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Mr. Andrew J. Stackpole
Environmental Division Director
U.S. Department of the Navy
Naval Submarine Base New London
Groton, CT 06349-5000

November 2, 2009

Re: **F-2009-0645(DA)**

U.S. Department of the Navy-SUBASE New London-proposed maintenance dredging at Naval Submarine Base New London with placement of ~170,000 cubic yards (cy) of contaminated material at a CAD cell constructed within the navigation channel in the Thames River and the disposal of ~230,000 cy of dredged material at the New London Disposal Site (NLDS) in Long Island Sound (LIS).

Objection To Consistency Certification

Dear Mr. Stackpole:

The New York State, Department of State (DOS) has completed its evaluation of the U.S. Department of the Navy's (Navy) consistency determination relating to the disposal of dredged material at the New London Disposal Site (NLDS). Pursuant to 15 CFR § 930.41(a), DOS objects to the consistency determination on the basis that the Navy's proposal to dispose of the Confined Aquatic Disposal (CAD) cell material at the NLDS is not consistent to the maximum extent practicable with the enforceable policies of the New York State Coastal Management Program (CMP).

Subject of the Review:

The Navy requests consistency concurrence to perform maintenance dredging within the Thames River at the SUBASE New London, Groton, Connecticut. Maintenance dredging will take place to restore pier areas to the authorized depth of 36ft. below mean lower low water (MLLW). The area between piers 15 and 17 contains a floating drydock berth with an authorized depth of 60 ft. below MLLW. The resultant 170,000 cy of material is proposed to be disposed of within a CAD cell created within the Thames River federal navigation channel. DOS has determined that this part of the project is consistent with the enforceable policies of the New York CMP.

The construction of the CAD cell will include the removal of approximately 249,300 cy from a 400' x 630' area excavated to -40', plus an allowable 2' overdredge depth, below the bottom of the channel (-40' MLLW), for a total CAD cell depth of 82' below MLLW. The top two feet excavated from the CAD cell area (approximately 19,300 cy) will be stockpiled for later re-use as cap for the CAD cell. DOS has determined that this part of the project is consistent with the enforceable policies of the New York CMP.

After creating the CAD cell, the Navy plans to dispose of 230,000 cubic yards of the excavation material into the waters of the Long Island Sound at NLDS. The dredged "parent" material is comprised of 50/50 silt and clay. DOS has determined that this part of the project will have reasonably foreseeable effects on the NYS Coastal Area and has found it to be inconsistent with the enforceable policies of the New York Coastal Management Program (NY CMP).

Project Purpose:

The stated purpose for the activity is to allow for the continued use of the SUBASE piers and the drydock berth.

Jurisdiction:

The Coastal Zone Management Act (CZMA) authorizes a coastal state to review activities, in or outside of the coastal zone affecting any land or water use or natural resource of the coastal zone, undertaken directly by a federal agency or requiring federal agency authorizations, for their consistency with the enforceable policies of the state's approved Coastal Management Program (CMP).¹ Interstate consistency review is also authorized where a federal action occurring in one state will affect uses or resources of another state's coastal zone.² The Navy's proposed dredging and dredged material disposal are subject to the consistency provisions of the CZMA, and are required to be consistent to the maximum extent practicable with the enforceable policies of the New York CMP.³

New York's consistency review authority applies to the Connecticut side of Long Island Sound. In 2006, the New York Department of State submitted to the US Department of Commerce's Office of Coastal Resource Management (OCRM) a list of activities that are permitted, licensed, or otherwise approved by the U.S. Army Corps of Engineers located within the State of Connecticut to be subject to interstate consistency review by the State of New York.⁴ These activities were part of New York's approved list of federal license or permit activities and subject to federal consistency review by New York, but the change included an expanded geographic area in Connecticut, encompassing almost the entirety of Long Island Sound (LIS)

¹ 16 U.S.C. § 1456.

² See 15 C.F.R. Part 930 Subpart I.

³ See 15 C.F.R. § 930.32(a)(1)(3).

⁴ The federal permit activities are pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (permits for ocean disposal of dredged material).

and Fishers Island Sound. On March 28, 2006, the OCRM approved the interstate list, making New York the first state to receive interstate approval for consistency review.⁵ On June 20, 2006, OCRM approved the Connecticut Coastal Program amendment, giving that state similar interstate consistency review authority in the New York portion of Long Island Sound.

The DOS is authorized to review the consistency of all federal agency actions as well as permit actions involving dredged material disposal in LIS beyond the -20 ft bathymetric contour line closest to the Connecticut shoreline. Applicants for federal permits to dispose of dredged material are required to affirmatively provide to DOS a consistency certification pursuant to the Coastal Zone Management Act.⁶ Federal agencies cannot issue permits until that consistency review has been completed.

Similarly, under 15 C.F.R. part 930, subpart C, a federal agency is obligated to provide DOS with a consistency determination when it disposes of sediment in LIS, as these activities are reasonably likely to affect land or water uses or natural resources of the coastal zone.⁷ Federal agencies must provide their consistency determinations for listed federal agency activities to New York “at the earliest practicable time in the planning or reassessment of the activity.”⁸ New York does not need to request OCRM approval to review listed federal activities in the Connecticut portion of LIS beyond the -20 foot bathymetric contour.⁹

In 2002, OCRM approved designation of the LIS as a regional "special management area" under the New York CMP. The resulting Long Island Sound Coastal Management Program (LIS CMP), with its 13 coastal policies, comprehensively focuses on the economic, environmental, and cultural characteristics of the LIS coastal region. Because the proposed disposal of dredged material at the NLDS would be conducted within the area covered by the State and federally

⁵ <http://coastalmanagement.noaa.gov/consistency/media/NYinterstateapproval.pdf>.

⁶ 16 U.S.C. §1456.

⁷ See 15 C.F.R. § 930.155(a) “The provisions of this subpart are neither a substitute for nor eliminate the statutory requirement of federal consistency with the enforceable policies of management programs for all activities affecting any coastal use or resource. Federal agencies shall submit consistency determinations to relevant State agencies for activities having coastal effects, regardless of location, and regardless of whether the activity is listed.; see also 15 C.F.R. 930.34(a)(1).

⁸ 15 C.F.R. § 930.36 (a). “The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule.”

⁹In 2006, the Navy failed to follow the consistency review process when it disposed of the sediments from the CAD cell for the SUBASE project at NLDS. The Navy violated the CZMA when it conducted the dredged material disposal without obtaining a consistency concurrence from New York State. The Navy also failed to provide NY with a consistency determination for the current proposal until NY specifically requested the Navy’s submission in a letter dated July 22, 2009.-

approved LIS CMP, which contains the enforceable policies of the NY CMP for this region, this proposal has been evaluated for its consistency with the enforceable policies of the LIS CMP.¹⁰

Factors Relevant to the Review:

New London Disposal Site:

The New London Disposal Site is located in New York and Connecticut in about 70 feet of water at the junctures of Fishers and Long Island Sounds on the northeastern side of the eastern basin of LIS. Approximately 1/3 of the NLDS is located within the territorial waters of the State of New York, and is situated approximately 1.5 miles west of Fishers Island in the Town of Southold, Suffolk County, New York. The NLDS is within close proximity to several NYS designated and federally approved Significant Coastal Fish and Wildlife Habitats (SCFWH),¹¹ and recreational and commercial fisheries of regional significance. NLDS is centered at 41° 16.3' N, 72° 04.6' W.

The eastern basin of LIS includes the area between Six Mile Reef to the west and The Race to the east. Ocean waters flow into the Sound as bottom currents and water leaves the Sound as surface currents through the constricted eastern entrance, and near the location of the NLDS. Incoming ocean waters upwell along the Connecticut shore and move oceanward via a counterclockwise gyre along the Long Island Shore. At the eastern edge of the Sound, extending approximately 5 to 8 km westward from The Race, there is a large area of erosion or non-deposition, likely caused by a combination of strong tidal currents and a net westward movement of sediments into the estuary.¹² Current speeds in the eastern basin are the strongest observed in the Sound.¹³ These current velocities have been measured at 62-82 cm/sec¹⁴ and are sufficient to erode silt and sand, and prevent deposition of silt and clay.¹⁵ There is a paucity of

¹⁰ See 33 C.F.R. § 325.2(b)(2). “the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act’s directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs.”

¹¹ www.nyswaterfronts.com.

¹² ENSR International 2001. Physical Oceanographic Evaluation of Long Island Sound and Block Island Sound. DEIS for the Designation of Dredged Material Disposal Sites in Central and Western Long Island Sound. September 2003. U.S. Environmental Protection Agency, New England Region, Boston, MA. U.S. Army Corps of Engineers, New England Division, Concord, MA. Appendix G1. Section 2.1.2

¹³ Id.

¹⁴ Long E.E. 1978 Tide and Tidal Current Observations from 1965 through 1967 in Long Island Sound, Block Island Sound and Tributaries. NOS Oceanographic Circulatory Survey Report No. 1:91 pages.

¹⁵ Hjultrom, F. 1935. Studies of the morphological activity of rivers as illustrated by the River Fyris. Univ. Uppsala Geol. Inst. Bull 25: 221-557.

silt and clay sized particles in surface sediments (0-25%) in the eastern basin reflecting the high energy current resuspension of fine sediment.¹⁶

In this consistency review, the Navy did not provide any analysis of the substantial environmental impacts of dredged material disposal at NLDS. The Disposal Area Monitoring Program (DAMOS)¹⁷ periodically monitors the NLDS using bathymetric surveys, sediment profile imaging and plan view imaging to verify the locations of disposal mounds, monitor any changes to the mounds, as well as to track the re-colonization of the mounds by benthic communities. The Corps recently provided DOS staff with a study of a NLDS disposal mound (DAMOS monitoring report #180) constructed between 2000 and 2006. The DAMOS monitoring report focused on mound NL-06 sediment from the time it left the barge until the survey was taken 8 months later. The study revealed that between 35% and 50% of the disposed material is missing and unaccounted for. This absence of material verified that the sediments disposed of at NLDS are transported rapidly and disappear quickly, indicating a very unstable, fast moving marine environment, which is unsuitable for disposal.

Even though the current Navy proposal involves the disposal of allegedly clean sediment on this occasion, recent dumping events at NLDS have involved the disposal of contaminated sediments, much of which cannot be accounted for. Furthermore, the report did not provide an assurance that the fine grained material in the proposed disposal contains sufficient coarse sediment to develop a surface lag that would result in long term stability of the mound in such a dynamic environment. The Navy's current proposal involves Thames River sediments which have been minimally tested for their chemical or toxic properties. Cumulative effects tests have not been conducted to measure the levels of contamination released from capped mounds by fauna, food chain effects, or bioaccumulation at NLDS. Over the longer term, such effects could be having impact on resources in New York.

LIS is the only embayment in the nation's territorial sea in which the Marine Protection Research & Sanctuaries Act, also known as the Ocean Dumping Act (ODA), applies. In 1980, Congress amended the ODA to subject the dumping of dredged material in Long Island Sound by federal agencies, or by private parties dumping more than 25,000 cubic yards of dredged material, to the site selection, site designation and environmental testing criteria of the ODA¹⁸ For private projects less than 25,000 cubic yards, the Clean Water Act standards apply. The ODA amendment was enacted because disposal of dredged material had been taking place in LIS, without regard to the cumulative environmental effects on that water body. The ODA authorizes the Environmental Protection Agency (EPA) Administrator, in conjunction with the Corps, to designate sites where ocean disposal may be permitted.¹⁹

¹⁶ NYS DOS Seawolf Decision Letter, F-1995-138.

¹⁷ The Corps is the administrator of the DAMOS program, which was begun in 1977 by the New England District of the US Army Corps of Engineers to manage and monitor offshore dredged material disposal sites from Long Island Sound to Maine.

¹⁸ 33 U.S.C. § 1416(f). The ODA amendment was proposed in order to "amend existing law to consider the Long Island Sound as ocean waters for the purpose of ocean dumping regulation." H.R. Rep. No. 894, Part 1, 96th Cong., 2d Sess. 2 (1980).

¹⁹ 33 U.S.C. § 1412.

Open water disposal in LIS is constrained by federal law, as well as public concerns about impacts to marine resources. Congressional history confirms that the ODA was made applicable to the LIS to afford greater protection to the marine environment from open water disposal than was otherwise available under the Clean Water Act.²⁰ In practice, however, dredged material disposal in the Sound has continued unconstrained by the stricter environmental standard. Recognizing Connecticut's legitimate economic need to routinely dredge its rivers does not require the expansion of open water disposal in the Sound through the formal designation of additional disposal sites in the Sound, rather than seeking alternative disposal options.

NLDS is not legally authorized for open water disposal of the Navy's sediments. The EPA Administrator has not designated it as a dredged material disposal site under 33 U.S.C. § 1412. The Navy and the Corps have indicated that NLDS was temporarily designated for short term use to receive dredged material under an ODA section which authorizes use of a non-designated site for two five year periods when the use of designated sites is not feasible and certain criteria are met.²¹

NLDS was not properly selected for short term use. Under the ODA, site designation is part of the permit evaluation process.²² The Corps was required to follow the criteria in 40 C.F.R. §227 and §228 when selecting dredge disposal sites. This process entails a public comment process,²³ environmental analysis²⁴ and, in this case, consistency review by the states of New York and Connecticut. This public process was not followed for NLDS. Public notice of the selection was not published in the Federal Register. When evidence of the designation was recently requested by DOS, the Corps produced a document labeled "internal memorandum" dated April 5, 2005, which purportedly was sent to the EPA, selecting NLDS for the disposal of 187,000 cubic yards of material for the initial CAD cell work in 2006. The internal document was kept from public comment and the consistency review process.²⁵ Nor was a public environmental analysis²⁶ conducted for the purported NLDS site selection in 2005, which might have provided the public and interested agencies another opportunity to review and comment on the permit and the

²⁰ See 33 U.S.C. § 1416(f).

²¹ See 33 U.S.C. § 1413.

²² See 33 U.S.C. §§ 1412 and 1413.

²³ The Secretary's issuance of permits for "the transportation of dredged material for the purpose of dumping it in ocean waters" can only occur "after notice and opportunity for public hearings." 33 U.S.C. § 1413 (a).

²⁴ See 33 U.S.C. § 1413(b) sets forth the process by which the Secretary is to evaluate the dredge material by first applying the environmental criteria in section 1412(a) relating to the effects of dumping.

²⁵ The April 5, 2005 internal memo information, which included an analysis of the site selection factors are required pursuant to 40 C.F.R. §§ 228(e)(4), 228.5 and 228.6, was never released to the public as required by 33 C.F.R. § 230.10(a).

²⁶ See 33 C.F.R. §§ 230.4, 230.7(a), 40 C.F.R. §§ 1508.1, 1508.9, and 1508.10.

Secretary's site selection as required by law.²⁷ The current use of NLDS as a disposal site selected for the Navy's sediments pursuant to ODA is unauthorized and is otherwise only available for the disposal of dredged material from non-federal projects under the total volume of 25,000 cubic yards. Moreover, the ODA requires the use of EPA designated sites before alternative sites can be considered.²⁸

Alternative Disposal Sites for the CAD Cell Material:

On June 3, 2005, the EPA Administrator designated two disposal sites in Long Island Sound pursuant to 33 U.S.C. § 1412: the Western Long Island Sound Disposal Site (WLIS) and the Central Long Island Sound Disposal Site (CLIS).²⁹ Once these two sites were designated, all open water disposal projects in the vicinity of the Sound were mandated to use them or another designated site unless, following an exhaustive analysis of criteria under 33 U.S.C. § 1413(b), use of the designated sites was determined to be infeasible.³⁰ Both CLIS and WLIS have Site Management and Monitoring Plans (SMMPs) and are suitable locations to accept the Navy's dredged sediment.

Applicable Long Island Sound CMP Policies:

²⁷ The Corps's NEPA implementing regulations are contained at 33 C.F.R. Part 230. The district commander is responsible for making this determination and for keeping the public informed of the availability of the [Environmental Assessment] EA and [Finding of no significant impact] FONSI; see also 42 U.S.C. § 4332; 40 C.F.R. Part 1500. The site selection process of a dredge disposal location is not listed as a categorical exemption in 33 C.F.R. 230.9 and, therefore the April 5, 2005 internal memo was to have been produced in the form of a NEPA document and released to the public for review and comment.

²⁸ The Secretary of the Army, in assessing the need for ocean disposal, was to the maximum extent practicable, to "utilize the recommended sites designated by the Administrator pursuant to section 1412(c)." 33 U.S.C. § 1413(a). "In the case of dredged material disposal sites, the Administrator, in conjunction with the Secretary, shall develop a site management plan for each site designated pursuant to this section." 33 U.S.C. § 1412(c).

²⁹ In accordance with EPA's Statement of Policy for Voluntary Preparation of National Environmental Policy Act documents for all ocean disposal site designations (Federal Register 62(229): 63334-63336, October 29, 1998), EPA issues this Notice of Intent to prepare an EIS for the Designation of Dredged Material Disposal Sites in Long Island Sound, offshore of Connecticut, and New York. 64 Fed. Reg. 29865-01. The June 3, 2005, final rule also included restrictions intended to reduce or eliminate the disposal of dredged material in Long Island Sound. See 70 Fed. Reg. 32498-01.

³⁰ See 33 U.S.C. § 1413(b). "Disposal at or in the vicinity of an alternative site shall be limited to a period of not greater than 5 years unless the site is subsequently designated pursuant to 33 USC § 1412(c); except that an alternative site may continue to be used for an additional period of time that shall not exceed 5 years if—

- (1) no feasible disposal site has been designated by the Administrator;
- (2) the continued use of the alternative site is necessary to maintain navigation and facilitate interstate or international commerce; and
- (3) the Administrator determines that the continued use of the site does not pose an unacceptable risk to human health, aquatic resources, or the environment."

POLICY 5: Protect and Improve Water Quality and Supply in the Long Island Sound Coastal Area.

5.3 Protect and enhance the quality of coastal waters.

The guidance for sub-policy 5.3 states “Protect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material.” The Navy’s proposal to dispose of 230,000 cubic yards of Thames River sediments at NLDS will have the effect of smothering benthic life and degrading the marine environment both at the site and in the surrounding area. This amount of fill material is the equivalent of placing a layer of sediment across 129 football fields at one foot thickness. Stated another way, it is equivalent to providing one foot of fill for approximately 145 acres of tidal wetlands which could be restored if the material were properly disposed of at a suitable intertidal location. The significance of the impacts associated with dredged material disposal at, and adjacent to, the NLDS will be substantial.

Given the high current velocities and unstable nature of sediment in the vicinity, adverse impacts are anticipated at the NLDS and adjacent areas as a result of the dredged material disposal activities. In addition to direct physical impacts, chemical impacts can include, but are not limited to: reduced dissolved oxygen in the water column during disposal activities; increased carbon dioxide, acidity, dissolved solids, nutrients, and organics within the water column during and after disposal activities. Chronic plumes and frequent resuspension of particles are also expected due to the fine grained nature of the material and the high current energy documented in the eastern basin. These factors are likely to cause physical disturbances to the site and surrounding areas that may result in biological and chemical effects. No information assessing these potential impacts resulting from the proposed disposal was provided, leaving DOS to conclude that there is substantial risk to the environment from this proposal.

According to the DAMOS special technical report entitled “Analysis of the Contribution of Dredged Material to Sediment and Contaminant Fluxes in Long Island Sound,” the remolding phase of a disposal mound involves compaction and local erosion until an equilibrium of grain-size distribution is attained and a mound can be considered armored. “With silt or clay caps or uncapped mounds, this condition may be attained only after considerable erosion.”³¹ As discussed below, monitoring data indicates a significant loss of dredged material in just 8 months, and in this case persistent erosion of the clay/silt material is expected since coarse material is virtually absent from all of the core samples taken for this project. Furthermore, DAMOS report # 180, which examined the NL-06 mound in 2007, noted that 8 months after disposal, “There was a very thin layer of sand (thinner than at NEREF) over silt/clay and the grain size major mode was >4 phi at every station. At many stations the consolidated clay was exposed at the surface.”³² This indicates that a lag layer had yet to fully form and thus resuspension, with water quality and physical impacts, is still ongoing.

With a paucity of coarse sediment, development of a suitable lag covering might take years and significant erosion of dredged material from this proposed project will have occurred. Given

³¹ SAIC. 1994. Analysis of the Contribution of Dredged Material to sediment and Contaminant Fluxes in long Island Sound. June 1994. DAMOS Contribution No. 88. U.S. Army Corps of Engineers, New England District, Concord, MA. p. 11.

³² AECOM. 2009. Monitoring Survey at the New London Disposal Site, July / August 2007. DAMOS Contribution No. 180. U.S. Army Corps of Engineers, New England District, Concord, MA, 80pp. (p 75.)

the instability due to current speeds at NLDS, the fine sand and shells that accumulate on the surface of mounds is not adequate lag material and thus insufficient to prevent material resuspension, especially during storm events.

As described in 40 CFR §228.15(4) and (5), the WLIS and CLIS have been evaluated for the significance of physical and chemical impacts as part of the designation process. As a result of the physical and environmental studies performed, the level of impairment at these locations as a result of their use as disposal sites has been judged to be acceptable. The NLDS has not undergone similar environmental studies and the significance of the impacts associated with dredged material disposal at, and adjacent to, the NLDS has not been evaluated or determined. While studies have been done to monitor the physical and to some extent, the chemical characteristics of the disposal mounds, biological and chemical parameters have not been evaluated to the extent that demonstrates that there will be no effects on the ecology of LIS. Monitoring of NLDS has typically performed well after disposal has taken place, but does not reflect real-time measurements during the disposal activities, and does not illustrate the extent of plume dispersion and resuspension of sediment at the site as a result of disposal activities.

In the DAMOS monitoring report prepared for NLDS, the U.S. Army Corps of Engineers (“Corps”) states that given the 277,000 m³ disposed at the NL-06 mound by November 2006, “The NL-06 Mound is expected to measure approximately 500-600 m in diameter with an elevation of 3-4 m...” Following actual field surveys of the mound, which were measured 8 months after the last disposal event, “The NL-06 Mound was approximately 4 m in height (elsewhere in the document elevation was cited as 3.6 m), similar to the predicted height: but the overall footprint (575m long x 250 m wide) was smaller than the predicted mound diameter of 500-600 m.”³³ This conclusion is likely that dredged material either was lost during the disposal events, or was eroded from the site subsequent to disposal. As noted earlier, DOS calculates that approximately 35% to 50% of the disposed material at NL-06 was no longer in the mound 8 months after the November 2006 disposal. The reason material was lost and the fate of that material is likely due to the strong currents. The missing sediment could have traveled and had physical and chemical impacts outside the disposal area. To date, the Corps has not produced information to refute this valid assumption. Much of the sediment disposed of and capped at NL-06 was highly contaminated (perhaps as much as 100,000 m³). The “precautionary principle” of ecosystem management makes it clear that “[w]hen an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”³⁴ It is appropriate to apply this principle for the benefit of the environment of Long Island Sound. The proposal is therefore inconsistent with this policy.

POLICY 6: Protect and Restore the Quality and Function of the Long Island Sound Ecosystem.

6.2 Protect and restore Significant Coastal Fish and Wildlife Habitats.

6.4 Protect vulnerable fish, wildlife, and plant species, and rare ecological communities.

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

³³ AECOM. 2009. Monitoring Survey at the New London Disposal Site, July/ August 2007. DAMOS Contribution No. 180. U.S. Army Corps of Engineers, New England District, Concord, MA, 80pp. (p. 76).

³⁴ www.mindfully.org/Precaution/Precautionary-Principle-Common-Sense.htm.

Given the high risk of environmental impacts from disposal of dredged material at NLDS, Policy 6 and the listed sub-policies and the guidance for sub-policy 6.2, which states: “Protect Long Island Sounds designated significant coastal fish and wildlife habitats (SCFWH) from uses or activities which would destroy habitat values or significantly impair the viability of the designed habitat beyond its tolerance range which is the ecological range of conditions that supports the species population or has the potential to support a restored population where practical” cannot be assured.

The NLDS is located approximately 1.5 miles from Fishers Island, NY, where there are several NYS-designated SCFWH(s). To the east of the NLDS are the “Fishers Island Beaches, Pine Islands and Shallows” and the “Dumpling Islands and Flat Hammock,” in which intertidal areas provide significant foraging, spawning and nesting areas for many species of fish, birds and colonial waterbirds. To the southeast of the NLDS is “The Race” which, due to its location, provides one of two major migratory routes through the Sound, provides significant spawning, nursery and foraging areas, and supports a nationally significant recreational fishery as well as a regionally significant commercial lobster fishery. There are several other SCFWH(s) in the vicinity of the NLDS and Fishers Island where breeding and foraging endangered and threatened species benefit from the diversity of flora and fauna produced within in this dynamic ecosystem and adjacent SCFWH(s). Given the relatively high current velocities and unstable character of the eastern portion of the Sound, the disposal of materials at this site could impair or affect these nearby habitats and this nationally significant estuary by: direct physical alteration, disturbance, or pollution of the area through indirect biological and chemical effects of disposal. Habitat destruction could be facilitated by increasing sedimentation; impairing the habitat by reducing vital resources (food, shelter, living space, light) or changing the environmental conditions (substrate) beyond the tolerance range of marine organisms. Additional discussions of foreseeable effects on these SCFWH(s) are discussed in the analysis of Policy 11. Any alteration and/or impact to these valuable habitats effects the availability and viability of food sources and resources within the Sound and associated SCFWH(s), contravene the intentions of this policy and must be avoided.

The guidance for sub-policy 6.5 states “Protect natural resources comprising a regionally important natural area... Adhere to management plans prepared for regionally important natural areas.” 33 U.S.C. § 1412(c)(3) requires that EPA designated sites must undergo the development of a SMMP as part of the designation process. The NLDS, which is located within a estuary of national significance, is not an EPA-designated site determined eligible to receive dredge material, and accordingly does not have a management plan in place.³⁵

The effects of disposal on several regionally important habitats located within relatively close proximity to the NLDS have not been studied. The potential for fine sediment dispersion, as well as resuspension of sediment due to storm events are high within LIS.³⁶ On page 24 of DAMOS

³⁵ In accordance with 33 U.S.C. § 1412(c)(3), the EPA completes a site management plan for each of its designated sites and this is done in consultation with the Corp. The EPA-designated sites, CLIS and WLIS, have SMMP’s in place for the management and receipt of dredge disposal material. The NLDS is an undesignated site and accordingly does not have a SMMP in place to manage the receipt of dredge material disposed at the site, including an evaluation of cumulative impacts.

³⁶ SAIC. 1994. Analysis of the Contribution of Dredged Material to sediment and Contaminant Fluxes in Long Island Sound. June 1994. DAMOS Contribution No. 88. U.S. Army

Special Technical Report “Analysis of the Contribution of Dredged Material to Sediment and Contaminant Fluxes in Long Island Sound,” it predicts that there is a maximum expected dispersion loss of 6.0% during disposal activities, a 0.06% mound remolding loss, and during a hurricane, scouring loss of 15.8%. In total, there is a potential 21.86% loss of material. If this value is applied to the current proposal, that accounts for 51,808 cubic yards of material that could be impacting the ecosystem of Long Island Sound outside of the disposal area. The significance of the impacts associated with dredged material disposal at, and adjacent to, the NLDS has not been adequately determined so as to remove reasonable doubt of environmental harm. The proposal is therefore inconsistent with this policy.

POLICY 10: Protect Long Island Sound’s Water-Dependent Uses and Promote Siting of New Water-Dependent Uses in Suitable Locations.

Policy 10.6 Provide sufficient infrastructure for water-dependent uses.

The guidance for sub-policy 10.6 states “Use suitable dredged material for beach nourishment, dune reconstruction, or other beneficial uses. Avoid placement of dredged material in LIS when opportunities for beneficial reuse of the material exist.” While the alternatives analysis for the pier area material is quite comprehensive, the alternative uses sought for the CAD cell material have not been discussed. The potential for beneficial use of this material has not been addressed and alternative options may exist. The stated cohesive nature of the material could make it suitable for use in construction projects, aggregates, or as structural fill, however, the lack of alternatives analysis for the CAD cell material provides insufficient information for the assessment of the effect(s) on coastal policy.

Additionally, the Regional Dredging Team (RDT) was created as a result of the settlement resulting in the preparation of the DMMP and the EPA Final Rule for the CLIS and WLIS designations. The jurisdiction of the RDT for review of projects extends to all eligible projects proposed within the entire LIS region in order to be consistent with the goal of the DMMP to eliminate or reduce disposal of dredged material in Long Island Sound.

Policy 10.6 requires “... sufficient infrastructure for water-dependent uses.” Infrastructure, in the form of a designated disposal site at CLIS and WLIS has been provided by the EPA. These sites have gone through environmental analysis and preparation of management plans and are deemed appropriate sites for use pending completion of the DMMP. However, this proposal ignored the existing designated sites and chose to utilize a site that has not been designated and has not undergone adequate environmental review or preparation of a management plan. This proposal is therefore inconsistent with this policy.

POLICY 11: Promote Sustainable Use of Living Marine Resources in Long Island Sound.

11.1 Ensure Long-term maintenance and health of living marine resources.

11.2 Provide for commercial and recreational use of the Sound’s finfish, shellfish, crustaceans, and marine plants.

The guidance for sub-policy 11.1 states “Foster occurrence and abundance of Long Island Sound’s marine resources by: protecting spawning grounds, habitats, and water quality; and enhancing and restoring fish and shellfish habitat, particularly for anadromous fish, oysters, and hard clams.” The guidance for policy 11.2 states “Maximize the benefits of marine resource use so as to provide a valuable recreation resource experience and viable business opportunities for commercial and recreational fisheries... Protect the public health and the marketability of marine and fishery resources by maintaining and improving water quality.”

As stated in the explanations of Policies 5 and 6 above, and unlike the CLIS and WLIS where evaluations of the effects of the disposal of dredged materials have been performed and have been determined to be acceptable until the completion of the LIS DMMP, adequate studies on the cumulative effects on the biological communities at and adjacent to the NLDS have not been undertaken and the effects on the resources and sustainable uses of this region have not been adequately addressed. Long Island Sound is an invaluable resource capable of sustaining numerous uses, however, insufficient information exists for the assessment of the effect(s) of dredged material disposal at the NLDS on the Sound's resources and sustainable uses, and on coastal policy. Biological effects to organisms due to physical and chemical disturbances that would effect the sustainable uses of the Sound include, but are not limited to: food chain effects such as bioaccumulation of contaminants in organisms; a decrease, or even an increase, in fecundity due to habitat disturbances, foraging capacity and chronic toxicity; abandonment of habitats, spawning, nursery and foraging areas due to frequent disturbances and degradation of the underlying infrastructure. High chemical oxygen demand (COD) of disposed sediments can cause significant reductions in dissolved oxygen levels of the overlying water column, causing mortality in sessile organisms. This results in the elimination of foraging material for many species, which then causes abandonment of the area, thus affecting the food chain. Recolonization of the mounds within the disposal site is well documented through the DAMOS program, as are the acute and short-term effects of disposal. However, depending upon the biological and chemical effects of previously disposed sediments upon those organisms, as well as their effects throughout the food chain, recolonization may not be desirable because it could be a continuing source of food chain contamination. Without current and continued data collection for these chronic long-term effects, educated assessments of these effects can not be made. The proposal is therefore inconsistent with this policy.

Conclusion

Given the foregoing, which highlights the unstable nature of NLDS as a disposal site leading to substantial risk of environmental harm to the resources of New York, and the lack of substantial proof to the contrary, this proposal is not be consistent with the NY CMP as it is expressed in Policies 5, 6, 10 and 11 of the Long Island Sound CMP.

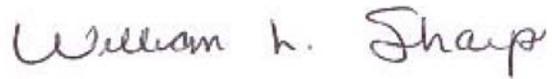
Alternatives

Pursuant to 15 C.F.R. § 930.43(a)(3), the Department of State may identify alternatives, if they exist, which, if adopted would allow an activity to proceed in a manner that is consistent to the maximum extent practicable with the enforceable policies of the CMP. Several alternatives exist that are consistent with the CMP and may include, but are not limited to: disposal of the CAD cell materials at any of the EPA designated open-water disposal sites that have a gone through the 33 U.S.C. § 1412 designation process and have a current SMMP; use in aggregates; upland filling, such as the USACE application # NAE-2008-2372 (project entitled "Northeast Armed Forces Reserve Center"); mined land reclamation; remediation of Brownfield Areas; construction activities; landfill contouring, capping and closure; use as remediation at the HARS. The submitted dredged material alternatives analysis, in support of your consistency determination, states that disposal of the pier materials at CLIS is feasible. This alternative disposal location would be an acceptable alternative for the CAD cell material and would be consistent with the NY CMP.

Pursuant to 15 C.F.R. § 930.43 and §930.112, you may attempt to resolve these issues with DOS, or request Secretarial Mediation from the U.S. Department of Commerce. Given that the mediation process may be lengthy, if you would like to continue discussions with this office while pursuing mediation, please call Mr. Fred Anders at (518) 473-2477.

The U.S. Department of Commerce is being notified of this decision by copy of this letter.

Sincerely,

A rectangular box containing a handwritten signature in dark ink that reads "William L. Sharp".

William L. Sharp
Deputy Secretary of State

GRS/jls

cc: US Department of the Navy - Richard Conant
US Department of the Navy – Captain Marc W. Denno
OCRM - David Kennedy, Director
OCRM - David Kaiser, Chief, Coastal programs Division
OCRM - John King
OCRM - Helen Farr
COE/New England District - Diane Ray, Timothy J. Dugan
COE/New York District - Randall G. Hintz, Richard Tomer
USEPA Region 1 - Ira W. Leighton, Acting Regional Administrator
USEPA Region 2 – George Pavlou, Acting Regional Administrator
Connecticut DEP – B. Thompson, G. Wisker, M. Grzywinski (#200900894-MG)
NYSDEC Central Office - John Ferguson
NYSDEC Region 1 - Rover Evans
NYSDEC Region 2 - John Cryan