on and off the island other than by private boat. Maintenance of that service is essential to the economic survival of Fishers Island and the health, safety and welfare of its residents.

The service to Orient Point provides a needed outlet to the Northeast, without which all auto and freight travel would be forced to go west through New York City or through Port Jefferson Harbor to Bridgeport. However, that service provides ridership to a wider geographic area than just Southold Town. Escalating levels of service are resulting in negative impacts on the quality of life and the transportation network within the Town.

Use the following considerations in the evaluation of proposals to expand existing ferry operations or the establishment of new ferry services:

1. compatibility of the proposal with the surrounding community,
2. public demand for the intended route,
3. adequately sheltered terminal site location and ferry waiting area,
4. adequate waterside access and dock facilities,
5. adequate size and design of

terminal and parking area to accommodate the intended volume of passengers during peak use,

6. availability of public rest rooms,
7. adequate road access to handle the volume of vehicle traffic generated during peak use,
8. mitigation of all adverse environmental impacts,
9. degree to which expansion will serve local demand (as opposed to pass through demand for portions of Long Island lacking direct ferry service.

10.5 Provide sufficient infrastructure for water-dependent uses.

The Town of Southold has identified Mattituck Inlet and Creek, Mill Creek and the Village of Greenport as the focus of its maritime activity. These will be the targets for improvements to existing infrastructure, such as water and sewer lines, maintenance dredging of navigation channels and anchorage basins, docks and piers, bulkheads, boat ramps, and pump out stations. This infrastructure, which is often too expensive for many water-dependent businesses to maintain or provide on their own, is necessary to sustain water-dependent uses.

A. Provide adequate navigation infrastructure.

Dredging is an essential activity but with costs and impacts that require it to be undertaken only to the extent necessary to meet the current and future needs of water-dependent uses of the Town of Southold. The Town of Southold will work in cooperation with New York State, Suffolk County, the Village of Greenport and private owners of water-dependent uses to:

1. Protect and maintain existing public and private navigation lanes and channels which provide access to the Town's water-dependent uses.
2. Maintain necessary public and private channels and basins at depths consistent with the needs of water-dependent uses. Discontinue or modify navigation channel or basin maintenance dredging where project depths exceed vessel needs
3. Limit in-water and overhead obstructions that impede commercial, industrial, and recreational navigation.
4. Provide new or expanded navigation lanes, channels, and basins when necessary to support new, or expansion of existing, water-dependent uses. Dredging

may be necessary to support a water-dependent use when:

a. an existing use, or a new use in a suitable location, would be generating vessel traffic that requires the navigation infrastructure,

b. the amount of dredging, including the project depth, is consistent with shipping needs, and

c. an alternative site with access to adequate water depth or less need for dredging is not available.

5. Avoid placement of dredged material in Long Island Sound when upland alternatives exist.

6. Put clean dredge material to beneficial use for either beach nourishment or dune reconstruction.

7. Give priority to commercial or industrial navigation in determining rights to navigable waters where commercial or industrial navigation activity exists.

8. Provide for services and facilities to facilitate commercial, industrial, and recreational navigation.

B. Provide and maintain efficient infrastructure for water-dependent uses.

Maintain existing infrastructure and improve or provide new infrastructure, particularly in Mattituck Inlet and Creek, Mill Creek and the Village of Greenport, for commercial and recreational vessels and water-dependent uses. The Town of Southold will work with the federal government, New York State, Suffolk County, the Village of Greenport and private owners of water-dependent uses to:

1. Maintain existing sound infrastructure for continued or potential future use by preventing loss through abandonment and neglect.
2. Demolish and remove alternative infrastructure which is likely to present hazards to harbor operations.
3. Maintain existing, and, where necessary for water-dependent uses, construct new, shoreline stabilization and engineering structures such as piers, wharves, jetties, and bulkheads.
4. Maintain facilities to meet safety requirements associated with vessel operations.

5. Maintain and provide for upland structures such as warehouses, off- loading yards, necessary adjacent upland areas, or other storage facilities.
6. Maintain and, where necessary for existing water-dependent uses, improve landside infrastructure such as sewer and water lines, sewage treatment facilities, parking areas, and roads for harbor uses.
7. Promote the provision of appropriate vessel services for commercial and recreational vessels, including berthing, repairs, information, and fueling services.
8. Maintain stabilized inlets at Mattituck Inlet and Silver Eel Pond.

10.6 Promote efficient harbor operation.

Conflicts between water-dependent and non-water-dependent uses, and conflicts among water-dependent uses within Southold's harbors, inlets and creeks have increased in recent years. Increased demand has created competition for space on the foreshore, surface waters, and underwater lands of the Town's harbors. These conflicts have the potential to degrade the natural and cultural characteristics of harbors and their ability

to support a range of uses.

The harbor management issues along the Long Island Sound shoreline are concentrated solely in Mattituck Inlet and Creek. The harbor management issues along the Peconic Estuary shoreline are concentrated in the numerous creeks. The highest priority issues are located in Stirling Basin, Gull Pond, and in the vicinity of Mill Creek/Budd's Pond, and Brickyard Cove. The most significant harbor management issues on Fishers Island occur in West Harbor and Silver Eel Pond.

Harbor management plans have been prepared for Mattituck and Fishers Island. A harbor management plan addresses conflict, congestion and competition for space in the use of a community's surface waters and underwater land. It provides consideration of and guidance and regulation on the managing of boat traffic, general harbor use, optimum location and number of boat support structures, such as docks, piers, moorings, pumpout facilities, special anchorage areas, and identification of local and federal navigation channels. It also provides the opportunity to identify various alternatives for optimum use of the waterfront and adjacent water surface, while at the same time analyzing the probable environmental effects of these alternatives.

A. *Prepare harbor management plans as needed for key harbors, inlets and creeks. The Town of Southold may prepare harbor management plans for Stirling Basin, Gull Pond, the vicinity of Mill Creek/Budd's Pond, and Brickyard Cove at some point in the future.*

B. *Promote efficient harbor operation in Mattituck Inlet and Creek*

The harbor management plan for Mattituck Inlet is included within the Town of Southold LWRP in *Section IV.* Following a review of the inventory and analysis and an assessment of the key issues in Mattituck Inlet and Creek, the Town of Southold has established the following guidelines for the harbor management of Mattituck Inlet and Creek:

1. Protect and improve water-dependent uses and the working waterfront.
2. Promote reuse of underutilized, previously disturbed waterfront properties for environmentally appropriate water-dependent uses.
3. Maintain navigation, including use of the Town's only federal harbor, including the federal anchorage, maintenance dredging, and the protection of navigation channels.

4. Expand access to the water for natural recreation, navigation and shellfishing.
5. Reduce conflicts between marine uses and the environment.
6. Improve water quality and reduce pollution sources.
7. Maintain natural resources within the inlet, such as significant fish and wildlife habitats, wetlands, and shellfish beds.
8. Provide opportunities for shellfishing and aquaculture.

C. Promote efficient harbor operation in the waters off Fishers Island

In response to the increasing congestion and competition for the use of the waters and harbors of Fishers Island, the Town of Southold appointed the *Fishers Island Harbor Committee*. Established in May 1994, they were charged with preparing a harbor management plan for all the Town waters and harbors surrounding Fishers Island. The *Fishers Island Harbor Management Plan* is included in the LWRP in *Section IV*. On the recommendation of the Committee, the Town of Southold has established the following guidelines for the harbor management of the

waters surrounding Fishers Island:

1. Ensure balance among existing use of the Island's surrounding waters and harbors.
2. Protect and maintain the shoreline character, heritage, and existing quality of life.
3. Promote and support access to the Island's surrounding waters and other resources in the shoreline areas for all Island residents.
4. Provide for and regulate multiple uses of the Island's surrounding waters and harbors in a manner that assures safe, orderly and optimum use of the water and shorefront resources.
5. Maintain the chemical, physical and biological integrity of the Island's surrounding waters and harbors and their dependent habitats.

Policy 11 Promote sustainable use of living marine resources in Long Island Sound, the Peconic Estuary and Town waters.

The living marine resources of the Town of Southold play an important role in the social and economic well being of the community. Fishermen and baymen have been an integral, but vanishing part of the local scene. Commercial and recreational harvesting of these living marine

resources also contributes significantly to the economy of the region and the state. The close proximity of the Town to the New York metropolitan area means that the resource is heavily used commercially and recreationally.

Continued use of the Town's living marine resources depends on maintaining the long-term health and abundance of marine fisheries resources and their habitats. Ensuring that the resources are sustained in usable abundance and diversity for future generations requires the active management of marine fisheries, protection and conservation of habitat, restoration of habitats in areas where they have been degraded, and maintenance of water quality at a level that will foster occurrence and abundance of living marine resources. Habitat protection and restoration must include an active program of protecting existing wetlands and preventing further loss of wetlands (and other habitat) to inappropriate bulkheading or other shoreline hardening structures. The quality of existing habitat needs to be protected from intrusions due to poor siting of moorings and other boating activity. Finally, allocation and use of the available resources must be consistent with the restoration and maintenance of healthy stocks and habitat and must maximize the benefits of resource use so as to provide valuable recreational experiences and viable business opportunities for commercial and recreational fisheries.

Management of these resources must take place not only with Town boundaries, but within the Peconic Estuary and the Long Island Sound. The

land use and resource management decisions of other Towns also factor into the equation. This means that estuarine resource management must include brokered agreements among the bordering Towns and Villages, as well as State and County agencies, about how to protect and manage the resource within their boundaries. The Town's Trustees support the creation of a task force to accomplish this. This also is one of the goals of the *Peconic Estuary Program*. In Long Island Sound, resource management efforts must include the cooperation of the State of Connecticut and its constituent counties and towns. Where certain threatened or endangered species of national significance are concerned, the active cooperation of the federal government will be necessary in order to provide adequate protection of the fishery.

Policy Standards

11.1 Ensure the long-term maintenance and health of living marine resources.

A. Ensure that commercial and recreational uses of living marine resources in the Town of Southold are managed in a manner that:

1. places primary importance on maintaining the long-term health and abundance of marine fisheries,
2. results in sustained useable abundance and diversity of the marine resource,

3. does not interfere with population and habitat maintenance and restoration efforts,

4. uses best available scientific information in managing the resources

5. minimizes waste and reduces discard mortality of marine fishery resources,

6. restricts commercial and recreational activities, including the use of certain gear types, gear sizes and practices that have negative impacts on marine habitats.

B. Protect and manage native stocks and restore sustainable populations of indigenous fish and wildlife species and other marine living resources.

The protection of native stocks includes protecting the genetic integrity of recognizable native populations that can be placed at risk by inappropriate stocking. Native stocks also need to be protected from adverse impacts due to introduction of non-indigenous species.

C. Foster the occurrence and abundance of the Town's marine resources

through:

1. protection of spawning grounds, habitats, and water quality,
2. enhancement and restoration of fish and shellfish habitat,
3. the prevention of over-fishing.

11.2 Provide for commercial and recreational use of the Town of Southold's finfish, shellfish, crustaceans, and marine plants.

A. Maximize the benefits of marine resource use so as to provide:

1. a valuable recreational resource experience,
2. viable business opportunities for commercial and recreational fisheries.

B. Where fishery conservation and management plans require actions that would result in resource allocation impacts, ensure equitable distribution of impacts among user groups.

C. Protect the public health and the marketability of marine and fishery resources by:

1. restricting the harvest of shellfish when the sanitary condition of waters exceeds public health standards,

2. restricting the harvest of fish and shellfish when they are contaminated with toxics exceeding established public health thresholds,

3. limiting the availability of shellfish from uncertified waters by depleting (transferring) shellfish stocks to levels which would discourage illegal harvest,

4. maintaining and improving water quality of fishery and marketable marine resources to protect public health.

D. Promote the restoration and protection of over-fished resources through the development of a region-wide management plan for fisheries.

11.3 Maintain and strengthen a stable commercial fishing fleet in the Town of Southold

The commercial fishing industry is both historically and economically significant in Southold. It is critical to maintain a stable commercial harvesting fleet and adequate levels of support facilities and infrastructure to prevent the irreversible loss of an industry that provides basic nourishment for the people of the Town, region and the state. However, it is also clear that the health of the harvested fisheries will be a dominant factor in the

size, stability and viability of the commercial fleet. The Town is not advocating subsidy of a fleet in excess of the capacity of the fishery resource to regenerate itself. Over-fishing or harvesting of any resource should be avoided at all costs.

A. Protect and strengthen commercial fishing harvest operations and facilities to support a stable commercial fishing industry.

1. Promote the improvement of existing and support the expansion of fishing operations and facilities for offshore commercial fishing in Mattituck Inlet and Creek and the Village of Greenport.

2. Protect and maintain nearshore harvest throughout the Town by providing access, berthing, and off-loading facilities suitable for nearshore operators.

B. Maintain existing commercial fishing infrastructure and promote the development of new commercial fishing infrastructure to support a stable commercial fishing fleet by promoting the provision of:

1. commercial fishing support facilities, including docks and dock space; off- loading areas;

gear storage space; commercially-priced fuel and service yards; ice and refrigeration; road access to commercial fishing docks; and affordable housing for fishery industry personnel,

2. fish processing facilities,

3. appropriately scaled baymen's docks in suitable locations near areas of significant harvest activity.

C. Protect commercial fishing support facilities from interference or displacement by competing land and water uses.

11.4 Promote recreational use of marine resources.

Direct public use of marine resources provides recreational experiences and economic benefits that are integral to the coastal identity of Southold. Recreational use of marine resources includes fishing from the beach and clamming near the shoreline. Commercial charter and party boats provide additional opportunities for recreational fishing in Southold for those who don't own their own boats.

As with the commercial fishing industry, the recreational fishing industry is both historically and economically significant in Southold. The recreational fishing industry has the capacity to over-harvest in much

the same way as the commercial industry. The Town does not support increasing the recreational harvest or the size of the recreational fleet (party/charter boats) in excess of the capacity of the fishery to regenerate itself. The enforcement of recreational harvest quotas is within the purview of both the Town's Bay Constables and the State Department of Environmental Conservation.

A. Provide opportunities for recreational use of marine resources throughout the Town, and not just through marine- zoned properties.

B. Provide adequate infrastructure at existing public waterfront parks to meet recreational needs including appropriate fishing piers, dockage, and parking.

C. Promote commercial charter and party boat businesses in Mattituck Inlet and the Village of Greenport.

D. Enforce harvest quotas.

11.5 Promote managed harvest of shellfish originating from uncertified waters.

Microbiological cleansing of shellfish from uncertified waters in depuration facilities, and relaying of shellfish from uncertified to certified areas for cleansing and eventual harvest, provide a means of marketing a valuable resource that would remain unused otherwise. This activity takes place

within the Town. Shellfish from uncertified waters outside the Town also are transferred within for cleansing before harvest and sale. The Plock Shellfisher Preserve and the Suffolk County Marine Environmental Learning Center at Cedar Beach County Park, both in Reach 7, are land-based centers for the managed cleansing of shellfish.

It should be noted here, however, that the use of mechanical and/or hydraulic gear to harvest shellfish is an issue of concern because of its potential to damage shellfish habitat. Improper or careless use of this type of gear also has the potential to injure juvenile finfish habitat, eelgrass beds and other marine habitat within Peconic and Gardiner's bays.

A. Allow for harvest of shellfish from uncertified waters, provided protocols are adhered to for protection of public health.

In order to ensure that there is minimal environmental disturbance of the harvest area, harvesters will:

1. use the scale or method of shellfish harvesting operations that is most appropriate to the resource and the physical characteristics of the harvest area,
2. allow sufficient shellfish

spawning stock to remain in the harvest area to maintain the resource while reducing the likelihood of illegal harvesting.

B. Promote harvesting stock for depuration and for relays by nearshore hand harvesters.

11.6 Promote aquaculture.

Aquaculture is a desired water-dependent use in Southold. Aquaculture of economically important species can not only provide additional economic opportunities, it can relieve pressure on and enhance wild stocks that may be adversely affected by pollution, loss of habitat, over-fishing, or other factors. Aquaculture is encouraged for the purpose of restoring native stock and reseeding the creeks and bays; with the primary objective of providing for local economic opportunities, both commercial and recreational in nature, but at a scale appropriate for the resource itself and the marine environment in which the operation is located. The siting of aquaculture facilities within inland portions of creeks should take into account and mitigate negative environmental impacts on the native ecology. The placement of aquaculture facilities within open waters also should be sited so that existing fishery resources are not negatively impacted. More specifically, the effect on finfish of the

loss of habitat resulting from aquaculture operations should be a major consideration in any leasing program within the Peconic Bays. Finally, the Town supports the continued activities of the Plock Shellfisher Preserve and the Suffolk County Marine Environmental Learning Center at Cedar Beach County Park in the area of promoting sustainable aquaculture.

A. Encourage and promote aquaculture of economically important species.

B. Protect native stocks from potential adverse biological impacts due to aquaculture.

Biological impacts to be addressed include direct displacement, competition, introduction of disease, exposure to antibiotics, animal wastes, and potential loss of genetic integrity as well as loss of habitat.

The Town of Southold may provide leases of Town-owned underwater lands for aquaculture only in areas which are not naturally significant shellfish producing areas or which are not supporting significant shellfish hand-harvesting. Similarly, leases of state- owned underwater lands for aquaculture should only occur in areas that are not already significant shellfish producing areas or which are not currently supporting significant shellfish hand-harvesting.

Policy 12 Protect agricultural lands in the Town of Southold.

The intent of this policy is to conserve and protect agricultural land in Southold by preventing the conversion of farmland to other uses. This policy requires a corollary commitment to protecting, promoting and encouraging agricultural activity including that of support services. Although Southold's agricultural acreage has been declining over the last 50 years, it still retains approximately 10,000 acres, nearly one-third of its entire land base. All of this acreage is prime soil for agricultural use. This loss has occurred primarily due to residential development that is transforming the landscape from that dominated by agrarian uses and activities to that dominated by single family residences. Protecting the remaining agricultural land in the Town of Southold is critical to ensuring preservation of the Town's agricultural economy, its 350+ year farming heritage, open space, and scenic quality. In January 2000, the Town adopted a *Farm and Farmland Protection Strategy*, the recommendations of which have been incorporated, into this document.

Note:

As used in this report and the Farm and Farmland Protection Strategy*, the term "agricultural land" is defined as land included in agricultural districts as created under Article 25 - AA of the New York State Agricultural and Markets Law. The term also signifies lands comprised of soils classified in soil groups 1,2,3, or*

4 according to the New York State Department of Agriculture and Markets Land Classification System; or lands used in agricultural production, as defined in Article 25-AA of the Agriculture and Markets Law. For the purposes of the Town's policy towards protecting and promoting agricultural land and production, all viable agricultural land has been targeted, not just those lands registered with an agricultural district.

Policy Standards

12.1 Protect agricultural lands from conversion to other land uses.

Elimination of agricultural production due to conversion to other land uses, primarily residential, is the major threat to agricultural lands in the Town of Southold. Conversion can occur through piecemeal or cumulative physical loss of land to development. Minor and major subdivisions of land contribute to the loss of viable farmland. The trend towards subdivision, as opposed to consolidation, of land has been longstanding. This trend poses a significant threat to the long-term stability of the agricultural industry as well as its land mass.