

EPA Region 1 Determination of Federal Action's Consistency with Enforceable Policies of New York's Coastal Zone Management Program (February 10, 2016)

I. EPA's Proposed Action

The New England Regional Office of the United States Environmental Protection Agency (EPA) is proposing to amend its regulations governing two previously designated open-water dredged material disposal sites in Long Island Sound: the Central Long Island Sound Dredged Material Disposal Site and the Western Long Island Sound Dredged Material Disposal Site. *See* 81 Fed. Reg. 7055 – 7063 (Feb. 10, 2016). *See also* 40 C.F.R. §§ 228.15(b)(4) and (5). Consistent with the terms of 40 C.F.R. § 228.15(b)(4)(vi)(C) and (G), the purpose of the regulatory amendments is to reduce or eliminate to the greatest extent practicable the disposal of dredged material in the waters of Long Island Sound. On February 10, 2016, EPA published the proposed amendments and an accompanying preamble in the Federal Register in order to inform the public of this proposed action and seek public review and comment on the proposal. 81 Fed. Reg. 7055 – 7063 (Feb. 10, 2016).

EPA is not proposing new disposal sites; rather, it is retaining the existing sites but amending the conditions on their use to include standards and procedures based on the Long Island Sound Dredged Material Management Plan that will strengthen the existing process for finding alternatives to open-water disposal and help reduce or eliminate such open-water disposal whenever practicable.

EPA has determined that its proposed action will be consistent to the maximum extent practicable with the enforceable policies of the State of New York's federally approved coastal management program. This determination is based on the analyses presented and referenced herein, including the analysis presented in the above-referenced Federal Register notice. Therefore, EPA is providing the New York Department of State (NY DOS), which administers the state's coastal zone management program, with this consistency determination pursuant to Section 307(c)(1)(C) of the federal Coastal Zone Management Act (CZMA). 16 U.S.C. § 1456(c)(1)(C).¹

The regulations that EPA is proposing to amend are found at 40 C.F.R. §§ 228.15(b)(4) and (5). These regulations designate, and impose conditions on the use of, the Central Long Island Sound and Western Long Island Sound Dredged Material Disposal Sites. EPA originally promulgated these regulations pursuant to Sections 102(c) and 106(f) of the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1412(c) and 1416(f), and is now proposing the amendments under the same statutory provisions as well as pursuant to the terms of 40 C.F.R. §§ 228.15(b)(4) and (5). The Central Long Island Sound Dredged Material Disposal Site and the Western Long Island Sound Dredged Material Disposal Site are currently abbreviated in the regulations as the CLIS and WLIS sites, respectively, but EPA is proposing to change those abbreviations going forward and refer to them as the CLDS and WLDS, respectively. EPA uses

¹ EPA has also determined that its proposed action will be consistent to the maximum extent practicable with the enforceable policies of the State of Connecticut's federally approved coastal zone management program. Accordingly, EPA is also providing a consistency determination to the State of Connecticut's Department of Energy and the Environment (CT DEEP), which administers the state's coastal zone management program. *See* 15 C.F.R. § 930.36(e)(1).

these new abbreviations herein.

II. Background - The 2005 Designation of the CLDS and WLDS

The primary federal law governing the designation of the CLDS and WLDS dredged material disposal sites is the MPRSA. EPA is authorized to designate ocean disposal sites for dredged material under MPRSA § 102(c), 33 U.S.C. § 1412(c). Such designations are subject to the requirements of MPRSA § 102(c) and EPA regulations that govern the designation of disposal sites. *See* 40 C.F.R. §§ 228.4, 228.5 and 228.6.

Although the MPRSA generally only applies to waters seaward of the baseline from which the territorial sea is measured (baseline), and the waters of Long Island Sound lie landward of the baseline, MPRSA § 106(f), 33 U.S.C. § 1416(f), specifically dictates that the requirements of the MPRSA apply to dredged material disposal in Long Island Sound for non-federal projects generating more than 25,000 cubic yards of material and for all federal projects.² Indeed, Long Island Sound is the only water body lying landward of the baseline in which dredged material disposal is subject to the MPRSA's stringent requirements for sediment testing, sediment quality, disposal site designations, and site management and monitoring.³ (Typically, dredged material disposal into waters landward of the baseline is subject to the similar requirements of CWA § 404, 33 U.S.C. 1344.) Under MPRSA § 103(a) – (c), 33 U.S.C. § 1413(a) – (c), each proposed dredged material disposal project must be separately authorized by the U.S. Army Corps of Engineers (USACE), subject to EPA review and concurrence, as well as various other types of federal and state review (*e.g.*, ESA review, CZMA review, water quality review under CWA § 401, 33 U.S.C. § 1341). MPRSA § 106(f) then brings this regulatory scheme into Long Island Sound.

As a result, MPRSA requirements also apply to the designation of dredged material disposal sites in the waters of Long Island Sound. Accordingly, EPA applied the disposal site designation requirements of the MPRSA in making its decision to designate the CLDS and WLDS. EPA's designations of the CLDS and the WLDS also satisfied the requirements of other federal laws, such as the Endangered Species Act (ESA), the Magnuson Stevens Fishery Conservation and Management Act (MSFCMA), and the CZMA. As evidenced in the supporting record, EPA's site designations complied with all of these other applicable laws. (The CZMA issues will be discussed in greater detail below.)

In addition, EPA conducted its evaluation of whether or not to designate the dredged material disposal sites consistent with the requirements of the National Environmental Policy Act

² Non-federal dredged material disposal projects involving 25,000 cubic yards of material or less are regulated under Section 404 of the Clean Water Act (CWA).

³ As explained above, under MPRSA § 106(f), non-federal disposal projects involving 25,000 cubic yards of material or less are not subject to MPRSA requirements.

(NEPA).⁴ EPA published its Final EIS in support of the site designations in March of 2004 (the 2004 FEIS). Consistent with NEPA, EPA assessed the purpose and need for its action, comparatively evaluated the environmental impacts and other effects of various alternative courses of action – including the “no action” alternative, which would have involved foregoing the site designations – and selected a preferred alternative based on that evaluation. EPA (together with the USACE) also conducted an extensive public participation process in connection with development of the EIS. As discussed in the EIS, monitoring at both disposal sites verified that past management practices had successfully limited potential adverse impacts to water quality and benthic habitat from past dredged material disposal.

In addition, because EPA designated the sites for dredged material disposal under the MPRSA, EPA and the USACE developed detailed Site Management and Monitoring Plans (SMMPs) for both the CLDS and WLDS sites.⁵ The SMMPs require the USACE and EPA to carefully monitor the effects of any dredged material disposal at the sites. If monitoring or other information indicates unacceptable adverse impacts to the marine environment from use of the sites, then EPA can, if necessary, modify the conditions under which the sites may be used or close the sites to further disposal activity. *See* MPRSA § 102(c)(2) and (3); 40 C.F.R. §§ 228.3(a), 228.7, 228.8, 228.11.

Finally, in the EIS, EPA not only evaluated open-water disposal options, but it also evaluated other dredged material management methods such as upland disposal, methods of beneficial use (*e.g.*, beach “nourishment”), and technologies for treating dredged material to reduce any sediment contamination. As explained below, the evaluation indicated that while such alternatives would likely be available in some cases and should be used when practicable, they did not currently provide viable options for managing the quantity of dredged material projected to be generated over the 20-year planning horizon of the analysis for the study area. Indeed, during the five-year public participation process leading up to the FEIS, no one identified any specific alternatives that would be viable to meet this need.⁶

⁴ EPA disposal site designation evaluations under the MPRSA are “functionally equivalent” to NEPA reviews and, as a result, are not as a matter of law subject to NEPA analysis requirements. Nevertheless, as a matter of policy, EPA voluntarily uses NEPA procedures when evaluating the potential designation of ocean dumping sites. *See* 63 Fed. Reg. 58045 (October 29, 1998) (Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents). While EPA voluntarily uses NEPA review procedures in conducting MPRSA disposal site designation evaluations, EPA has also explained that “[t]he voluntary preparation of these documents in no way legally subjects the Agency to NEPA’s requirements.” 63 Fed. Reg. 58046.

⁵ SMMPs are only required for dredged material disposal sites designated by EPA under the MPRSA. *See* MPRSA § 102(c)(3), (4) and (5). EPA is currently working with the USACE to complete its review and revision of the SMMPs for the CLDS and WLDS. *See* 33 U.S.C. § 1412(c)(3)(F).

⁶ As stated above, EPA’s EIS also evaluated a “no action alternative(s)” under which EPA would not have designated any dredged material disposal sites. EPA determined in the FEIS, however, that “no action” was not appropriate in this case given the public need for environmentally sound, practicable dredged material management options.

In support of the designation of the CLDS and WLDS, EPA compiled a detailed record in collaboration with a number of federal and state agencies. EPA published a Federal Register notice and a Draft EIS seeking public comment on the proposed disposal site designations in September 2003. *See* 68 Fed. Reg. 53687 (Sept. 12, 2003). In April 2004, EPA published its Final EIS, including responses to the public comments on the Draft EIS. Then, on June 3, 2005, after multi-agency negotiations, as described below, EPA published the final rule and regulations in the Federal Register designating the CLDS and WLDS (the 2005 Final Rule). 70 Fed. Reg. 32498-32520 (June 3, 2005). (EPA's Draft and Final EISs and the two Federal Register notices have already been provided to NY DOS.) The two disposal sites are both located in Connecticut waters and were designated to provide needed disposal capacity for suitable dredged material from Connecticut and New York harbors and navigation channels in and around Long Island Sound.

Use of the CLDS and WLDS to receive dredged material is subject to a variety of restrictions under the MPRSA and EPA's regulations promulgated under the MPRSA. As mentioned above, dredged material must pass rigorous testing protocols before it can be deemed "suitable" for placement at an approved site. The sediments are subjected to a variety of testing protocols (*e.g.*, chemistry, toxicity, bioaccumulation) and must satisfy criteria from EPA's ocean dumping regulations at 40 C.F.R. Part 227. Suitability for open-water disposal is determined based on whether the material satisfies criteria related to its physical characteristics, toxicity, bioaccumulation potential, and water quality effects. *See, e.g.*, 40 C.F.R. §§ 227.5 and 227.6. If the material does not satisfy these regulatory criteria, then it is deemed "unsuitable" for open-water disposal and it cannot be placed into waters subject to the MPRSA.⁷

In addition, dredged material cannot be authorized for open-water disposal under the MPRSA unless it has been determined that there is a need for such open-water disposal. This means that it must be determined that there is no other practicable alternative for managing the dredged material that would cause less adverse environmental effects or risks. *See, e.g.*, 40 C.F.R. §§ 227.1(b) and 227.16. Thus, designation of a disposal site under the MPRSA only makes the site *available* as a management option for dredged material that has been determined to be suitable for open-water disposal and the site can be used only when there is no practicable alternative means of managing the material that poses less threat to the environment.

Beyond these MPRSA restrictions that apply to all dredged material disposal sites governed by the MPRSA, the 2005 Final Rule added a number of additional restrictions that apply only to the CLDS and WLDS. Some of these restrictions in the site designation regulations merely reiterate

⁷ This bar is subject to the narrow waiver provision of MPRSA § 103(d), but to EPA Region 1's knowledge, this waiver process has never been used. Additional restrictions on any use of the waiver process apply to the CLDS and the WLDS. *See also* 40 C.F.R. § 228.15(b)(4)(vi)(K) (disposal of materials under a waiver will not be allowed at CLDS or WLDS unless 30 days prior to requesting the waiver, the New England or New York District of the USACE first provides written notice to the Governors of Connecticut and New York and the North Atlantic Division of the USACE).

certain of the preexisting MPRSA restrictions. Other of the restrictions were crafted specifically for the CLDS and WLDS but are the type of restrictions that are commonly created for all designated ocean disposal sites for dredged material (*e.g.*, providing specific coordinates to identify the boundaries of the disposal site; limiting site use to the placement of material from the general vicinity of the site). Still other restrictions were developed that are entirely unique to the CLDS and WLDS disposal sites. Taken together, the site use restrictions are intended both to support the goal of reducing or eliminating the placement of dredged material at sites in the waters of Long Island Sound, and to ensure that when the sites are used, they are used appropriately.

The disposal site restrictions in the 2005 Final Rule were the product of negotiations to resolve a dispute between EPA and the NY DOS regarding whether the proposed site designations were consistent to the maximum extent practicable with the enforceable policies of New York's federally approved coastal zone management program. Certain of the restrictions that came out of these negotiations are the impetus for the regulatory amendments now being proposed by EPA. The process leading to the site use restrictions and the current regulatory amendments is described in more detail below.

As part of the regulatory process for its proposed disposal site designations, EPA evaluated whether the proposed designation of the CLDS and WLDS would be consistent to the maximum extent practicable with the enforceable policies of New York's (and Connecticut's) coastal zone management programs (CMP). On March 4, 2004, EPA sent NY DOS its determination that the proposed designations of the CLDS and WLDS would be consistent to the maximum extent practicable with the enforceable policies of New York's CMP (EPA's 2004 CZMA Consistency Determination).⁸ EPA also submitted a consistency determination to the State of Connecticut with regard to its CMP. *See* 15 C.F.R. § 930.36(e)(1). Connecticut concurred with EPA's determination as to its program, but NY DOS objected to EPA's determination regarding its program.

On June 3, 2004, NY DOS sent EPA a letter formally objecting to EPA's 2004 CZMA Consistency Determination (NY DOS's 2004 CZMA Consistency Objection). NY DOS argued both that EPA had provided insufficient information to support a consistency determination and that, based on the information that was provided, the site designations were inconsistent with the enforceable policies of the NY CMP. NY DOS also argued that EPA's proposed site designations would be inconsistent with certain requirements of the MPRSA.

EPA reviewed and considered NY DOS's 2004 CZMA Consistency Objection and ultimately disagreed with its arguments and conclusions.⁹ EPA continued to conclude that the site

⁸ In the case of Long Island Sound, the state's Long Island Sound Coastal Management Program and certain Local Waterfront Revitalization Programs were used to represent the state's CMP.

⁹ *See, e.g.*, Memorandum, from Mel Cote, et al., to File. "Responses to Issues Raised in New York Department of

designations, as proposed, would be consistent to the maximum extent practicable with the enforceable policies of the NY CMP. In an effort to avoid litigation over this disagreement, however, and in recognition of the federal and state agencies' shared commitment to protecting Long Island Sound's natural resources consistent with applicable law, the interested agencies – including EPA, the USACE and the National Oceanic and Atmospheric Administration (NOAA), the NY DOS and Department of Environmental Conservation (NY DEC), and the Connecticut Department of Environmental Protection (CT DEP)¹⁰ – engaged in lengthy, multi-stakeholder negotiations to determine whether there was a way to allow the dredged material disposal site designations to go forward, while also addressing NY DOS's concerns under the CZMA.

In the end, the agencies succeeded in reaching an agreement under which EPA was able to complete the disposal site designations while agreeing to include a number of additional restrictions on site use to address NY DOS's concerns. With these restrictions included, NY DOS withdrew its objection to EPA's CZMA consistency determination. While EPA retained the view that its site designations as proposed would satisfy the CZMA, MPRSA and all other applicable laws, it agreed to include the negotiated site use restrictions in order to allow the site designations to go forward without litigation and because the restrictions did not violate applicable law and would provide enhanced assurance that the CZMA and other applicable laws would be satisfied going forward. *See* 70 Fed. Reg. 32511.

The site use restrictions adopted as part of EPA's 2005 Final Rule are spelled out in EPA's site designation regulations at 40 C.F.R. §§ 228.15(b)(4) and (5). The following list summarizes these restrictions.¹¹

1. The regulations specify the location, size and depth of the CLDS and WLDS disposal sites (*see* 40 C.F.R. §§ 228.15(b)(4)(i) – (iii) and 228.15(b)(5)(i) – (iii));
2. The designations are only for dredged material disposal (*see* 40 C.F.R. §§ 228.15(b)(4)(iv) and 228.15(b)(5)(iv)).
3. Consistent with MPRSA § 106(f), the designations and restrictions for these sites apply only for material from federal projects, including USACE projects, or private projects involving more than 25,000 cubic yards of material (*see* 40 C.F.R. §§ 228.15(b)(4)(vi) and 228.15(b)(5)(vi)).

State's June 3, 2004, Letter Objecting Under the Coastal Zone Management Act to Proposed Dredged Material Disposal Site Designations by EPA Region I" (May 19, 2005) (EPA 2005 CZMA Responses); 70 Fed. Reg. 32511 ("EPA continues to hold the view that the site designations without the additional restrictions would still be consistent with the enforceable policies of New York's CMP."). EPA incorporates the EPA 2005 CZMA Responses herein by reference and provides a copy of it to NY DOS with this determination.

¹⁰ CT DEP has since been renamed and reconfigured as the Connecticut Department of Energy & Environmental Protection (CT DEEP).

¹¹ This list is a *summary* and is not intended to quote or restate every specific detail and nuance of the restrictions contained in the regulations.

4. Disposal is limited to dredged material from Long Island Sound and its vicinity (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(A) and 228.15(b)(5)(vi)).
5. Disposal must comply with the terms of the most recent approved Site Management and Monitoring Plan (SMMP) for each site (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(B) and 228.15(b)(5)(vi)).
6. Disposal is limited to dredged material that complies with the Ocean Dumping Regulations (e.g., sediment quality criteria) (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(J) and 228.15(b)(5)(vi)).
7. Disposal is prohibited during specified weather conditions that would create a heightened risk of spillage of dredged material during transit (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(L) and 228.15(b)(5)(vi)).
8. No disposal is allowed under a waiver of requirements by EPA under 33 U.S.C. § 1413(d) unless the USACE first gives 30 days advanced notice to the Governors of Connecticut and New York that it will be seeking a waiver (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(K) and 228.15(b)(5)(vi)).
9. A “Regional Dredging Team” (RDT) will be formed comprised of “regulatory and coastal policy” specialists from the interested federal and state agencies (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(I) and footnote 3 and 228.15(b)(5)(vi));.
10. Prior to completion of a Regional Dredged Material Management Plan (DMMP), disposal will be allowed at the sites only if, after consideration of the recommendations from the RDT, the USACE finds (and EPA does not object) that there are no practicable alternatives to open-water disposal for the amount of material to be disposed at the- site(s) in question, with the exception that the previously authorized dredged material disposal projects from Norwalk, CT, New Rochelle, NY, and Rye, NY, were allowed to dispose of material at the sites subject to the preexisting statutory and regulatory requirements but without being subject to the requirements of 40 C.F.R. §§ 228.15(b)(4)(C) – (G) and 228.15(b)(4)(I) (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(H) and (I) and 228.15(b)(5)(vi)).
11. Use of CLDS and WLDS will either be suspended or terminate, depending on the circumstances, unless the USACE (in consultation with New York, Connecticut and EPA) timely completes a regional dredged material management plan with a goal of reducing or eliminating the disposal of dredge material in Long Island Sound, and EPA then timely amends the site designation regulations to incorporate procedures and standards consistent with those recommended in the DMMP (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(C), including footnote 1, and 228.15(b)(5)(vi)).
12. According to 40 C.F.R. § 228.15(b)(4)(vi)(C), “[c]ompletion of the DMMP means finishing the items listed in the work plan (except for any ongoing long-term studies), including the identification of alternatives to open-water disposal, and the development of procedures and standards for the use of practicable alternatives to open-water disposal.”
13. Under 40 C.F.R. § 228.15(b)(4)(vi)(G), “[u]pon completion of the DMMP, disposal of dredged material at the designated sites pursuant to the designation in

- this paragraph (b)(4) shall be allowed only from permittees that comply with procedures and standards consistent with the recommendations of the DMMP, and consistent with applicable law, for the use of the sites and for the use of practicable alternatives to open-water disposal, so as to reduce or eliminate the disposal of dredged material in Long Island Sound.”
14. Furthermore, under 40 C.F.R. § 228.15(b)(4)(vi)(G), “[u]pon the completion of the DMMP, the EPA will within 60 days propose and within 120 days (subject to consideration of public comments) issue a legally binding amendment to the designation in this paragraph (b)(4) describing all such procedures and standards and specifying that they must be complied with as part of this designation.”
 15. Amplifying the parenthetical language in the regulatory text quoted immediately above, footnote 2 to 40 C.F.R. § 228.15(b)(4)(vi)(G) specifies that “[t]he EPA must preserve its discretion, in response to public comments, not to adopt such an amendment to this designation.” At the same time, the footnote also states that “[t]he EPA understands that the State of New York has reserved its rights to revive its objection to this designation if the DMMP procedures and standards are not adopted.”
 16. Footnote 1 to 40 C.F.R. § 228.15(b)(4)(vi)(C) provides that if a party thinks that EPA’s regulatory amendments fail to include all the necessary procedures and standards from the DMMP, that party may petition EPA to adopt the additional necessary provisions.
 17. In addition, 40 C.F.R. § 228.15(b)(4)(vi)(G) also provides:
 - a. that if any party is not satisfied that the DMMP recommends sufficient procedures and standards to reduce or eliminate disposal of dredged material in Long Island Sound to the greatest extent practicable, or is not satisfied with the EPA’s amendment adopting such procedures and standards, that party may petition EPA to amend the regulations to adopt different or additional standards and EPA will respond to the petition within 120 days by either granting the petition (and proposing a rule change) or denying the petition; and
 - b. that EPA may on its own initiative decide that the DMMP has not recommended sufficient procedures and standards and, therefore, amend the regulations to adopt different or additional standards.

Thus, the agreed-upon site use restrictions allowed the CLDS and WLDS site designations to go forward, while conditioning the continued long-term use of the sites on completion of a regional DMMP for Long Island Sound with the goal of reducing or eliminating dredged material disposal in the Sound and the modification of the site use restrictions consistent with the procedures and standards specified in the DMMP. As a result of these restrictions being included in the disposal site designations, NY DOS formally withdrew its objection to EPA’s CZMA consistency determination in a letter dated May 13, 2005.

The USACE was the lead agency responsible for developing the DMMP for Long Island Sound, but the USACE coordinated its effort with EPA, NOAA, agencies from New York and

Connecticut, and other stakeholders. The USACE also prepared a Programmatic EIS (PEIS) under NEPA in support of the DMMP. Building off the information in EPA's site designation EIS, the DMMP developed detailed estimates of dredging and dredged material management needs, further investigated and identified possible alternatives to open-water disposal for managing dredged material, and considered and identified procedures and standards for future dredged material disposal in order to help reduce or eliminate the placement of dredged material at disposal sites in the waters of Long Island Sound.

III. EPA's Proposed Amendments to the Site Designation Regulations for the CLDS and WLDS

On January 11, 2016, the USACE announced that it had completed the final DMMP. The USACE also completed its Final PEIS (PEIS) in support of the DMMP. This was the culmination of a lengthy public review and comment process in which public comments were taken on a draft of the DMMP and a Draft PEIS. EPA was a cooperating agency in the preparation of the PEIS for the DMMP. The NY DOS has already received copies of the DMMP and the associated draft and final PEISs, but these records can also be found online from the USACE's Long Island Sound DMMP website at:

<http://www.nae.usace.army.mil/Missions/ProjectsTopics/LongIslandSoundDMMP.aspx>. The DMMP and the PEIS are a part of the information supporting this consistency determination.

Within 60 days of the DMMP's completion, EPA is required to propose amendments to the CLDS and WLDS site designation regulations to incorporate procedures and standards consistent with those recommended in the DMMP. *See* 40 C.F.R. §§ 228.15(b)(vi)(C) and (G).

Accordingly, EPA is now proposing such regulatory amendments and has published a proposed rule and accompanying Federal Register notice in order to make the proposed amendments available for public review and comment. 81 Fed. Reg. 7055 – 7063 (February 10, 2016). This Federal Register notice is also part of the information supporting this consistency determination and it is available at EPA's website at <http://www3.epa.gov/region1/eco/lisidreg/eis.html>.

EPA's amendments to the CLDS and WLDS site designation regulations include procedures and standards for the use of these sites and the use of practicable alternatives to using these sites. In some cases, the amendments retain the procedures and standards from the existing regulations, but in all cases the amendments are consistent with the recommendations of the DMMP and with applicable law, and they are sufficient to reduce or eliminate whenever practicable the open water disposal of dredged material in the waters of Long Island Sound.

EPA's proposed amendments to the site designation regulations in response to the DMMP, are summarized below.

1. Propose retaining the regulations specify the location, size and depth of the CLDS and WLDS disposal sites (*see* 40 C.F.R. §§ 228.15(b)(4)(i) – (iii) and 228.15(b)(5)(i) – (iii) and Proposed 40 C.F.R. §§ 228.15(b)(4)(i) – (iii) and 228.15(b)(5)(i) – (iii));

2. Propose retaining the restriction specifying that the designations are only for dredged material disposal (*see* 40 C.F.R. §§ 228.15(b)(4)(iv) and 228.15(b)(5)(iv) and Proposed 40 C.F.R. §§ 228.15(b)(4)(iv) and 228.15(b)(5)(iv)).
3. Propose retaining the regulation specifying that, consistent with MPRSA § 106(f), the designations and restrictions for these sites apply only for material from federal projects, including USACE projects, or private projects involving more than 25,000 cubic yards of material (*see* 40 C.F.R. §§ 228.15(b)(4)(vi) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi) and 228.15(b)(5)(vi)).
4. Propose retaining the restriction limiting disposal at these sites to dredged material from Long Island Sound and its vicinity (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(A) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(A) and 228.15(b)(5)(vi)).
5. Propose retaining the restriction specifying that disposal must comply with the terms of the most recent approved Site Management and Monitoring Plan (SMMP) for each site (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(B) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(B) and 228.15(b)(5)(vi)).
6. Propose retaining the restriction that disposal is limited to dredged material that complies with the Ocean Dumping Regulations (*e.g.*, sediment quality criteria) (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(J) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(G) and 228.15(b)(5)(vi)).
7. Propose retaining the restriction prohibiting disposal during specified weather conditions that would create a heightened risk of spillage of dredged material during transit (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(L) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(I) and 228.15(b)(5)(vi)).
8. Propose retaining the restriction prohibiting disposal under a waiver of requirements by EPA under 33 U.S.C. § 1413(d) unless the USACE first gives 30 days advanced notice to the Governors of Connecticut and New York that it will be seeking a waiver (*see* 40 C.F.R. §§ 228.15(b)(4)(vi)(K) and 228.15(b)(5)(vi) and Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(H) and 228.15(b)(5)(vi)).
9. Propose new restrictions (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(C)(1), (2) and (3)(a), (b) and (c) and 228.15(b)(5)(vi)) building on the RDT process created by 40 C.F.R. §§ 228.15(b)(4)(vi)(I), footnote 3 and 228.15(b)(5)(vi), which would allow disposal of dredged material at the designated sites only if, after full consideration of recommendations provided by the RDT, the USACE finds (and the EPA does not object to such finding), based on a fully documented analysis, that for a given dredging project:
 - a. There are no practicable alternatives (as defined in 40 CFR 227.16(b)) to open-water disposal in Long Island Sound and that any available practicable alternative to open water disposal will be fully utilized for the maximum volume of dredged material practicable before any such material may be placed at the designated disposal sites.
 - b. Determinations relating to paragraph (b)(4)(vi)(C)(1) of this section will

- recognize that any alternative to open-water disposal may add additional costs. Disposal of dredged material at the designated sites pursuant to this paragraph (b)(4) shall not be allowed to the extent that a practicable alternative is available.
- c. The following standards for different dredged material types have been appropriately considered:
- (1) **Unsuitable Materials.** Fine-grained materials that have been determined by physical, chemical and biological testing to be unsuitable for unconfined open-water placement should be disposed of in existing or newly created Confined Aquatic Disposal (CAD) Cells or at an approved upland location. Unsuitable fine-grained materials shall not be disposed of at the designated sites.
 - (2) **Suitable Sandy Material.** Coarse-grained material, which generally may include up to 20 percent fines when used for direct beach placement, or up to 40 percent fines when used for nearshore bar/berm nourishment, should be used for beach or nearshore bar/berm nourishment or other beneficial use whenever practicable.
 - (3) **Suitable Fine-Grained Material.** This material has typically greater than 20 to 40 percent fine content and, therefore, is not typically considered suitable for beach or nearshore placement, but has been determined to be suitable for open water placement as determined through testing and analysis. Materials dredged from Upper River channels, whenever possible, should be disposed of at existing Confined Open Water (COW) sites, on-shore or through in-river placement. Other beneficial uses such as marsh creation, should be examined and used whenever practicable. If no other alternative is determined to be practicable, suitable fine-grained material may be placed at the designated sites.
10. Propose new restrictions which again build on the RDT process created by 40 C.F.R. §§ 228.15(b)(4)(vi)(I), footnote 3 and 228.15(b)(5)(vi). These new restrictions (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(E)(1), (2), (3) and (4) and 228.15(b)(5)(vi)) would specify that:
- a. The goal of the Regional Dredging Team (RDT) is to reduce wherever practicable the open-water disposal of dredged material.
 - b. The RDT's purpose, geographic scope, membership, organization and procedures are provided as follows:
 - (1) **Purpose.** The RDT's primary purpose is to conduct the review of dredging projects and make recommendations as described in paragraph (vi)(C) above. The RDT shall also serve as a forum for continuing exploration of new beneficial use alternatives to open-water disposal and suggested approaches for cost-sharing opportunities. The RDT and its member agencies should also assist USACE and EPA in continuing long-term activities intended to track disposal of dredged material and monitor dredging impacts in Long Island Sound.
 - (2) **Geographic Scope.** The geographic scope of the RDT includes all of Long

- Island Sound and adjacent waters landward of the seaward boundary of the territorial sea (three-mile limit) or, in other words, from Throgs Neck to a line three miles seaward of the baseline across western Block Island Sound.
- (3) Membership. The RDT shall be comprised of representatives from affected federal and state government organizations.
 - (4) Organization and Procedures. Specific details regarding structure (e.g., chair, committees, working groups) and process shall be determined by the RDT and may be revised as necessary to best accomplish the team's purpose.
11. Propose new restrictions calling for contaminant source reduction efforts. The proposed regulations state that “[e]fforts to control sediment entering waterways can reduce the need for maintenance dredging of harbor features and facilities by reducing shoaling rates. Federal, State and local agencies tasked with regulating discharges into the watershed should continue to exercise their authorities under various statues and regulations in a continuing effort to reduce the flow of sediments into state waterways and harbors.” (See Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(D), footnote 3 and 228.15(b)(5)(vi)).
 12. Propose retaining the substance of the existing rule's provisions specifying that that if any party is not satisfied that EPA's 2016 rule amendments adopt procedures and standards to reduce or eliminate the disposal of dredged material in Long Island Sound to the greatest extent practicable, that party may petition the EPA to amend the designation regulations again to establish different or additional standards, and that EPA will act on any such petition within 120 days by either granting the petition (and proposing a rule change) or denying the petition. (See 40 C.F.R. § 228.15(b)(4)(vi)(F) and Proposed 40 C.F.R. § 228.15(b)(4)(vi)(G).”
 13. Propose retaining the terms of 40 C.F.R. § 228.15(b)(4)(vi)(N) which provides that nothing in the regulations precludes EPA from designating other dredged material disposal sites, or amending the CLDS and/or WLDS designations, as long as any such action is carried out through a separate rulemaking in accordance with applicable law. In addition, nothing in the site designations is to be interpreted to restrict EPA's authorities under the MPRSA or the implementing regulations, or to restrict EPA's authority to amend the regulations. (See Proposed 40 C.F.R. § 228.15(b)(4)(vi)(K)).

While the DMMP and associated PEIS have identified potential alternatives to open-water disposal for some amount of dredged material from the waters of Long Island Sound, these reports also make clear that there is still not enough upland or confined in-water disposal capacity available to handle the full amount of all types of dredged material that are expected to need to be dredged from the central and western portions of Long Island Sound for EPA to withdraw the designations for the CLDS and WLDS. To the contrary, the information indicates that there will be a need to use those sites to receive some amount of suitable dredged material from areas that need to be dredged to maintain navigational safety, marine commerce and

recreational opportunities. Ultimately, decisions about whether particular dredged material can and should be disposed of at the CLDS or WLDS, or whether there is a practicable alternative for handling it in another way (e.g., upland disposal, beneficial reuse, such as beach nourishment), will need to be made on a fact-specific, case-by-case basis. Such case-by-case decisions will be made taking into account the facts pertaining to both the specific dredged material and the range of possible management options available for such material.

That said, the procedures and standards proposed in the regulatory amendments are well designed to minimize the amount of material to be disposed of at the CLDS and WLDS. Building on the requirements of the MPRSA and the legal restrictions in the regulations (e.g., prohibiting the disposal of material that does not satisfy the MPRSA sediment quality criteria or for which a practicable alternative to open-water disposal is available), and consistent with the standards and procedures recommended in the DMMP, the proposed regulatory amendments:

- a) retain important substantive and procedural restrictions on open-water disposal of dredged material that were already in the existing regulations (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(A), (B), (F), (G), (H), and (I) and 228.15(b)(5)(vi));
- b) add procedural restrictions to significantly bolster the regulatory footing for a collaborative state and federal inter-agency process geared to minimizing open-water disposal of dredged material (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(C) and (E) and 228.15(b)(5)(vi));
- c) adopt new or amended substantive standards to help guide decisions about whether dredged material will be allowed to be placed at the CLDS or WLDS sites or whether, instead, there are practicable alternatives available for managing such material (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(C) and 228.15(b)(5)(vi)); and
- d) adopt new standards to promote continued source reduction efforts to help reduce sediment volumes and the levels of contamination found in such sediment (*see* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(D) and 228.15(b)(5)(vi)).

81 Fed. Reg. 7062-7063.

IV. Applicability of the CZMA to Designation of the CLDS and WLDS

Section 307(c)(1)(A) of the CZMA provides that:

[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.

16 U.S.C. § 1456(c)(1)(A). In addition, CZMA § 307(c)(1)(C) provides that:

[e]ach 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.

16 U.S.C. § 1456(c)(1)(C). Thus, CZMA § 307(c) dictates that when an action by a federal agency, whether conducted within or outside a state's coastal zone, will affect any land or water use or natural resource of a state's coastal zone, that federal agency must send the relevant state(s) a determination that the federal activity will be carried out "in a manner which is consistent to the maximum extent practicable with the enforceable policies of [relevant] approved State [coastal zone] management programs." *Id.*

NOAA regulations under the CZMA state that:

[t]he term "effect on any coastal use or resource" means any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity 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.

15 C.F.R. § 930.11(g). In addition, the NOAA regulations also explain that:

[t]he 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," 16 U.S.C. § 1453(6a), and which are incorporated in a management program as approved by OCRM either as part of program approval or as a program change under 15 CFR part 923, subpart H. 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. A State agency, however, must base its objection on enforceable policies.

15 C.F.R. § 930.11(h). Finally, while the federal action must be consistent to the maximum extent practicable with the enforceable policies of the state's management program, NOAA's regulations also indicate that the federal agency "should give consideration to management

program provisions which are in the nature of recommendations.”

EPA dredged material disposal site designations under the MPRSA are federal agency activities, *see* 15 C.F.R. § 930.31(a), which may, depending on the facts of the site designation in question, affect natural resources and/or land or water uses of a state’s coastal zone under the terms of CZMA § 307(c)(1)(A) and (C), 16 U.S.C. § 1456(c)(1)(A) and (C). *See also* 15 C.F.R. § 930.11(g). In the case of the CLDS and WLDS designations, however, neither the original nor the amended disposal site designations *directly* affect any coastal use or resource of New York’s or Connecticut’s coastal zones. This is because neither action actually authorizes the disposal of any dredged material in the waters of Long Island Sound. *See* 15 C.F.R. §930.11(g) (“direct effects ... result from the activity and occur at the same time and place as the activity ...”). The site designations make the CLDS and WLDS sites potentially available for dredged material disposal, but no material may be placed at these sites unless and until disposal of such material is reviewed and authorized under the MPRSA regulations. As discussed farther above, such authorization cannot be granted unless the material satisfies strict sediment quality criteria and there are no practicable alternatives to open water disposal. *See* 40 C.F.R. §§ 227.1(b), 227.5, 227.6, 227.16.

The site designations and the amendments to them, however, will arguably have *indirect* effects on the coastal zones of both Connecticut and New York. As explained above, “indirect (cumulative and secondary) effects ... [are effects that] result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.” 15 C.F.R. § 930.11(g). The site designations will *result in* indirect effects *at the location of each disposal site* because it is “reasonably foreseeable” that later federal actions will approve the placement at the CLDS and WLDS of some amount of sediment dredged from locations in both states.¹² The amendments will have the same effects because without the amendments, the site designations would be terminated under the regulations. *See* 40 C.F.R. § 228.15(b)(4)(vi)(C).

Moreover, without the designations, these effects would be unlikely to occur. For the CLDS, unless the site is designated by EPA, no effects would be expected at that site in the future because the time allowed for using that site under the USACE’s site selection authority has been used up. *See* 70 Fed. Reg. 32499; 33 U.S.C. § 1413(b). (Of course, this assumes that Congress would not extend the time for using the CLDS as it did for the NLDS.) For the WLDS, the USACE could still potentially have selected the site for an additional five-year term, but the site designation authorizes potential use of the site for a longer period of time. As a result, indirect effects could occur at the sites over a lengthier period of time.

This is not to say that there would be no effects on the waters of Long Island Sound without the site designations. Indeed, in the absence of these site designations, the need for dredging and dredged material management could lead to the selection or designation of other sites in the central and western regions of the Sound to receive the material. *See* 33 U.S.C. § 1413(b); 40

¹² Such future disposal is reasonably foreseeable in light of the projections in the DMMP and PEIS.

C.F.R. § 228.15(b)(4)(vi)(N). This could lead to a proliferation of disposal sites used for a lesser period of time, which would be contrary to “EPA’s policy view that it is generally environmentally preferable to concentrate any open-water disposal at sites that have been used historically and at fewer sites, *see* 40 CFR 228.5(e)” 70 Fed. Reg. 32502 (June 3, 2005). While there might be additional environmentally *acceptable* sites that could be identified, using other sites would be a relative environmental detriment given that that EPA determined that the CLDS and WLDS were environmentally *preferable* to the other alternative sites in their respective regions. Yet, if no alternative sites were designated or selected for the central and/or western regions, then either needed dredging would not occur and adverse effects on navigational safety and marine commerce and recreation would result, or dredged material would have to be hauled to more distant dredged material disposal sites and adverse environmental and economic impacts would result (*e.g.*, more fuel use, more air emissions, greater risk of accidental spills, greater cost).

EPA’s analysis does not assume that without the site designations, needed dredging will still go forward and all sediments will be managed without open-water placement (*e.g.*, beneficial uses, upland disposal, confined in-water disposal facilities). This is based on the conclusion drawn in both the DMMP and EPA’s analysis for the original site designations that these other methods of dredged material management are not sufficiently available to handle the material from all needed dredging projects over the next 20-30 years.¹³

Because decisions about whether the sites will actually be used will be made on a project-by-project basis in the future, there is no way to be certain about exactly how much material will be disposed of at either site in the future. Similarly, there is also no way to know in advance the precise characteristics of any such dredged material. That said, the DMMP provides estimates and predictions regarding the amount of various types of material that may be dredged in the future and how much is likely to be suitable for open water disposal and need to be managed in that manner. Regardless of these predictions, however, before any material can be authorized for open-water disposal, it will need to be tested and any material that does not satisfy the MPRSA regulations, including the sediment quality criteria in 40 C.F.R. Part 227, Subpart B, will not be authorized for disposal.

Beyond the effects at the disposal sites, it can also be argued that the site designations will result in indirect effects at the sites where the dredging will occur. This line of argument posits that the disposal site designations would affect locations in the coastal zone where dredging would be carried out because the disposal sites would allow for more dredging projects by providing a way to manage the material without which dredging would be unable to occur. After considering this analysis, however, EPA concludes that indirect effects at dredging sites would not be a result of EPA’s site designations.

Even without designation of the CLDS and/or the WLDS, some dredging would still occur in the

¹³ At the same time, EPA certainly does not assume that all material will go to the open-water sites, because when practicable alternatives to open-water placement are available, they must be used.

central and western regions of the Sound. First, to the extent that practicable alternatives to open-water disposal are available, dredging could go forward while managing the material using those alternatives (*e.g.*, dredged sand could be used for beach nourishment projects). Second, without designated sites, material could still potentially be placed at open-water disposal sites *selected* by the USACE under its time-limited site selection authority. *See* 33 U.S.C. § 1413(b). Although the CLDS could not be selected for future use by the USACE, because the time period for use of the site under that authority has already been used up, and the WLDS could only be selected for one additional five-year term, the USACE could potentially select different appropriate sites in the central and western Long Island Sound regions to use for five (and potentially ten) year periods. If the USACE did so, then dredging would still be able to go forward and there would still be effects at the dredging sites.¹⁴

If no sites were selected in the region where the dredging was proposed to take place, however, then either the material would have to be hauled to more distant sites, with the associated adverse effects of greater haul distances, or the dredging projects would be unable to proceed and sediments would build up in the channels and harbors in question. For the latter projects – *i.e.*, those that would not occur without a relatively nearby designated disposal site – the effects at the dredging sites can be said to be indirect effects of the site designations. EPA finds that it is impossible to predict how many dredging projects would fall into this category or precisely what their effects on the coastal zones of New York and Connecticut might be. That said, EPA finds that any adverse effects on marine life or water quality would not be expected to be significant given the manner in which dredging projects are carefully controlled (*e.g.*, dredging authorizations would be subject to federal, state and local regulatory review; dredging is allowed only within designated dredging “windows”). Any such dredging projects would also be expected to benefit public coastal uses by improving navigational safety and facilitating marine commerce and recreation.

Finally, there could also be indirect effects from the site designations on Connecticut’s and New York’s coastal zones as a result of barges travelling from the dredging location to the disposal site. These types of effects are not considered to be significant, however, and conditions are in place to help prevent any significant adverse effects from such vessel trips. Barge and navigation technology is used that ensures that sediments are placed only at the intended disposal site locations. In addition, the regulations preclude disposal trips during threatening sea conditions. *See* 40 C.F.R. § 228.15(b)(4)(vi)(L) and Proposed 40 C.F.R. § 228.15(b)(4)(vi)(I). Moreover, even if the disposal sites were not designated, the effects of vessel trips might be similar or worse because longer trips might be made to take the material to more distant disposal sites and vessel trips are also needed to take material to sites for beneficial uses. Furthermore, if dredging projects had to be cancelled due to the lack of a designated disposal site, sediment build-up could result in navigational hazards that could cause vessel accidents that could harm the environment

¹⁴ There would also be effects at the alternative, selected disposal sites which would likely be acceptable given that the sites would have to be approved under MPRSA requirements, but such effects are unlikely to be preferable to those that would occur at the CLDS and WLDS given that EPA found those two sites to be environmentally preferred within their respective regions of the Sound.

as well as public safety.

In sum, there are no direct effects from the site designations alone, but short-term, indirect effects on coastal uses or resources at the disposal sites could result from the site designations when they are considered together with reasonably foreseeable future actions to authorize dredged material disposal at these sites. *See* 15 C.F.R. § 930.11(g). As discussed in the USACE's PEIS, "although short-term impacts and long-term changes in habitat due to sediment type and elevation of the seafloor have occurred [at the disposal sites], there is no evidence of long-term effects on benthic processes or habitat conditions." In addition, the site designations could have indeterminate, but insignificant, effects on local dredging sites and along navigational routes to the disposal sites.

The CLDS and WLDS disposal sites are both located entirely in Connecticut state waters and Connecticut has an approved State CZMA program applicable to those waters. Thus, the indirect effects on the coastal uses and resources at the disposal sites would occur within Connecticut's coastal zone. In addition, there could be indirect effects from dredging at sites located in Connecticut's coastal zone, and from barges travelling to the disposal sites through waters located in Connecticut's coastal zone, but neither of these indirect effects are expected to be significant. Indeed, not going forward with the site designations, or the amendments to the site designation regulations, would likely have even greater adverse effects on Connecticut's coastal zone than these insignificant indirect effect. EPA has determined that designating the CLDS and WLDS sites, along with the amendments to the site designation regulations, will be fully consistent with the enforceable policies of Connecticut's CZMA program. EPA is sending the CT DEEP a determination to that effect.

Neither of the disposal sites are located in New York's coastal zone. The CLDS is located approximately 2.5 nautical miles (nmi) north of the border of New York waters, while the WLDS is located approximately 200 yards north of the New York border. 70 Fed. Reg. 32499 – 32500. Moreover, the scientific analysis supporting the site designations, and updated for the USACE PEIS, indicates that both sites retain material that is placed at them and that any temporary water quality perturbations during disposal events remain within site boundaries. *See, e.g.*, 70 Fed. Reg. 32502-32508; Final PEIS, Chapter 5. As a result, the indirect effects at the disposal sites that will result from the disposal site designations are not expected to occur within New York's coastal zone. This is particularly clear with regard to the CLDS, given its distance from New York waters, but the same result is also expected for the WLDS.

In addition, based on the scientific information collected for the site designation studies and the more recent USACE PEIS, and the nature of the restrictions on what material may be placed at the sites, potential adverse impacts to fish, lobsters or other organisms residing in or transiting the sites would be limited and of short duration. *See, e.g.*, 70 Fed. Reg. 32502-32508; Final PEIS, Chapter 5. Accordingly, no indirect effects of any significance are expected to result to uses or resources of New York's coastal zone from the exposure of such organisms to the sites.

As with dredging sites in Connecticut's coastal zone, EPA also does not expect the site

designations and the regulatory amendments to result in indirect effects of any significance to the uses and resources of New York's coastal zone at New York dredging sites. While there might be some indeterminate amount of dredging that would not occur without the site designations, dredging is carefully regulated by federal, state and local authorities to prevent adverse environmental effects. Moreover, there could be even more substantial adverse effects on coastal uses and resources from failing to conduct needed dredging.

Finally, EPA does not expect the site designations and the regulatory amendments to have indirect effects of any significance on New York's coastal uses and resources as a result of barges travelling through New York waters to take dredged material to the disposal sites. Such barge traffic can be safely managed, *see* 70 Fed. Reg. 32505, and the above-discussed amendments to the disposal site restrictions will ensure that barge trips will not be undertaken during severe sea conditions that might threaten an accident. Moreover, barge trips to the disposal sites will be minimized by the requirement that material can only be disposed of at the disposal sites when there is no practicable alternative available to open-water disposal. In addition, time-of-year restrictions that preclude dredging during the late spring and summer months will preclude dredged material barge trips during the busiest recreational boating and tourism months of the year. At the same time, because managing dredged material with methods other than open-water disposal also typically involves barging the material to management sites, designating the CLDS and WLDS is unlikely to result in a significant increase in barge trips hauling dredged material.

Because of the possibility that the original designation of CLDS and WLDS would have indirect effects on coastal uses and resources of New York and Connecticut, albeit insignificant effects on New York's waters, EPA submitted CZMA consistency determinations to both states for those actions. *See* 15 C.F.R. § 930.155. Likewise, because the currently proposed amendments to the site designation regulations could also indirectly affect the coastal uses and resources of both states, EPA is now submitting this updated CZMA consistency determination to New York and will also be submitting one to Connecticut. It should be understood that EPA concludes that any effects from the proposed action on New York's coastal zone will be insignificant, but it still appears to be appropriate for EPA to provide this certification under NOAA regulations because there is no agreement between EPA and New York to treat the proposed action as having *de minimis* effects and EPA has concluded that the effects on New York's coastal zone will be insignificant rather than non-existent. *See* 15 C.F.R. §§ 930.33(a)(3) and 930.35(a)(3) (submission of negative declaration when it is determined that there will be no effects). Again, it should also be understood that, as stated farther above, EPA is not proposing new disposal sites; rather, it is retaining the existing sites but amending the conditions on their use to include standards and procedures based on the Long Island Sound Dredged Material Management Plan that will strengthen the existing process for finding alternatives to open-water disposal and help reduce or eliminate such open-water disposal whenever practicable.

V. Pre-Consistency Determination Consultation Between EPA and NY DOS

EPA has consulted and coordinated extensively with NY DOS (and others) in connection with

dredged material management in Long Island Sound, including the designation and use of the CLDS and WLDS dredged material sites. The CZMA consistency process for the original designations of the CLDS and WLDS involved a lengthy and detailed negotiation over the site designation restrictions. There was also substantial interaction in the NEPA process for the site designations.

Since designation of the disposal sites in 2005, EPA has continued working with NY DOS and other federal and state agencies on numerous issues related to the management of dredged material from Long Island Sound. This has included participation on the RDT and playing a consultative role in the USACE's development of the DMMP. EPA and NY DOS personnel have had numerous informal discussions and participated in a number of meetings to discuss issues related to the management of dredged material in the Sound, including the DMMP and the related amendments to the site designation regulations.

Directly related to the current CZMA process, EPA sent NY DOS an early coordination letter on December 22, 2015, requesting certain "guidance and assistance" consistent with 15 C.F.R. §930.34(d). *See* Letter from Kenneth Moraff, EPA, to Hon. Cesar A. Pareles, Secretary of State, NY DOS (December 22, 2015). Noting that EPA was planning to revise its disposal site designation regulations for the CLDS and WLDS following the USACE's completion of the DMMP, *see* 40 C.F.R. § 228.15(b)(4)(vi)(G), EPA requested that NY DOS provide a copy of, or reference to, New York's current, up-to-date CMP. EPA also requested that NY DOS "identify any enforceable policies [of its coastal zone management program] applicable to the proposed activity[ies] ...," and provide its "views and assistance" regarding "the means for determining that the proposed activity will be consistent to the maximum extent practicable with the enforceable policies of ... [your] management program." 15 C.F.R. §930.34(d).

On January 5, 2016, NY DOS sent a letter to EPA expressing appreciation for EPA's early notice of its forthcoming consistency determination. *See* Letter from Jeffrey Zappieri, NY DOS, to Kenneth Moraff, EPA (January 5, 2016). This letter informed EPA that "consistency determinations of your actions' potential coastal effects should be based on the coastal policies contained in the Long Island Sound Coastal Management Program (LISCMP), a regional refinement of the New York CMP," and provided website references for obtaining this material. NY DOS also indicated that it would provide further information in subsequent correspondence.

NY DOS sent this follow-up correspondence to EPA on January 19, 2016. *See* Letter from Jeffrey Zappieri, NY DOS, to Kenneth Moraff, EPA (January 15, 2016). In its letter, NY DOS reiterated that EPA must determine the consistency of its action's with the "Long Island Sound Coastal Management Program (LISCMP)" and explained that NY DOS will use the LISCMP's 13 coastal policies when considering EPA's consistency determination. *See also* LISCMP, p. 1 ("The Long Island Sound Coastal Management Program replaces the state Coastal Management Program for the Sound shorelines of Westchester County, New York City to the Throgs Neck Bridge, Nassau County, and Suffolk County."). NY DOS also indicated that "Long Island Sound also has eight federally-approved Local Waterfront Revitalization Programs (LWRPs), which are a local refinement of the NYS CMP and LIS CMP," and that EPA's assessment must use "the

coastal policies of each Long Island Sound LWRP [(in addition to the 13 LIS CMP coastal policies)] to assess [the] coastal effects of the proposed activities on each community.” Finally, NY DOS stated that “[a]ll LISCMP and LWRP coastal policies are enforceable”

Beyond pointing to these policies to be considered in EPA’s review, NY DOS also presented an initial evaluation of EPA’s proposed activities. It stated that:

[b]ased on a preliminary policy assessment of EPA’s proposed activities, DOS has concerns that they will affect New York’s coastal resources and several policies contained in the Long Island Sound CMP and LWRPs as the proposed designation of disposal sites has the potential to cause significant adverse changes to the quality of the Long Island Sound ecosystem including physical loss, degradation, or functional loss of ecological components.

NY DOS caveats its assessment by stating:

... that this assessment does not constitute a consistency concurrence or objection, [and] is provided solely as part of a consultation and coordination process and the omission of an assessment of a specific policy in this letter should not necessarily be construed to mean that the policy is not applicable. Therefore, DOS reserves the right to engage the EPA in further consultation as details of the two proposed activities become available to DOS.

Beyond expressing “concerns,” NY DOS then goes on to state that (emphasis in the original):

DOS’s initial assessment of the proposed federal activities’ impacts finds that adverse effects on New York State coastal resources, and users of those resources, are possible as a result of designation of the proposed disposal sites and continued open water disposal of dredged materials. EPA should consider whether the designation of dredge disposal sites and the consequent unabated dumping of sediments, which will degrade the Sound and threaten its environmental resources and economic viability, may impact the following policies during the consistency determination process:

LIS CMP Coastal Policies:¹⁵

Policy 1: Foster a pattern of development in the Long Island Sound coastal area 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.

1.4: Maintain and enhance natural areas, recreation, open space, and

¹⁵ <http://www.dos.ny.gov/opd/programs/WFRevitalization/longisland.html>

agricultural lands.

Policy 5: Protect and improve water quality and supply in the Long Island Sound coastal area.

5.2: Manage land use activities and use best management practices to minimize nonpoint pollution of coastal waters.

5.3: Protect and enhance the quality of coastal waters.

Policy 6: Protect and restore the quality and function of the Long Island Sound ecosystem.

6.1: Protect and restore ecological quality throughout Long Island Sound.

6.2: Protect and restore Significant Coastal Fish and Wildlife Habitats.

6.3: Protect and restore tidal and freshwater wetlands.

6.5: Protect natural resources and associated values in identified regionally important natural areas.

Policy 8: Minimize environmental degradation in the Long Island Sound coastal area from solid waste and hazardous substances and wastes.

8.1: Manage solid waste to protect public health and control pollution

8.3: Protect the environment from degradation due to toxic pollutants and substances hazardous to the environment and public health.

Policy 10: Protect Long Island Sound's water-dependent uses and promote siting of new water-dependent uses in suitable locations.

10.6: Provide sufficient infrastructure for water-dependent uses.

Policy 11: Promote sustainable use of living marine resources in Long Island Sound.

11.1: Ensure the long-term maintenance and health of living marine resources.

EPA shares NY DOS's concern about protecting and restoring the environment of Long Island Sound and agrees to assess its action in light of the policies identified by NY DOS. EPA does not, however, agree that the record supports the assertion in NY DOS's letter that "the designation of dredge disposal sites and the consequent unabated dumping of sediments ... will degrade the Sound and threaten its environmental resources and economic viability"

There is a need for dredging coupled with environmentally sound dredged material management within Long Island Sound to ensure safe navigation for marine-based recreation and commerce. The importance of dredging and its proper management is recognized in the LISCMP (*see* p. 60). Recommendation 38 in the LISCMP (p. 63) calls for steps to:

[i]mprove the economic viability of maritime centers, by working with local governments and the private sector to identify opportunities and priorities for

public and private investments to upgrade necessary infrastructure such as: ... maintenance dredging of navigation channels and anchorage basins, docks, and piers

LISCMP Recommendation 39 urges steps to locate funding for improving infrastructure for the Sound's maritime centers. The text supporting this Recommendations states:

[a] critical and costly infrastructure problem is the need to maintain adequate depths in existing navigation channels and basins to ensure unobstructed and efficient vessel access to and from maritime centers and ports. Obstructed navigation channels and basins, caused by excessive sediment accumulation, adversely affects the state's intermodal transport system, rendering it inefficient and unsafe. This is a pressing issue facing nearly all of the state's maritime centers and ports. Many private or local government dredging proposals have either been significantly reduced in scale or abandoned all together due to prohibitive project costs for sediment testing, dredging, and disposal. Two major problems that contribute to the high cost of dredging projects are: (1) the cost to test sediment for contaminants, and (2) if contaminated sediments are found, the lack of suitable disposal areas. Finding suitable disposal areas can cause inordinately long delays in, or the cancellation of, dredging projects.

LISCMP, p. 64. Recommendation 49 calls for efforts to ensure completion of dredging needed to meet the "current and future needs of water-dependent commercial and industrial uses of Long Island Sound." *Id.* at 69. In addition, Recommendation 50 calls for steps to "[e]xpeditate and coordinate dredging projects within maritime centers." *Id.* The supporting text for Recommendation 50 states that:

[d]redging and disposal of contaminated material are not well coordinated. This lack of coordination typically results in: the misuse of valuable sand supplies for non-related shoreline projects; excessive delays in completing simple maintenance dredging because suitable dredged material disposal sites remain unidentified; and the inability of dredging sponsors to take advantage of combining their projects to reduce costs.

Id. In EPA's view, the designation of the CLDS and WLDS, with the accompanying restrictions on their use, should help to address at least many of the problems noted in the LISCMP by providing sites for the placement of suitable material for which there are no practicable alternatives, and by creating the RDT process and adopting standards to help direct appropriate material to alternative sediment management methods, such as beach nourishment.

Dredging and dredged material management must be regulated and implemented in an environmentally sound way. EPA and NY DOS share this goal and NY DOS has played an important role in helping to shape EPA's environmentally protective regulations. EPA has determined that its site designation regulations, as amended, will be appropriately protective of

the environment while also properly allowing needed dredging to be carried out and, thus, are consistent to the maximum extent practicable with the enforceable provisions of New York's coastal management program.

VI. EPA's Consistency Determination

NOAA's CZMA regulations indicate that a federal agency 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. 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.

15 C.F.R. § 930.39(a). This consistency determination satisfies these requirements. It includes a brief statement that the proposed activity will be consistent to the maximum extent practicable with the enforceable policies of the management program. This statement is based upon EPA's evaluation of the relevant enforceable policies of the State of New York's CMP, as refined by the LIS CMP and the relevant LWRPs, and this evaluation, along with a detailed description of the proposed activity and its coastal effects, is included herein. Furthermore, in support of this consistency determination, data and information has been provided commensurate to the expected coastal effects of the activity.

As described above, NY DOS instructed EPA that because the amendments to the CLDS and WLDS site designation regulations relate to actions with potential coastal effects within the geographical boundaries of Long Island Sound, EPA's consistency determination "should be based on the coastal policies contained in the Long Island Sound Coastal Management Program (LISCMP), a regional refinement of the New York CMP." Letter from Jeffrey Zappieri, NY DOS, to Kenneth Moraff, EPA (January 5, 2016).

EPA Evaluation of Specific Policies from the LISCMP:

1. **Policies 1 and 1.4**

NY DOS's January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites "may impact" LISCMP

Policies 1 and 1.4. EPA concludes that these policies will not be affected because they are focused on objectives for upland land use control, while EPA's action deals with dredged material management. To the extent that these policies apply, however, EPA's proposed action is fully consistent with them.

Policies 1 and 1.4 state the following:

Policy 1: Foster a pattern of development in the Long Island Sound coastal area 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.

1.4: Maintain and enhance natural areas, recreation, open space, and agricultural lands

Based on a review of the text of these policies, as well as the supporting explanatory material in the LISCOMP, EPA understands that Policies 1 and 1.4 are intended to promote a pattern of development befitting the character of the communities along Long Island Sound. They seek to provide overarching guidelines that will help shape development in a manner consistent with the existing pattern of developed and open land that helps to define the region's character. Policy 1 also seeks to promote the efficient use of infrastructure, the preservation of open space, and the beneficial use of Long Island Sound's coastal location.

To the extent that these policies apply, EPA's proposed action is fully consistent with them. EPA's proposed action is to retain and amend the designation of the CLDS and WLDS in a manner that will help to reduce or eliminate dredged material disposal in Long Island Sound. EPA's action will not affect upland land use or the pattern of upland development. EPA's action affects dredging and dredged material disposal (a) by continuing the use of two open-water disposal sites as options for the management of suitable dredged material for which there is no other practicable management alternative, and (b) by creating procedures and standards related to the use of the CLDS and WLDS that are geared to reducing or eliminating the need to use those sites. While EPA's action will promote the use of practicable alternatives to the open-water placement of dredged material, such as upland beneficial uses, and this could be viewed as having the potential to affect land uses, such upland management will only occur when such upland management is *practicable* and all requirements applicable to such upland management are satisfied. Thus, open space and other existing uses and use patterns will be unaffected.

Furthermore, EPA's action should contribute to maintaining and enhancing community character, recreation, natural areas and beneficial uses of coastal locations. By providing the CLDS and WLDS as dredged material management options for Long Island Sound, dredging needed to maintain safe navigation and berthing areas will support and enhance marine recreation, beneficial uses of coastal locations, and the maintenance of community character. By ensuring the accessibility of existing navigation channels and berthing areas, EPA's action will help provide for the efficient use of existing infrastructure. Moreover, EPA's action will help to

promote practicable beach nourishment projects, and other beneficial uses, for appropriate dredged material, which should further maintain and enhance natural areas, open space and recreation. Finally, EPA regulatory amendments will promote source control efforts to reduce sediment and contaminant loadings that adversely affect the quantity and quality of dredged materials. This should support the protection and enhancement of natural areas.

Finally, while acknowledging that NY DOS's letter of January 15, 2016, states that all the referenced LISCMP policies are "enforceable policies," it is not clear to EPA that the policies discussed above are, in fact, "enforceable policies" of the state's coastal management program under NOAA's regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

2. Policies 5, 5.2 and 5.3

NY DOS's January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites "may impact" LISCMP Policies 5, 5.2 and 5.3. These policies provide as follows:

Policy 5: Protect and improve water quality and supply in the Long Island Sound coastal area.

5.2: Manage land use activities and use best management practices to minimize nonpoint pollution of coastal waters.

5.3: Protect and enhance the quality of coastal waters.

Based on a review of their text, as well as the supporting explanatory material in the LISCMP, EPA understands that these policies are intended to promote the protection of water quality and water quantity.

The LISCMP (p. 77) explains that "[t]he primary quantity consideration is the maintenance of an adequate supply of potable water in the region." EPA's action will have no bearing on the quantity of potable water in Long Island Sound and, therefore, this aspect of these policies is not relevant to EPA's action.

The water *quality* aspects of these policies are, however, relevant to EPA's proposed action. As stated in their text, these policies seek to promote the protection and improvement (or enhancement) of the quality of Long Island Sound's coastal waters. The LISCMP (p. 78) explanatory text focuses on the need to consider "both point source and nonpoint source pollution management," and states that, "[w]ater quality protection and improvement in the region must be accomplished by the combination of managing new and remediating existing sources of pollution." In addition, the LISCMP's discussion accompanying Policy 5.3 (p. 78)

urges actions to “[p]rotect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material.”

EPA’s action will be fully consistent with these policies. EPA’s proposed action does not itself authorize any dredging or disposal of dredged material; it only keeps the CLDS and WLDS available as options for the placement of suitable dredged material for which there are no practicable alternative management methods. The dredging itself is regulated under federal and state authorities apart from the MPRSA. Proposals to place dredged material at the CLDS or WLDS *are* regulated under the MPRSA, but any such proposals would be subject to a separate regulatory process. Before any such placement would be authorized in that separate process, the material would have to satisfy the strict sediment quality requirements of EPA’s regulations, *see* 40 C.F.R. Part 227, and it would need to be demonstrated that there were no practicable alternatives to placing the material at the open-water disposal sites. Furthermore, as discussed farther above, the amended procedures and standards that EPA is proposing based on the DMMP will bolster these preexisting legal requirements and help to ensure that any available, practicable alternatives are identified, therefore supporting the overarching goal of the DMMP to help reduce or eliminate open-water disposal.

It should be understood that neither EPA’s proposed action, nor any future authorization to place dredged material at the CLDS or WLDS, will involve pollutants being *added* to the waters of Long Island Sound or its watershed. Use of these disposal sites is restricted to suitable material dredged from “Long Island Sound and its vicinity,” 40 C.F.R. §§ 228.15(b)(4)(vi)(A) and 228.15(b)(5)(vi), and dredged material is, by definition, material that is *already* in the water. In other words, placing dredged material at the CLDS and WLDS will only involve the moving material from a site(s) within the waters of the Sound (or its vicinity) to the designated sites. We further note that the CLDS and WLDS are located in Connecticut waters and that past research and analysis demonstrates that there will be no adverse water quality impacts outside the disposal sites and that within the sites the only water quality effects will be short-term effects from a disposal event as the material travels through the water column to the bottom. Again, any material placed at the sites will have to have satisfied the protective physical, chemical and biological criteria of EPA’s regulations and have had no practicable alternative means of management. If any unsuitable material is found, that material would have to be managed by other means, or the dredging will not move forward.¹⁶ Finally, as discussed farther above, and as consistent with these LISCMP policies, EPA’s proposed new regulations call upon federal, state and local regulators to continue to exercise their authorities to reduce the flow of sediments into the watershed of Long Island Sound. *See* Proposed 40 C.F.R. § 228.15(b)(4)(vi)(D).

EPA notes that although NY DOS’s letter did not identify Policy 5.1 as being particularly relevant to this review, EPA also has considered it and determined that the proposed action will be fully consistent with it. Policy 5.1 urges that actions should “[p]rohibit direct or indirect discharges which would cause or contribute to contravention of water quality standards.” The

¹⁶ Unless a waiver is provided, *see* 33 U.S.C. § 1413(d), but, as discussed above, EPA is not aware of such a waiver ever having been granted.

LISCMP's explanatory text (p. 78) also urges that the Sound's water quality will be restored by, among other things, "remediating existing contaminated sediment, and limiting introduction of new contaminated sediment."

Thus, Policy 5.1 appears focused on point and non-point discharges to the waters of Long Island Sound, which is probably why NY DOS did not indicate that it needed to be considered here. These types of pollutant discharges are primarily addressed by a variety of Clean Water Act programs implemented by New York, Connecticut and EPA (*e.g.*, the NPDES permit program). That said, EPA's current proposed action also is consistent with this policy. By facilitating dredging without allowing unsuitable sediments to be placed at the CLDS or WLDS, and while also promoting the identification and use of other dredged material management methods, some remediation of contaminated sediments is likely to occur. In other words, this is not a concerted sediment remediation program, but some remediation is likely. Furthermore, EPA's proposed action also urges authorities to continue existing efforts to reduce sediment and contaminant loading to the waters of Long Island Sound, which should help to achieve the goal of "limiting the introduction of new contaminated sediment."

Again, it is not clear to EPA that the LISCMP policies discussed immediately above constitute "enforceable policies" of the state's coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

3. Policies 6, 6.1, 6.2, 6.3 and 6.5

NY DOS's January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites "may impact" LISCMP Policies 6, 6.1, 6.2, 6.3 and 6.5. These policies provide as follows:

Policy 6: Protect and restore the quality and function of the Long Island Sound ecosystem.

- 6.1: Protect and restore ecological quality throughout Long Island Sound.**
- 6.2: Protect and restore Significant Coastal Fish and Wildlife Habitats.**
- 6.3: Protect and restore tidal and freshwater wetlands.**
- 6.5: Protect natural resources and associated values in identified regionally important natural areas.**

Based on a review of their text, as well as the supporting explanatory material in the LISCMP, EPA understands that these policies are intended to promote the protection and restoration of the natural resources of Long Island Sound, including their functions and interactions as parts of healthy local ecosystems. The policies also give specific attention to identified habitats or ecosystems of particular importance within the Sound.

The goals of the specified policies are summarized below. Policy 6 (p. 79) calls for the protection and restoration of Long Island Sound's ecosystem, including its "physical (non-living) components, biological (living) components, and their interactions." It also calls for the protection of specifically identified important ecosystems and natural resources, as well as more broadly distributed resources. Policy 6.1 (p. 79) calls for the protection and restoration of the Sound's ecological quality by "avoid[ing] significant adverse changes to the quality of the Long Island Sound ecosystem . . .," and, among other things, "avoid[ing] permanent adverse changes to ecological processes." Policy 6.2 (p. 80) calls for the protection and restoration of Long Island Sound's designated significant coastal fish and wildlife habitats," and for minimizing any adverse effects that cannot be avoided. Policy 6.3 (p. 80) calls for the protection of tidal and freshwater wetlands consistent with state wetlands laws, and for the restoration of such wetlands wherever practical. Policy 6.5 calls for the protection of natural resources comprising regionally important natural areas.

EPA's proposed action will be fully consistent with these policies. It does not authorize any dredging or disposal of dredged material; it only keeps the CLDS and WLDS available as options for the placement of suitable dredged material for which there are no practicable alternative management methods. Furthermore, the goal of the LIS Regional Dredging Team is to reduce or eliminate whenever practicable the open-water disposal of dredged material. The dredging itself will be regulated under other federal and state programs. Neither the transport of dredged material to the disposal sites nor the disposal of suitable dredged material will cause any permanent or otherwise significant adverse changes to the quality of the ecosystem of Long Island Sound. As explained in EPA's record supporting the original site designation in 2005, and as supported by data collected since that time, placement of suitable dredged material at the CLDS and WLDS will not cause adverse environmental effects outside of the site boundaries, and the adverse effects within the site boundaries are localized, short-term effects.¹⁷ *See, e.g.*, 70 Fed. Reg. 32502 – 32507 (June 3, 2005); ACOE Final PEIS, Chapter 5.

The designation of the disposal sites also will not have any adverse effects on designated Significant Coastal Fish and Wildlife Habitats (SCFWHs) or any other identified regionally important natural area. While there are well over 100 SCFWHs designated in New York waters bordering both the north and south shores of Long Island, *see* <http://www.dos.ny.gov/opd/programs/consistency/scfwhabitats.html#li>, these sites are all located far from the two disposal sites, with the nearest appearing to be the Lloyd Point SCFWH, which is approximately 2 nautical miles to the south of the WLDS. *See* https://appext20.dos.ny.gov/coastal_map_public/map.aspx (map with SCFWH layer showing); 70 Fed. Reg. 32500.

Moreover, the designation and use of the disposal sites, consistent with the newly proposed regulatory amendments, will not have any significant adverse effect on the Long Island Sound ecosystem or its aquatic organisms. *See, e.g.*, 70 Fed. Reg. 32503 – 32507 (June 3, 2005). As

¹⁷ It should also be noted that the CLDS and WLDS sites have been used for the periodic placement of dredged material for approximately 75 and 35 years, respectively. *See* 70 Fed. Reg. 32499 – 32500 (June 3, 2005).

explained with the original site designations, dredged material disposal would have only “incidental, insignificant effects on organisms in the disposal sites and no appreciable effects beyond the sites.” 70 Fed. Reg. 32506. *See also* 70 Fed. Reg. 32513 - 32514 (the site designations are not likely to adversely affect any endangered or threatened species listed under the federal Endangered Species Act or any designated critical habitat of any such species, and will not adversely affect Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act).

While the designation of the disposal sites will not affect tidal or freshwater wetlands, the proposed regulatory changes to promote the identification and use of dredged material management methods alternative to open-water disposal could help lead to identification of dredged sediments that could be used for wetlands restoration. Of course, the sediments in question would need to be found suitable for that use and any such restoration efforts would be subject to separate regulatory oversight by state and local authorities. *See* Proposed 40 C.F.R. § 228.15(b)(4)(vi)(C)(3)(c). *See* EPA’s 2004 FEIS, pp. 3-2, 3-5 and 3-8.

Again, it is not clear to EPA that the LISCMP policies discussed immediately above constitute “enforceable policies” of the state’s coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) (“An enforceable policy shall contain standards of sufficient specificity to guide public and private uses.”). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) (“Federal agencies should give consideration to management program provisions which are in the nature of recommendations.”).

4. Policies 8, 8.1 and 8.3

NY DOS’s January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites “may impact” LISCMP Policies 8, 8.1, and 8.3. These policies provide as follows:

Policy 8: Minimize environmental degradation in the Long Island Sound coastal area from solid waste and hazardous substances and wastes.

8.1: Manage solid waste to protect public health and control pollution.

8.3: Protect the environment from degradation due to toxic pollutants and substances hazardous to the environment and public health.

Based on a review of their text, as well as the supporting explanatory material in the LISCMP, EPA understands that these policies are intended to prevent environmental harm to the natural resources of Long Island Sound from solid waste and hazardous and toxic substances, including hazardous wastes. EPA’s proposed action is fully consistent with these policies of the LISCMP. The goals of the specified policies are summarized below.

Policy 8 calls for minimization of any degradation to Long Island Sound’s environment from solid waste and hazardous substances. The explanatory text (p. 81) indicates that this policy primarily focuses on waste management on the land, but also urges attention to identify and

address sources of soil and water contamination resulting from, among other things, “in-place sediment contamination.” This policy does not appear relevant to EPA’s proposed action because the CLDS and WLDS disposal site designations, as they are proposed to be amended, do not deal with or address the land-based management of solid or hazardous waste. While contaminated sediments prohibited from being placed at the open-water disposal sites might, instead, be proposed for some type of land-based management (e.g., disposal in a landfill), any such proposal will be subject to review under an entirely separate regulatory process. Furthermore, EPA’s proposed action is not a program for identifying contaminated sediments which might possibly be contributing to water quality problems. The sediment quality testing requirements for proposed dredged material disposal projects under EPA’s MPRSA regulations might turn out to identify such in-place contaminated sediments, but that is a function of the existing requirements of the MPRSA requirements and is not affected by EPA’s currently proposed action. To the extent this policy could be understood to apply to the control of sources of sediment loading and/or contaminant loading to existing sediments, then EPA’s proposed action is consistent with it because EPA is proposing a regulatory amendments to promote and support the control of such sources of sedimentation and contamination. *See* Proposed 40 C.F.R. § 228.15(b)(4)(vi)(D); EPA’s Prepublication Draft of Federal Register Notice, p. 14 of 35 (Feb. 1, 2016).

Policy 8.1 calls for solid wastes to be managed to protect public health and control pollution. According to the explanatory text (p. 81), this policy calls for planning to ensure proper, effective solid waste disposal before undertaking development activity. It also calls for solid waste management using recycling, reuse, and other approved methods of management, such as land burial, in order to reduce solid waste volumes. In addition, the policy calls for “proper handling, management, and transportation practices ...” to “prevent the discharge of solid wastes into the environment ...,” and for solid waste management facilities to be operated to prevent environmental pollution or other conditions harmful to public health.

Policy 8.1 is relevant to EPA’s proposed action only if dredged material is categorized as “solid waste” under the LISCMP, but the LISCMP does not define “solid waste.” Therefore, EPA will assume for the purpose of this discussion that dredged material should be considered “solid waste” under the LISCMP, and EPA’s analysis indicates that its proposed action will be fully consistent with Policy 8.1.¹⁸ First, EPA’s proposed action does not authorize any dredging projects, but, consistent with the policy, sediments proposed for dredging must be tested and management plans authorized *before dredging is undertaken*. Second, consistent with the policy’s preference for recycling or reuse of solid wastes, open-water disposal of dredged material is allowed under EPA regulations only when no practicable alternatives, such as beneficial reuse, are available. Moreover, EPA’s proposed regulatory amendments are geared to strengthen the identification and development of such practicable alternatives to further minimize the need for open-water disposal in the waters of Long Island Sound. Third, and also consistent with Policy 8.1, open-water placement of dredged material is managed to prevent accidental release of the materials at any locations other than the approved disposal sites.

¹⁸ *See* 40 C.F.R. § 261.4 (EPA RCRA regulations excluding “dredged material” subject to permit/authorization under MPRSA § 103 from definition of “hazardous waste”).

Navigation equipment and barge technology is used that is capable of precise placement of the dredged material at specific locations within a disposal site. Moreover, EPA regulations prohibit open-water placement of material during risky sea conditions. Finally, only suitable material (*i.e.*, material that satisfies EPA's sediment quality criteria in 40 C.F.R. Part 227) is allowed for open-water placement, and the CLDS and WLDS sites are properly managed and monitored under the applicable SMMPs.

As discussed in the LISCMP's explanatory text (p. 82), Policy 8.3 urges the prevention of releases to the environment of hazardous and/or toxic pollutants, including radionuclides, that would harm the environment or the health of people or other types of living organisms. The LISCMP further explains that Policy 8.3 calls for actions to:

[p]revent environmental degradation due to persistent toxic pollutants by: limiting discharge of bioaccumulative substances, avoiding resuspension of toxic pollutants and hazardous substances and wastes, and avoiding reentry of bioaccumulative substances into the food chain from existing sources.

LISCMP, p. 82. EPA's action is fully consistent with Policy 8.3, as EPA's regulations require chemical and biological testing of dredged material to ensure that toxic, bioaccumulative or otherwise hazardous materials, including any materials with dangerous levels of radiological contamination, cannot be placed at open-water disposal sites. *See* 40 C.F.R. §§ 227.5 and 227.6. Aspects of Policy 8.3 related to pesticide use and "the correction of unregulated releases of substances hazardous to the environment" are not relevant to EPA's action.

It is not clear to EPA that the LISCMP policies discussed immediately above constitute "enforceable policies" of the state's coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

5. Policies 10 and 10.6

NY DOS's January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites "may impact" LISCMP Policies 10 and 10.6. These policies provide as follows:

Policy 10: Protect Long Island Sound's water-dependent uses and promote siting of new water-dependent uses in suitable locations.

10.6: Provide sufficient infrastructure for water-dependent uses.

Based on a review of their text, as well as the supporting explanatory material in the LISCMP, EPA understands that these policies are intended to protect and promote water dependent uses of

Long Island Sound's coast. EPA's proposed action is fully consistent with these policies of the LISCOMP. The goals of the specified policies are summarized below.

Policy 10 (p. 84) seeks to "protect existing water-dependent commercial, industrial, and recreational uses and to promote suitable uses of maritime centers ... [and] to enhance the economic viability of water-dependent uses by ensuring adequate infrastructure for [them] and their efficient operation" The explanatory text further notes that there are nearly 200 water-dependent uses along the Long Island coast and they are "vital to the economic health of the region."

As indicated by its text, Policy 10.6 is specifically focused on helping to ensure that adequate infrastructure is provided for water-dependent uses. The explanatory text for the policy (p. 85) specifies several goals relevant to EPA's proposed action. These goals are as follows:

[p]rotect and maintain existing public and private navigation lanes and channels at depths consistent with the needs of water-dependent uses. Provide new or expanded navigation lanes, channels, and basins when necessary to support water-dependent uses.

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.

LISCOMP, p. 85. Additional goals of this policy are to avoid water and shore uses that would impede navigation, prioritize existing commercial navigation when determining rights over navigable waters, provide services and facilities to facilitate navigation, foster water transport of cargo and people, and maintain stabilized inlets at certain specified coastal locations. *Id.*

EPA's proposed action is fully consistent with Policies 10 and 10.6. Designating the CLDS and WLDS with the proposed restrictions are measures designed to achieve all of the goals of these policies. Providing these open-water disposal sites for potential management of dredged material will allow for necessary dredging to maintain existing navigation channels for water-dependent uses and for any new or expanded channels or basins. The sites are needed to allow for dredging because it is not currently anticipated that upland disposal, beneficial uses, and other means will be sufficient to accommodate the volume of sediments that will require management. That said, only material that is deemed suitable for open-water disposal based on the application of EPA's sediment quality criteria, *see* 40 C.F.R. §§ 227.5 and 227.6, will be authorized for placement at

the disposal sites. Moreover, use of the CLDS and WLDS will only be allowed when there is no practicable alternative to open-water placement. Consistent with Policy 10.6, EPA's site designation regulations are geared to ensure that beach nourishment, dune reconstruction and other beneficial use options are used whenever practicable. Regulatory decisions on whether sediments are suitable for these beneficial use options would be made on a project-by-project basis. Similarly, and consistent with Policy 10.6, EPA's action will promote the proper management of unsuitable sediments in near-shore containment facilities or confined aquatic disposal sites, when appropriate. Again, decisions about whether material is suitable for open-water disposal or needs to be managed in some sort of containment facility, and whether such a containment facility can be properly sited, constructed and managed, will be subject to separate regulatory review.

Once again, it is not clear to EPA that the LISCMP policies discussed immediately above constitute "enforceable policies" of the state's coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

6. Policies 11 and 11.1

NY DOS's January 15, 2016, letter suggests that EPA should consider whether the designation of disposal sites and continued placement of dredged material at the sites "may impact" LISCMP Policies 11 and 11.1. These policies provide as follows:

Policy 11: Promote sustainable use of living marine resources in Long Island Sound.

11.1: Ensure the long-term maintenance and health of living marine resources.

Based on a review of their text, as well as the supporting explanatory material in the LISCMP, EPA understands that these policies are intended to help ensure the long-term, sustainable use and health of aquatic organisms in the waters of Long Island Sound. EPA's proposed action is fully consistent with these policies of the LISCMP. The goals of the specified policies are discussed below.

Policies 11 and 11.1 are intended to help promote the sustainable use of the living resources of the waters of Long Island Sound (e.g., fish and shellfish) to ensure that they contribute to the social and economic well-being of Long Island now and into the future. The explanatory text accompanying these policies (p. 86) explains that such living resources are commercial and recreational resources that contribute to the economy of the region and the state, and the social and economic well-being of many of its residents. The text further notes the importance of maintaining the long-term health, diversity and abundance of those living resources through the

active state efforts to protect and restore habitat and water quality and sustainably manage use of living resources.

EPA's proposed action is fully consistent with these policies. EPA's action has nothing to do with the direct use or management of Long Island Sound's living resources. The site designations also do not authorize any particular dredged material disposal operations. Any proposals for such disposal will be subject to its own case-specific regulatory review. At the same time, EPA's designation of the CLDS and WLDS considered any potential indirect impacts to marine organisms and their habitat, including their spawning habitat, as well as potential impacts on fishing activity, and concluded that use of these disposal sites would not have harmful effects. EPA also determined that the site designations would not have adverse effects on "essential fish habitat" under the Magnuson-Stevens Fishery Conservation and Management Act, and NOAA concurred. Furthermore, as stated previously, unsuitable material will not be authorized for placement at either disposal site, and the effects of the placement of suitable material at the sites will be localized and insignificant. *See, e.g.,* 70 Fed. Reg. 32502-32514 (June 3, 2005). Even suitable material will only be placed at the sites when there are no practical alternatives to open-water disposal.

With regard to the potential indirect impacts associated with dredging operations, EPA's site designations do not authorize any particular dredging project. Therefore, there is no way to assess the impacts of any such hypothetical individual projects. Yet, EPA notes that by seasonally limiting dredging activities using "dredging windows" to limit dredging activities to the months of April to October in order to avoid key spawning periods, significant adverse effects are avoided. *See* 70 Fed. Reg. 32503-32504. Further, individual dredging proposals which would involve disposal at either the CLDS or WLDS under the MPRSA are subject to case-specific regulatory review which would include evaluation under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, the ESA and the CZMA. Therefore, EPA is confident that any indirect effects of the site designations arising from potential future dredging projects will not adversely affect the abundance, diversity, or overall long-term health of living resources of New York's Long Island coastal zone.

Thus, EPA's proposed site designations, as proposed to be amended, are fully consistent with LISCMP.

As stated previously with regard to other policies, it is not clear to EPA that the LISCMP policies discussed immediately above constitute "enforceable policies" of the state's coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered these policies as urged by 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

7. Local Waterfront Revitalization Programs

In its letter January 15, 2016, NY DOS states that Local Waterfront Revitalization Programs (LWRPs):

... are a local refinement of the NYS CMP and LIS CMP ... [containing] coastal policies that reflect the unique attributes and characteristics of each community and are used for local, state, and federal consistency reviews ...[, and that in] addition to EPA's Sound-wide assessment of its proposed activities using the 13 LIS CMP coastal policies, the activities must also be evaluated using the coastal policies of each Long Island Sound LWRP to assess to coastal effects of the proposed activities on each community.

NY DOS also identified the following ten (10) communities as having LWRPs relevant to EPA's action: Village of Bayville, Village of Head of the Harbor, Village of Larchmont, Village of Lloyd Harbor, Town of Mamaroneck, Village of Mamaroneck, Village of Nissequoque, City of Rye, Town of Smithtown, and Town of Southold. *See* http://www.dos.ny.gov/opd/programs/WFRevitalization/LWRP_status.html. Consistent with this direction, EPA also evaluated its proposed action under these relevant LWRPs and has again determined its action to be consistent to the maximum extent practicable with the relevant LWRPs.

EPA has determined that the LWRPs do not appear applicable to EPA's designation of the CLDS and WLDS or the proposed amendments to the disposal site regulations, but that to the extent they are applicable, the site designations and proposed amendments are fully consistent with them. To the extent that the LWRPs address dredging, they speak to dredging or dredged material placement *within the LWRP areas*. The CLDS and WLDS are outside of all of these areas and, thus, the LWRPs do not seem to apply to the site designations or the proposed amendments to the site designation regulations.

In addition, as explained farther above, designation of the CLDS and WLDS will have no direct effects on New York's coastal resources or uses. As also explained above, neither the disposal site designations nor the amendments to the designation regulations will have indirect effects of any significance on New York's coastal resources or uses resulting from the placement of material at the disposal sites consistent with the current and newly proposed site use restrictions. Similarly, neither the disposal site designations nor the amendments to the designation regulations will have indirect effects of any significance on New York's coastal resources or uses resulting from dredged material being transported through New York waters to the disposal sites in Connecticut. These conclusions with regard to New York's coastal resources and uses apply equally to the resources and uses of the relevant LWRP areas. EPA has individually considered each of the relevant LWRPs, as directed by NY DOS, but these conclusions apply for each across-the-board.

To the extent that designation of the CLDS and WLDS, and the amendments to the site designation regulations, might have an indirect effect on the waterfront of a local community by facilitating needed dredging as a result of providing an open-water location to safely place the dredged material in the absence of any other practicable method of managing the material, any such effects would be expected to be beneficial to the coastal resources and their uses.

Furthermore, the disposal site designations and the amendments to the site use regulations do not regulate dredging activities; they only pertain to material to be placed at one of the two disposal sites. Any dredging proposals will be subject to separate, case-specific review and regulation under federal, state and local requirements, including the application of the state's coastal management program, including the LISCMP and any relevant LWRPs. EPA presumes that a community would undertake a dredging project (or allow one to proceed) only if the dredging is consistent with the LWRPs.

Again, as explained above, EPA's current action does not authorize the open-water disposal of any dredged material. EPA previously designated the CLDS and WLDS in order to provide an open-water disposal *option* for suitable dredged material when no practicable alternative to open-water disposal is available. EPA's currently proposed action amends the conditions on the use of these sites to, among other things, provide procedures that will strengthen the Regional Dredging Team process for identifying possible practicable alternatives to open-water disposal, and to provide standards to help identify the types of material that may be suitable for various alternative management methods. *See* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(C) and (E). Further, EPA is proposing an amendment to the regulations to urge federal, state and local regulators to use their authorities to minimize sediment loadings to the waters of Long Island Sound. *See* Proposed 40 C.F.R. §§ 228.15(b)(4)(vi)(D). Taken together, these proposed regulatory amendments are geared to reduce or eliminate the open-water disposal of dredged material into the waters of Long Island Sound whenever practicable.

Once again, it is not clear to EPA that the policies in the LWRPs, which are discussed in more detail below, constitute "enforceable policies" of the state's coastal management program under NOAA regulations. *See* 15 C.F.R. § 930.11(h) ("An enforceable policy shall contain standards of sufficient specificity to guide public and private uses."). Regardless of this uncertainty, however, EPA has fully considered the potentially relevant policies in the pertinent LWRPs, as urged by NY DOS and 15 C.F.R. § 930.39(c) ("Federal agencies should give consideration to management program provisions which are in the nature of recommendations.").

All of that said, EPA will now discuss the relevant individual LWRPs.

A. Village of Bayville - Local Waterfront Revitalization Program

This LWRP area is more than 2 nautical miles from the WLDS and farther from the CLDS. The area covered by the LWRP is defined in Section 1 of the program document. Dredging in the

waters covered by the plan would be subject to state and federal regulation, but there are no Federal navigation projects within the Bayville LWRP area. *See* pp. II-34, II-47, II-48, VI-29, VI-30. The LWRP identifies that the LWRP area has important dredging needs, but that such dredging must be conducted in environmentally sound manner, including the use of appropriate dredging windows, as are used for federal projects. *See* p. II-21.

With regard to the policies of the LWRP, the planning document explains:

[t]hese local policies follow the 13 regional policies that are defined under the Long Island Sound Coastal Management Program (LISCMP). The main policy statements have been retained exactly as they appear in the LISCMP. The sub-policies and policy explanations have been modified and expanded to reflect the unique conditions in the Bayville area, and new sub-policies have been added to address specific issues and opportunities that apply to Bayville.

LWRP, p. III-1. Policy 4 of the LWRP seeks to “Minimize Loss of Life, Structures, and Natural Resources from Flooding and Erosion.” *Id.*, p. III-7. The LWRP specifically states that “[b]arrier beach landforms should be maintained by using clean, compatible dredged material, when feasible, for beach nourishment, offshore bar building, or marsh creation projects.” *Id.*, p. III-8. *See also id.*, p. III-10 (section 4-4 calls for, among other things, the beneficial use of suitable dredged material). Policy 5 seeks to “Protect and Improve Water Quality and Supply in the Long Island Sound Coastal Area.” In this regard, the LWRP calls for, among other things, the protection of water quality from adverse effects of dredging and dredged material disposal. *Id.*, p. III. 12.

Policy 10 seeks to “Protect Long Island Sound’s Water-Dependent Uses and Promote Siting of New Water-Dependent Uses in Suitable Locations.” The LWRP specifically calls for, among other things, the following:

- [Maintain] appropriate nearshore depths [for water-dependent uses] to minimize the need for dredging;
- Avoid placement of dredged material in the open waters of Long Island Sound when opportunities for beneficial reuse of the material exist.
- Allow placement of suitable dredged material in nearshore locations to advance maritime functions, provided it is adequately contained and avoids negative impacts on tidal wetland areas and the Mill Neck Creek Wetlands and Oyster Bay Harbor Significant Coastal Fish and Wildlife Habitats.
- Provide new or expanded navigation lanes, channels, and basins where necessary to support water-dependent uses.
- Use suitable dredged material for beach nourishment, dune reconstruction, or other beneficial uses.

Id., pp. III-24 and III-25. In addition, LWRP calls for dredging projects to be facilitated to prevent impediments to navigation and to ensure boater safety and recreational enjoyment. *Id.*, p. III-26.

After considering the LWRP and its policies that are potentially relevant to EPA's site designations and proposed regulatory amendments, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the Village of Bayville's LWRP. EPA's 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA's sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA's proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (*e.g.*, such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA's proposed action is consistent to the maximum extent practicable with the LWRP.

B. Village of Head of the Harbor and Village of Nissequogue - Local Waterfront Revitalization Program

A single LWRP is developed for the Villages of Head of the Harbor and Nissequogue. The LWRP for the Villages of Head of the Harbor and Nissequogue "addresses local conditions and needs within the context of consistency with the State program." Village of Head of the Harbor and Village of Nissequogue LWRP, p. III-1. These localities are well over 2 nautical miles from the WLDS and significantly farther from the CLDS. *See* 70 Fed. Reg. 32500; Village of Head of the Harbor and Village of Nissequogue LWRP, Section I. The LWRP notes that dredging should be scheduled in fall and winter, should be regulated to maintain existing tidal patterns, and limited to existing channels to avoid disturbance to wildlife. *Id.*, pp. II-58 to II-59. The LWRP also discusses particular natural resource areas within the LWRP area which could benefit from the placement of suitable dredged spoils and for which dredging must be carried out with care (*e.g.*, Short Beach, Stony Brook Harbor). *Id.*, pp. II-59 to II-66. The LWRP indicates that "no dredging is permitted within the 500 foot municipal boundary of Head-of-the-Harbor in Stony Brook Harbor." *Id.*, p. IV-9.

Policy 2B of the LWRP calls for development of water-dependent uses on the Nissequogue River in a way that minimizes dredging to protect natural resources. *Id.*, p. III-4. Policy 7D, 15 and 35

indicates that dredging should be minimized to avoid adverse environmental effects and that dredged spoils should be beneficially used to maintain or improve habitat areas whenever possible. *Id.*, p. III-4.

The LWRP, also includes the following policies relevant to dredging:

Policy 35: Dredging and Dredge Spoil Disposal In Coastal Waters Will Be Undertaken In A Manner that Meets Existing State Dredging Permit Requirements, and Protects Significant Fish and Wildlife Habitats, Scenic Resources, Natural Protective Features, Important Agricultural Lands, and Wetlands.

Policy 35A: No Dredging Shall Occur Without A Comprehensive Dredging Plan Based Upon Detailed Hydraulic and Environmental Analysis.

Policy 35B: Dredge Spoil Disposal Shall Be Undertaken In A Manner Which Does Not Result In the Introduction or Reintroduction of Dredged Material into Stony Brook Harbor or the Nissequogue River.

Id., p. III-49. The LWRP notes that dredging needs in the specified waters are minimal as they depths need only be maintained for recreational boating. *Id.* Furthermore, the LWRP specifies that:

[t]here is a one-third rate of return of dredge material to Stony Brook Harbor resulting from improper disposal on wetlands and on Young's Island. Any future disposal of dredge material - shall not be located on wetlands within the ownership or jurisdiction of either Village. Dredge spoil disposal shall not occur on Young's Island or on other lands bordering Stony Brook Harbor. Appropriate disposal methods shall be contained in the dredging plan. Within the Village of Nissequogue, no dredged material shall be deposited in a manner which causes it to be reintroduced into the Nissequogue River or causes erosion and sloughing of the receiving land. Use of the dredged material which is of suitable quality and characteristics for beach nourishment is encouraged, provided it does not hasten the need for redredging.

Id., p. III-49. Also, the LWRP notes that consistent with Policies 44 and 44A, dredging associated with development projects should avoid impacts to tidal wetlands. *Id.*, p. III-56.

EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCOMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Villages of Head of the Harbor and Nissequogue. EPA's 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA's sediment quality criteria

regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA's proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (e.g., such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA's proposed action is consistent to the maximum extent practicable with the LWRP.

C. LWRP for the Village of Larchmont and the Town of Mamaroneck

A single LWRP is developed for the Village of Larchmont and the Town of Mamaroneck. The LWRP "refines and supplements the State's Coastal Management Program and provides a comprehensive framework within which critical waterfront issues can be addressed and planned waterfront improvement projects can be pursued and implemented," and it applies to natural, public, and developed waterfront resources of these communities that lie along the East Creek, Pine Brook, Premium and Sheldrake Rivers, and Long Island Sound. The areas covered by the LWRP lie well over 2 nautical miles from the WLDS and substantially farther from the CLDS. See 70 Fed. Reg. 32500; Village of Larchmont and Town of Mamaroneck LWRP, Section I.

The LWRP describes a variety of dredging needs within the LWRP area to ensure safe navigation, access to marinas and vessel mooring locations, and to restore tidal circulation, while also noting that dredging projects have been stalled at times due to the difficulty of finding places to put the dredged sediments, even as other projects have proceeded using marine disposal or beneficial use of the sediments. LWRP, pp. II-13, II-21, and II-40 to II-46.

Policy 35 of the LWRP addresses dredging directly and calls for all dredging to meet federal and state requirements and protect important natural resource areas. *Id.*, p. III-36 to III-37. The LWRP document explains that:

Periodic dredging in this area is necessary for several purposes, primarily for maintenance of navigational channels at sufficient depths for recreational boating in Larchmont Harbor, Little Harbor Sound, and Horseshoe Harbor. In addition, actions to counter the effects of siltation and erosion in the Premium and Hommocks marshes (see Policies 7A and 14), and thereby to restore and maintain their ecological, recreational, and scenic value, may include dredging.

However, dredging projects, including dredge spoil disposal, may adversely affect water quality, fish and wildlife habitats, wetlands, and other important coastal resources. Such effects can be avoided or minimized by careful design

and timing and by proper siting of spoil disposal.

Government agencies will assure that dredging operations in this area are in conformity with these principles and with State dredging permit requirements.

Id.: LWRP Policy 15 calls for controlling dredging in coastal waters so that it will not interfere with natural coastal processes that supply material to adjacent beaches. *Id.*, p. III-21. Policy 12 provides certain criteria for beach nourishment projects. *Id.*, p. III-16 (“Clean sand or gravel of an equivalent size or slightly larger grain size is the only material which may be deposited within beach areas.”). Policy 7A notes that dredging must be carefully controlled to prevent it from causing harmful siltation to important environmental areas. *Id.*, p. III-16. Policies 2 and 5 of the LWRP note that new water-dependent development should be controlled to be consistent with policies for reducing siltation in local waters, *see id.*, pp. III-4 to III-7, while a number of other policies (Policies 8, 30-34, 37 and 39) apply to call for controlling point and non-point source discharges of pollutants and/or sedimentation. *Id.*, pp. III-12, III-32 to III-36, III-38-42.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Village of Larchmont and the Town of Mamaroneck. EPA’s 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA’s sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA’s proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (*e.g.*, such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA’s proposed action is consistent to the maximum extent practicable with the LWRP.

D. LWRP for the Village of Lloyd Harbor

A LWRP has been developed for the Village of Lloyd Harbor. It is a land and water use plan for the Village's natural, public, and developed waterfront resources along Lloyd Harbor, Huntington Bay, Cold Spring Harbor, and Long Island Sound. The area covered by the LWRP

lies approximately 2 nautical miles or more from the WLDS and an even farther distance from the CLDS. *See* 70 Fed. Reg. 32500; Village of Lloyd Harbor LWRP, Section I.

LWRP Policy 35 provides as follows:

Dredging and Dredge Spoil Disposal in Coastal Waters Will Be Undertaken in a Manner that Meets Existing State Dredging Permit Requirements, and Protects Significant Fish and Wildlife Habitats, Scenic Resources, Natural Protective Features, Important Agricultural Lands, and Wetlands.

Id., p. III-54. The explanatory text with this policy states the following:

Dredging often proves to be essential for waterfront revitalization and development, maintaining navigational channels at sufficient depths, pollutant removal and meeting other coastal management needs. Such dredging projects, however, may adversely affect water quality, fish and wildlife habitats, wetlands and other important coastal resources. Often these adverse effects can be minimized through careful design and timing of the dredging operation and proper siting of the dredge spoil disposal site. Dredging permits will be granted if it has been satisfactorily demonstrated these anticipated adverse effects have been reduced to levels which satisfy State dredging permit standards set forth in regulations developed pursuant to Environmental Conservation Law, (Articles 15, 24, 25, and 34), and are consistent with policies pertaining to the protection of coastal resources (State Coastal Management Policies 7, 15, 24, 26 and 44).

All proposed dredging projects in the LWRA will be evaluated on a case-by-case basis, with approval contingent upon an analysis of the anticipated benefits (in terms of increased navigability and access, consequent economic benefits, and other pertinent factors) versus the potential environmental impacts (e.g., habitat disturbance, loss of wetlands, adverse changes in hydrology, increased shoaling at other locations, increases in shoreline erosion, etc.). Impact assessment pertains to the effects of spoil disposal, as well as the consequences of the dredging operation itself. Public funds shall not be used to perform dredging in any case where there is no current public need for the dredging. Thus, even in areas that have been subject to dredging in the past, public need must be re-examined prior to the assignment of public funds to any new project to perform maintenance dredging. The method of dredge spoil disposal is a key consideration for any proposed dredging operation. Spoil that consists of uncontaminated sand and/or gravel should be used whenever possible for the nourishment of a public beach, habitat enhancement, or other beneficial purpose. Contaminated spoil shall be properly disposed of in conformance with applicable laws and regulations. Spoil disposal shall not directly decrease the area of tidal wetlands, and indirect impacts shall be anticipated (through the environmental review process) and avoided.

All dredging shall be performed during a time of year and utilizing a methodology that minimizes environmental impacts. All dredging shall also be conducted in a manner that minimizes the duration and frequency of dredging.

The spoil disposal site shall be carefully selected to avoid the reintroduction of material into the waterway. Additional measures (e.g., earthen berms, hay bales, and dewatering) shall be used as necessary to stabilize the spoil deposit and prevent its transport to surface waters or wetlands.

Id., pp. III-54 to III-55. At the same time, LWRP Policy 15 calls for controlling dredging and other activities in coastal waters so that it will not interfere with natural coastal processes that supply materials to adjacent beaches, *id.*, p. III-29, but the text explains that, “This policy is not applicable to the Lloyd Harbor LWRP as there are no mining, excavation or dredging activities which occur in Village waters.” *Id.*, p. III-30.

Policy 12 indicates that activities should be conducted in the LWRP area in a manner that protects natural resources, *id.*, p. III-19, specifically noting that “... dredging which diminishes the erosion protection afforded by nearshore areas is prohibited ... [but that] dredging may be allowed for maintaining navigation channels, bypassing sand around natural and man-made obstructions, or artificial beach nourishment ...” *Id.*, p. III-24. Policy 12 also specifies criteria for any material to be placed on beaches, dunes or nearshore areas (e.g., clean, like grain size). *Id.*, pp. III-22, III-24 to III-25.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Village of Lloyd Harbor. EPA’s 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA’s sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA’s proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (e.g., such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA’s proposed action is consistent to the maximum extent practicable with the LWRP.

E. LWRP for the Village of Mamaroneck

A LWRP has been developed for the Village of Mamaroneck. (This is separate from the Town of Mamaroneck's LWRP.) It is a land and water use plan for the Town's natural, public, and developed waterfront resources. The area covered by the LWRP lies well over more than 2 nautical miles from the WLDS and an even farther distance from the CLDS. *See* 70 Fed. Reg. 32500; Village of Mamaroneck LWRP, Section I.

Policy 4 of the LWRP calls for actions to develop and enhance existing water-dependent uses, while the explanatory text calls for long-term planning for dredging needed to support such uses. *Id.*, pp. 53-54. Several policies, such as Policy 33 and 37, for example, *id.*, p. 64-66, are directed at the control of point and non-point source discharges of pollutants and sediment to the waters of the LWRP area.

LWRP Policy 35 provides as follows:

Dredging and Dredge Spoil Disposal in Coastal Waters Will Be Undertaken in a Manner that Meets Existing State Dredging Permit Requirements, and Protects Significant Fish and Wildlife Habitats, Scenic Resources, Natural Protective Features, Important Agricultural Lands, and Wetlands.

Id., p. III-65. The explanatory text with this policy states the following:

[d]redging is essential for waterfront revitalization, development and maintenance of adequate water depths in Mamaroneck Harbor as well as for meeting other coastal management needs of the Village's waterfront. Dredging projects, however may adversely affect water quality, fish and wildlife habitats, wetlands, beach facilities, and other important coastal resources. Through careful timing which is based on environmental considerations and on design of the dredging operation, it is often possible to mitigate these potential adverse effects. Dredging will be done in accordance with applicable state and federal regulations.

Id.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Village of Mamaroneck. EPA's 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA's sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA's proposed regulatory amendments will strengthen the RDT process for determining

whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (e.g., such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA's proposed action is consistent to the maximum extent practicable with the LWRP.

F. LWRP for the City of Rye

A LWRP has been developed for the City of Rye. It is a land and water use plan for the City's natural, public, and developed waterfront resources along the Mill Pond, Playland Pond and Long Island Sound. The area covered by the LWRP lies well over more than 2 nautical miles from the WLDS and an even farther distance from the CLDS. *See* 70 Fed. Reg. 32500; City of Rye LWRP, Section I.

Several policies in the LWRP have some potential relevance to dredging and dredged material management within the LWRP area. Policies 7A and 7B are intended to protect certain sensitive natural resource areas, such as marshlands, and call for dredging to maintain boat channels to be scheduled for late-fall/winter to minimize effects on aquatic life. *Id.*, pp. III-14 to III-16.

Policy 15 provides that "...Dredging in Coastal Waters Shall Not Significantly Interfere with the Natural Coastal Processes which Supply Beach Materials to Land Adjacent to Such Waters and Shall Be Undertaken in a Manner which Will Not Cause an Increase in Erosion of Such Land." *Id.*, p. III-26. The explanatory text with Policy 15 states as follows:

Dredging of existing or necessary channels to support water dependent uses of Milton Harbor, Greenhaven, Kniffen Cove, Pine Island Cove, Playland Park, and Port Chester Harbor will be undertaken in accordance with Federal and State guidelines (See Policy 35). Dredging and filling must conform to the following standards:

1. The applicant has produced evidence of marketable title to the area proposed to be dredged and/or filled.
2. The proposed dredging will not reduce the area or dimensions of an existing lot below the required minimum standards and/or the proposed filling will not create a building site not previously considered in the Rye Development Plan, unless a specific finding is made that such sites and their proposed use and structures would not adversely affect the area.
3. Such filling, dredging and proposed structures and uses are to improve such land, wetland or watercourse for reasonable activities and structures customarily incidental to a permitted use of abutting upland property of the applicant.

4. The proposed dredging, filling or development of a structure or facility shall not be of such a nature or undertaken in such a manner as to undermine, weaken or deprive of support other land or structures in the vicinity, substantially change the course of any channel, increase the danger of flooding, adversely affect navigation or cause or accelerate the drift of soil, shale, mud or bog, upland or underwater.
5. The proposed filling, dredging or development of structures shall be of such a nature and undertaken in such a manner as to have no substantial adverse impact upon the natural movement or flow of any waters or upon a wetland or watercourse.
6. Excavating, grading, mining, or dredging which diminishes the erosion protection afforded by nearshore areas is prohibited, except construction or maintenance of navigation channels, bypassing sand around natural and man-made obstructions and artificial beach nourishment.
7. Clean sand or gravel of an equivalent or slightly larger grain size is the only material which may be deposited within nearshore areas.

Id., pp. III-26 to III-27.

Policy 35 is also relevant to dredging and dredged material management in the LWRP area. It provides that:

Dredging and Dredge Spoil Disposal in Coastal Waters will be Undertaken in a Manner that Meets Existing State Dredging Permit Requirements, and Protects Significant Fish and Wildlife Habitats, Scenic Resources, Natural Protective Features, Important Agricultural Lands, And Wetlands.

Id., pp. III-46. The explanatory text accompanying Policy 35 states as follows:

Dredging often proves to be essential for maintaining navigation channels at sufficient depths, pollutant removal and meeting other coastal management needs. Dredging of existing or necessary channels to support water dependent uses of Milton Harbor, Greenhaven, Kniffen Cove, Pine Island Cove, Playland Park and Port Chester Harbor will be undertaken in accordance with federal and state guidelines. Such dredging projects, however, may adversely affect water quality, fish and wildlife habitats, wetlands and other important coastal resources. Often these adverse effects can be minimized through careful design and timing of the dredging operation and proper siting of the dredge spoil disposal site. Dredging permits will be granted if it has been satisfactorily demonstrated that these anticipated adverse effects have been reduced to levels which satisfy State dredging permit standards set forth in regulations developed pursuant to Environmental Conservation Law, (Articles 15, 24, 25, and 34), and are consistent

with policies pertaining to the protection of coastal resources (See Policies 7, 15,24,25,26 and 44).

In the City of Rye:

1. No person, firm or corporation shall commence filling or dredging in any watercourse or wetland or change in any way the nature of a watercourse or wetland without first obtaining a filling and/or dredging permit.
2. A waiver of the requirement for filing plans and obtaining local approval may be granted for minor filling and or dredging necessary to restore an eroded shoreline or a silted or obstructed channel to its original state, provided that, in the case of restoring an eroded shore line, the activity 1) is a single and complete project; 2) is less than 500 feet in length; 3) is necessary for erosion protection; 4) is limited to less than an average of one (1) cubic yard per running foot placed along the shore line bank; 5) does not involve the placement of materials in excess of the minimum needed for erosion protection in any wetland area or in any manner so as to impair surface water flow into or out of any wetland area; and 6) includes the use of only clean material free of waste metal products, organic materials, unsightly debris, etc. In cases where dredge and/or fill activities are proposed, including shore line restoration, the total volume of material involved shall not exceed ten (10) cubic yards as part of a single and complete project. In addition, the dredge and fill activity shall not cause stream diversion or connect canals or other artificial waterways to navigable waters.
3. Upon completion of the work permitted by a permit a survey and topographic map shall be submitted to the City of Rye showing the depth of area from which material has been removed and/or in which it has been deposited and the slopes from which the material has been removed and/or on which it has been deposited connecting with adjoining lands, along with a certificate from a registered land surveyor or registered engineer duly licensed by the State of New York stating that the work has been completed in accordance with the local permit. Sites for the disposal of dredge spoils will be limited to Federal and State approved disposal sites.

Id., p. III-46 to III-47.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum

extent practicable with the policies of the LWRP of the City of Rye. EPA's 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA's sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA's proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (*e.g.*, such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA's proposed action is consistent to the maximum extent practicable with the LWRP.

G. LWRP for the Town of Smithtown

A LWRP has been developed for the Town of Smithtown. The LWRP applies to natural, public, and developed waterfront resources of these communities that lie along the Nissequogue River, Stony Brook Harbor and Long Island Sound. The areas covered by the LWRP lie approximately 2 nautical miles from the WLDS and farther from the CLDS. *See* 70 Fed. Reg. 32500; Town of Smithtown LWRP, Section I.

Policies 7 through 7D urge that activities be undertaken in a way that protects sensitive natural resource areas. The explanatory text states that “[d]redging to maintain boat channels in the [Nissequogue] River should be minimized, and scheduled in late fall and winter to minimize potential impacts on aquatic organisms, and to allow for spoil disposal when marsh and intertidal areas, through excavation or filling, would result in a direct loss of valuable habitat area.” *Id.*, p. III-11 to III-12. The text also states that “... unregulated dredge spoil disposal in ... [the areas of Short Beach Town Park, Sunken Meadow State Park, Stony Brook Harbor, or West Meadow] could be detrimental, but such activities may be designed to maintain or improve the habitat by setting back vegetative succession,” and that dredging and filling should otherwise be avoided in sensitive habitat areas or, if it cannot be avoided, it should be mitigated. *Id.*, pp. III-12 to III-13.

Policy 15 of the LWRP states that, “... Dredging in Coastal Waters Shall Not Significantly Interfere with the Natural Coastal Processes which Supply Beach Materials to Land Adjacent to Such Waters Shall Be Undertaken in a Manner which Will Not Cause an Increase in Erosion of Such Land.” *Id.*, p. III-20. The explanatory text states as follows:

[c]oastal processes, including the movement of beach materials by water, and any mining, excavation or dredging in nearshore or offshore waters which changes the

supply and net flow of such materials can deprive shorelands of their natural regenerative powers. Such mining, excavation and dredging should be accomplished in a manner so as not to cause a reduction of supply, and thus an increase of erosion, to such shorelands. (See Policy 35)

Id. Policies 19 and 21 seek to direct boating facilities and recreational uses to areas that are already dredged to minimize the need for additional dredging. *Id.*, pp. III-22 to III-23, III-27 to III-28. Policy 25 indicates that dredging and dredged material disposal should be managed to prevent adverse effects to Smithtown's waterfront area.

LWRP Policies 35 and 35A provide that:

Dredging and Dredge Spoil Disposal in Coastal Waters Will Be Undertaken in a Manner that Meets Existing State Dredging Permit Requirements and Protects Significant Fish and Wildlife Habitats, Scenic Resources, Natural Protective Features, Important Agricultural Lands, and Wetlands.

Dredging to Realign Channels May Be Undertaken in the Nissequogue River and Stony Brook Harbor Mouth Solely If Actions Will Result In Less Maintenance and Minimal Impact On Environmental Resources.”

Id., pp. III-40. The explanatory text accompanying these policies states as follows:

The Town of Smithtown and Suffolk County have undertaken dredging activities in the past in an effort to maintain navigation channels at sufficient depths. Such dredging projects, however, may have adversely affected water quality, fish and wildlife habitats, wetlands, and coastal scenic vistas. The indirect adverse effects of dredging to wetlands, caused by access of larger boats and increased number of vessels and improper depositing of dredge spoil by the County shall be regulated by SEQRA review of all dredging projects.

The dredge spoil collected from past dredging activity and currently being stored at the Kings Park Psychiatric Center is considered to be of a poor engineering quality. The spoil has been placed over tidal wetlands throughout the Town. The most severe use of these areas should be for a parking lot. Dredging activity will only occur in existing dredged channels. Dredging at these locations will minimize impact on the environment and enable the Town to more easily maintain costs. The location for the depositing of the dredge spoil will be determined on a case by case basis. The following factors will be used to determine the location of spoil: impact on significant wildlife habitat, visual quality impact, and the propensity of spoil to migrate into a channel.

These adverse effects can often be minimized through careful design and timing of the dredging operation, and proper siting of the dredge spoil disposal site.

Dredging permits will be granted if it has been satisfactorily demonstrated that these anticipated adverse effects have been reduced to levels which satisfy State dredging permit standards set forth in regulations developed pursuant to Environmental Conservation Law (Articles 24, 25 and 34), and are consistent with policies pertaining to the protection of coastal resources (see Policies 7, 14, 25 and 44). Within waters under the Town's jurisdiction no persons may dredge without providing:

1. Plans and a detailed explanation necessary to determine exactly what is proposed.
2. Evidence that the dredging is not likely to fail and become a danger or obstruction to navigation.
3. Measures to minimize the effects of dredging on fish and wildlife habitats.
4. The exact location of the dredging.
5. The depth to which the proposed dredging is to be carried out.
6. The approximate amount of material to be moved.
7. The exact location of the deposit of dredged material.

Id., pp. III-40 to III-41.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Town of Smithtown. EPA's 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA's sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA's proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (*e.g.*, such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA's proposed action is consistent to the maximum extent practicable with the LWRP.

H. LWRP for Town of Southold

A LWRP has been developed for the Town of Southold. The LWRP applies to natural, public, and developed waterfront resources of these communities that lie along Gardiners Bay, the Peconic Estuary, and Long Island Sound. The areas covered by the LWRP lie approximately 2 nautical miles or more from the CLDS and even farther from the CLDS. *See* 70 Fed. Reg. 32500; Town of Southold LWRP, Section I.

Section IV of the LWRP provides a Harbor Management Plan that identifies a variety of dredging needs to provide boats with safe, adequate navigational channels and mooring locations. This section also indicates that care and inter-agency coordination and planning are needed to facilitate such dredging in an effective way without causing adverse environmental effects.

Section III of the LWRP presents coastal management policies. Policy 4 is directed at avoiding harms from erosion, stating that, “[b]arrier beach landforms should be maintained by using clean, compatible dredged material, when feasible, for beach nourishment, offshore bar building, or marsh creation projects.” *Id.*, pp. III-7 to III-8. *See also id.*, p. III-9, III-11, III-14. Policy 5 is directed at protecting water quality, both drinking water and surface waters, by controlling discharges. It calls for the protection of water quality from adverse effects from dredging and dredged material disposal. *Id.*, pp. III-14, III-19. Policy 8 calls for minimizing environmental degradation from solid wastes, *id.*, p. 31, and it calls for “... 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.” *Id.*, p. 33. Under Policy 10, the LWRP suggests that marinas and other water-dependent uses be sited in locations that will minimize the need for dredging. *Id.*, p. III-47. Policy 10 also indicates that adequate infrastructure should be provided for water dependent uses, stating that:

[d]redging 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 with ... [others] 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.
- * * *
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.

Id., p. III-48 to III-49. Policy 10 further calls for “harbor management of Mattituck Inlet and Creek” to, among other things, “[m]aintain navigation, including use of the Town’s only federal harbor, including the federal anchorage, maintenance dredging, and the protection of navigation channels.” *Id.*, pp. III-50 to III-51.

After considering the LWRP and its potentially relevant policies, EPA has determined that the designation of the CLDS and the WLDS, and the proposed amendments to the site designation regulations, as discussed above with regard to the LISCMP, are consistent to the maximum extent practicable with the policies of the LWRP of the Town of Southold. EPA’s 2005 site designations of the CLDS and WLDS, and the currently proposed regulatory amendments, do not authorize either dredging or dredged material disposal. Separate case-specific approvals are needed to authorize dredging and dredged material disposal. That said, under the MPRSA and the regulations for the use of the CLDS and WLDS, only suitable material (*i.e.*, material satisfying EPA’s sediment quality criteria regulations) can be authorized for placement at these sites, and such placement will be allowed only when there is no practicable alternative for managing the materials. The designation of the CLDS and WLDS only make those sites available options for suitable dredged materials for which no practicable management alternative exists. EPA’s proposed regulatory amendments will strengthen the RDT process for determining whether practicable alternatives exist, and will provide standards to help direct material to appropriate alternative uses (*e.g.*, such as beach nourishment). The site designations, as amended, will help allow needed dredging to occur by providing an open-water placement alternative for suitable material when no practicable alternative exists. At the same time, placement of material at these sites will have no adverse effects on the uses or resources of the LWRP area. Thus, EPA’s proposed action is consistent to the maximum extent practicable with the LWRP.

