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April 25, 2016

Mr. Melville P. Coté, Jr., Chief
Surface Water Branch
U.S. Environmental Protection Agency
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Re: F-2016-0116 (DA)
U.S. Environmental Protection Agency (EPA), Region 1 – submission of a consistency determination for the Amendments to the EPA Regulations Governing the Use of the Western Long Island Sound (re-named WLDS) and Central Long Island Sound (CLDS) Dredged Material Disposal Sites.
Conditioned Concurrence (CDL) with Consistency Determination

Dear Mr. Coté:

The Department of State (DOS) has completed its review of the EPA's consistency determination for the above referenced proposal in accordance with the federal Coastal Zone Management Act (CZMA), and, pursuant to 15 C.F.R. § 930.4(a), DOS conditionally concurs with the consistency determination for the proposed amended Rule under the applicable enforceable coastal policies of the Long Island Sound Coastal Management Program (LIS CMP) as included in the New York State Coastal Management Program (NY CMP). The CZMA requires that the EPA determine its action to be consistent to the maximum extent practicable with New York State's enforceable coastal policies.[1] The conditions included in this letter are specific for CLDS and WLDS only and must be included in the final version of the amended EPA rule for these site designations in order for the determination to be a considered as a concurrence.[2] If the final versions of 40 C.F.R. §§ 228.15 (b)(4)(vi) and (b)(5)(vi) do not contain the conditions set forth in this letter, then this conditional concurrence shall be treated as an objection pursuant to 15 C.F.R. § 930.43.

I. STATUTORY FRAMEWORK FOR CONSISTENCY REVIEW

The CZMA authorizes a coastal state to review federal agency activities in or outside of the coastal zone affecting any land or water use or natural resource of the coastal zone for their consistency with the enforceable policies of the State's approved CMP. Under the regulatory framework in 15 C.F.R. Part 930 subpart A, the designated state coastal agency can concur with, conditionally concur with, or object to the consistency determination. Pursuant to 15 C.F.R. § 930.4(a)(1) through (3), the federal agency must amend

[1] See 15 C.F.R. § 930.32.
[2] The EPA amendments to the rule at 40 C.F.R. § 228.15(b)(4) and (5) for the continuing use of the two open water disposal sites, CLDS and WLDS, are promulgated pursuant to the Ocean Dumping Act § 102 and the implementing regulations at 40 C.F.R. §§ 228.4, 228.5, and 228.6.

the proposal to include the State's condition(s) (see section V). The Federal agency shall immediately notify DOS if the conditions are not acceptable. If the proposal is not amended or the Federal agency notifies DOS that the conditions are not accepted, the conditional concurrence automatically becomes an objection.

II. SUBJECT OF THE REVIEW

The EPA has submitted a consistency determination to DOS that presents the procedures and standards in the proposed rule as consistent with the LIS CMP enforceable coastal policies. (See 81 Fed. Reg. 7062-7063 [Feb. 10, 2016]). The EPA's consistency determination states:

> "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. 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."

The EPA has stated in its consistency determination that the amended conditions will:

1. "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));

2. 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));

3. 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

4. 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))."

DOS does not concur with the EPA's determination that the proposed rulemaking, as proposed in 81 Fed. Reg. at 7062- 7063 [Feb. 10, 2016], is consistent to the maximum extent practicable with the LIS CMP enforceable coastal policies. (15 C.F.R. § 930.32).

III. FACTORS RELEVANT TO THE REVIEW

The Department previously reviewed and issued an objection to the EPA's consistency determination for the 2004 Proposed Rule (file no. F-2004-0228). DOS found the long-term site designations of CLIS (re-named CLDS) and WLIS (re-named WLDS) to be inconsistent with the NYS CMP. Subsequent coordination

resulted in mutually agreed upon conditions to be included in the Final Rule, which enabled the Department to withdraw its objection and issue a concurrence with the conditioned 2005 Final Rule (40 C.F.R. §§ 228.15 (b)(4) and (5)). DOS agreed that one of the conditions was the development of a comprehensive dredged material management plan (DMMP) that would develop procedures and standards, based on a thorough environmental, economic and alternatives analyses, to achieve the goal of reducing or eliminating open-water disposal of dredged material in Long Island Sound.

A pre-draft of DMMP was released by the U.S. Army Corps, New England District on June 1, 2015, and submitted for DOS review. The Department provided comments to the Corps and EPA on both the pre-draft and a subsequent publically-released draft DMMP and Programmatic Environmental Impact Statement (PEIS) (see letters dated July 10, 2015, July 24, 2015, and October 16, 2015). The comments iterated DOS concerns that the draft DMMP and PEIS were severely deficient and failed to address the goal to reduce or eliminate open-water dredged material disposal; therefore, the DMMP, which did not adequately address these comments, does not satisfy the goal of the 2005 Final Rule, or support the proposed amendments to the designation rule (40 C.F.R. §§ 228.15(b)(4)and (5)).

EPA has submitted this consistency determination for the proposed amendments to the designation rule for long-term use of the CLDS and WLDS to include procedures and standards based on the information contained within the DMMP. However, the DMMP's deficiencies include an absence of procedures and standards that would reduce or eliminate the use of CLDS and WLDS as open water disposal sites. Accordingly, on March 4, 2016, DOS submitted a petition to EPA, requesting that EPA develop and include standards and procedures that will achieve the goal of the 2005 EPA Final Rule[3], including mandated clear, staged reductions over the next 30 years. The EPA has not yet responded to the petition.

IV. COASTAL POLICY ANALYSIS

In addition to the enforceable coastal policies of the LIS CMP, it is noted that there are several Local Waterfront Revitalization Programs (LWRPs) adjacent to the planning area for the DMMP that would be affected by the proposed amendments to the site designations. Generally, the policy numbers and objectives of each LWRP mirror those of the Long Island Sound CMP. This coastal policy analysis is inclusive of the LIS CMP and LWRPs.

<u>LIS CMP Policy Analysis</u>

Policy 5 Protect and improve water quality and supply in the Long Island Sound coastal area.
Policy 5.3 Protect and enhance the quality of coastal waters.

One of the principal purposes of this policy is to protect water quality of coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material. Water quality protection and improvement in the region must be accomplished by the combination of managing new and remediating existing sources of pollution. The long-term designation of an open-water disposal site makes available an incompatible use of New York's coastal waters and resources. While many of the restrictions published in the 2005 Final Rule are being retained, the newly proposed amendments do not go far enough to manage or remediate new and existing sources of pollution.

Dredging and dumping dredged material in open-water degrades water quality. Adverse effects to human health and the estuarine environment can be directly attributed to the discharge of dredged

[3] 40 C.F.R. § 228.15(b)(4)(vi)(G).

sediments in open water. These effects may be exacerbated with the presence of elevated levels of certain contaminants known to exist in LIS, such as copper, mercury, PCB congeners, and dioxin. Warming ocean temperatures compound these effects and are expected to increase in the future.

Dredged material that would be disposed of in the Sound after the amended site designations will contain elevated levels of organic material and nutrients, including nitrogen, which exert oxygen demand on those waters, thereby decreasing dissolved oxygen levels in the Sound, causing fish kills and encouraging algae growth. Programs costly to municipalities and taxpayers which are intended to remove nitrogen and implement storm-water controls are mandated by EPA in order to lessen contamination of the Sound.

An additional issue that is key to understanding impacts to water quality parameters from open water disposal is the question of cumulative and secondary impacts. While sediments involved in individual disposal events may not exceed current toxicity thresholds for certain contaminants and certain species, the cumulative long-term impact of repeated disposal actions has not been adequately assessed nor addressed by EPA. Additionally, the DMMP and the PEIS, while acknowledging the Sound's history as a waste-dumping ground, dismiss the need for further study of the cumulative impacts of past dredging activities.

The standards in the EPA amended rule are limited to classification of material based on grain-size and that promotes the use of open water disposal for material that has typically greater than 20 to 40 percent fine content based upon a determination of suitability. More specifically, "materials dredged from upper river channels in the Connecticut, Housatonic and Thames Rivers, whenever possible, should be disposed of at existing Confined Open Water sites, on-shore or through in-river placement. Other beneficial uses such as marsh creation, should be examined and used whenever practicable. If no other alternative is determined to be practicable, suitable fine-grained material may be placed at the designated sites." While the amended rule is recognizing that dredged material from these three geographic location may not meet Ocean Dumping Act § 102 standards for open water disposal, additional management measures may be needed to ensure the dredged material from these locations does not enter the Sound. As the DMMP and PEIS provide little to no information on water quality and the anticipated direct and cumulative effects of disposal at CLDS and WLDS, these standards do not meet our goal, or the goal of the 2005 Final Rule. The proposed activity is not consistent to the maximum extent practicable with this policy.

Policy 6 Protect and restore the quality and function of the Long Island Sound ecosystem.
Policy 6.1 Protect and restore ecological quality throughout Long Island Sound.
Policy 6.2 Protect and restore Significant Coastal Fish and Wildlife Habitats.
Policy 6.4 Protect vulnerable fish, wildlife, and plant species, and rare ecological communities.
Policy 6.5 Protect natural resources and associated values in identified regionally important natural areas.
Protect natural resources comprising a regionally important natural area. Focus state actions on protection, restoration, and management of natural resources. Protect and enhance activities associated with sustainable human use or appreciation of natural resources. Adhere to management plans prepared for regionally important natural areas.

The high natural resource value of the Long Island Sound ecosystem is a product of its physical and biological components, and their interactions. Certain natural resources that are important for their contribution to the quality, function and biological diversity of the Sound ecosystem have been specifically identified by the State for protection. EPA maintains that the proposed action -- amendments to the restrictions for the site designations -- will have no effect on these resources because it is not an authorization of any actual disposal and, therefore, consistent to the maximum extent practicable, with the applicable, enforceable policies of the NYS CMP, as it is expressed in the LIS CMP, as well as the federally enforceable policies of the applicable LWRPs.

The EPA's determination asserts that the proposed rule amendments are consistent with this policy and that they would result in negligible effects on ecosystem quality. However, that conclusion fails to consider the cumulative effects of the proposed designations and the cumulative effects of the continued long-term use of these sites after designation. Because the purpose of a site designation is to establish its use for long-term open-water disposal, the foreseeable effects of primary and secondary cumulated impacts must be anticipated. The EPA's consistency determination neglects to include what reasonably foreseeable primary and secondary cumulative effects may likely accrue from the unabated continuation of this federal activity. Therefore, the proposed activity is not consistent to the maximum extent practicable with this policy.

Policy 8 Minimize environmental degradation in the Long Island Sound coastal area from solid waste and hazardous substances and wastes.
Policy 8.3 Protect the environment from degradation due to toxic pollutants and substances hazardous to the environment and public health.

The intent of this policy is to protect people from sources of contamination and to protect Long Island Sound's coastal resource from degradation through proper control and management of wastes and hazardous materials. EPA's proposed amendments fail to provide a strategy to achieve the long-term clear staged reduction of open water disposal. The unabated continuation of the use of CLDS and WLDS as open water disposal sites will lead to the permanent establishment of Long Island Sound as a solid waste disposal facility, which is not consistent with the State's management program.[4]

In the absence of clear staged reductions, the continuation of long-term unabated disposal will contribute to the adverse effects associated by introducing dredged material contaminants to the water column and benthos. The open-water disposal of dredged material may result adverse effects on aquatic species and the benthic community directly through sediment dispersal through the water column and burial. The effects of chemical contamination may not be manifest until after several generations of species propagation and at such time, the adverse impacts would be irreversible.

Contaminants routinely found in the dredged material proposed for placement at these sites, at measurable levels sometimes significantly above ambient concentrations at each site, may include but are not limited to: PCBs, copper, cadmium, iron, zinc, and mercury. These compounds will bioaccumulate throughout the food chain, potentially causing consumptive risks to humans, as well as acute and chronic toxicity to fish and other predators, including federally and state-listed threatened and endangered species. As with concerns over water quality impacts set forth in Policy 5 and repeated here, failure to adequately address cumulative and secondary impacts of these contaminants represents a significant gap in EPA's analysis in the consistency determination.

The EPA's proposed rule amendments do not address cumulative effects due to the anticipated disposal activities and the repeated and intentional addition of elevated contaminants to the Sound. The proposed amendments are not consistent to the maximum extent practicable 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.

Policy 10 promotes beneficial uses of dredged material, consistent with past practices in the Long Island Sound region, by requiring the beneficial use of suitable dredged material" ... for beach nourishment,

[4] See NYS Petition to EPA, dated March 4, 2016

dune reconstruction, and other beneficial uses," allowing" ... placement of suitable dredged material in nearshore locations to advance maritime and port-related functions" and avoiding "placement of dredged material in Long Island Sound when opportunities for beneficial reuse of the material exist" (LIS CMP at page 85).[5]

The 2005 Final Rule and its restrictions directed the Corps to develop a DMMP to establish a management strategy for dredged material that would reduce or eliminate open-water disposal in Long Island Sound. The proposed rule amendment accepts and anticipates continued unabated use of CLDS and WLDS as the selected preferred alternative for a majority of the identified projects, as summarized in the DMMP, section 7 and currently written in the proposed rule. (See 81 Fed. Reg. 7062-7063 [Feb. 10, 2016]). The proposed rule does not establish any measurable pathways to the clear staged reduction in open-water disposal. Therefore the proposed action is not consistent to the maximum extent practicable with this policy.

Policy 11 Promote sustainable use of living marine resources in Long Island Sound.
Policy 11.1 Ensure the long-term maintenance and health of living marine resources.
Policy 11.2 Provide for commercial and recreational use of the Sound's finfish, shellfish, crustaceans, and marine plants.

The living marine resources of the Sound play an important role in the social and economic well-being of the people of the Long Island Sound region. Commercial and recreational uses of the Sound's living marine resources constitute an important contribution to the economy of the region and the State. The continued use of the Sound's living resources depends on maintaining the long-term health and abundance of marine fisheries resources and the habitats, and on ensuring that the resources are sustained in usable abundance and diversity for future generations.

The DMMP provides very limited data on the cumulative effects to the benthic ecology from repeated disposal activities at these sites to support the EPA's proposed rule amendments. While the Corps and the EPA have relied on the DAMOS monitoring program, DAMOS does not address cumulative chemical impacts to species. As stated in the analysis of Policies 6 and 8 above, water quality impacts are anticipated as a result of site use, as well as the introduction of contaminants that could cause consumptive risks to humans, as well as acute and chronic toxicity to fish and other predators. Therefore, the activity is not consistent to the maximum extent practicable with this policy.

V. CONDITION

DOS has determined, through the above coastal policy analysis, that the EPA's proposed rule amendments and its accompanying consistency determination are not consistent with the enforceable policies contained within the LIS CMP.

The Department is setting forth the following conditions in accordance with 15 C.F.R. § 930.4 that, if included in the EPA amended rule, would lead to the clear staged reduction of open-water disposal at CLDS and WLDS and allow the project to be found consistent with the LIS CMP. These conditions, as identified in DOS's comment on the proposed EPA rule amendments,[6] address the shortcomings of the DMMP and EPA's proposed amendments, as well as DOS's concerns for achieving the 2005 Final Rule's goal of measurable, staged reductions in open-water disposal of dredged materials in Long Island Sound, and are as follows:

[5] See additional policy analysis on pp. 22-23 of the NYS DOS 2004 Objection letter for F-2004-0228 (DA), attached.
[6] See NYS Public Comments to EPA dated March 25, 2015

1. The goal of the amended Rule must remain the same as the 2005 Rule "to reduce or eliminate open-water disposal of dredged material in Long Island Sound".
2. A Steering Committee of high level representatives from the States, EPA and the Corps should be established and charged with setting a baseline from which to measure how much dredged material has been disposed of in the Sound.
3. The Steering Committee will establish step-downs in the amount of dredged material to be disposed of over time with a mechanism to track those step-down reductions. Due to the very nature of dredging projects, we recognize that there may be fluctuations in annual volumes. We believe that this type of process will ultimately achieve actual reductions in accordance with the goal of the 2005 rule.
4. To provide additional surety that the goal will be met, we request that an additional provision be included in the rule to provide that if there is an initial failure to maintain or reduce the amount of disposal over the next 10 years, as measured at year 10, that the rule can be re-opened upon a petition to EPA. This would afford further assurance that the parties successfully work together to meet the goal. For the purpose of step-downs, we recognize that due to the nature of dredge projects there may be "exceptional circumstances" that on occasion, could result in delay in meeting a step-down, but that this should not affect our shared ability to meet the ten-year milestone.
5. We support EPA's proposal to charge the regional dredge team to review each project and require beneficial use of dredged material, where practicable, utilizing the EPA definition of practicable.
6. Ultimately, we believe that all the parties must work together to find viable alternatives to open-water disposal, including identifying possible resources and the removal of regulatory hurdles to alternative uses to open-water disposal. New York is willing to do so and commits to work with the parties on two initial pilot projects.

VI. CONCLUSION

The EPA rule amendment, as currently proposed, is inconsistent with the enforceable coastal Policies 6, 8, 10, and 11 of the LIS CMP and applicable LWRPs. DOS has included conditions in Section V, above, that if accepted and included in the EPA amended rule for the CLDS and WLDS site designations, would provide for this conditional concurrence to be considered as a concurrence. If the conditions are not accepted and fully implemented, this conditional concurrence shall be treated as an objection.

Sincerely

Sandra Allen
Deputy Secretary of State

Cc: *via e-mail only*
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