

of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during any investigation and to take measures to circumvent the investigation (e.g., destroy evidence or flee the area to avoid investigation).

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the accounting disclosures provision of subsection (c)(3). The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases.

(3) From subsection (d), (e)(4)(G) and (H), (e)(8), (f) and (g) because these provisions concern individual access to and amendment of law enforcement and intelligence records and compliance could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access could compromise sensitive law enforcement information; disclose information that could constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses. The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases with subjects of the information.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes. Relevance and necessity are questions of judgment and timing. For example, what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(5) From subsections (e)(2) and (3) because it is not feasible to comply with these provisions given the nature of this system. The majority of the records in

this system come from other federal, state, local, joint, foreign, tribal, and international agencies; therefore, it is not feasible for the FBI to collect information directly from the individual or to provide notice. Additionally, the application of this provision could present a serious impediment to the FBI's responsibilities to detect, deter, and prosecute crimes and to protect the national security. Application of these provisions would put the subject of an investigation on notice of that fact and allow the subject an opportunity to engage in conduct intended to impede that activity or avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has already been published in the **Federal Register** through the SORN documentation. Should the subsection be so interpreted, exemption from this provision is necessary to protect the sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With time, additional facts, or analysis, information may acquire new significance. The restrictions imposed by subsection (e)(5) would limit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement. Although the FBI has claimed this exemption, it continuously works with its federal, state, local, tribal, and international partners to maintain the accuracy of records to the greatest extent practicable. The FBI does so with established policies and practices. The criminal justice and national security communities have a strong operational interest in using up-to-date and accurate records and will foster relationships with partners to further this interest.

Dated: August 28, 2019.

**Peter A. Winn,**

*Acting Chief Privacy and Civil Liberties Officer, United States Department of Justice.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 228

[EPA-R01-OW-2019-0521; FRL-9999-61-Region 1]

### Ocean Disposal; Designation of an Ocean Dredged Material Disposal Site for the Southern Maine, New Hampshire, and Northern Massachusetts Coastal Region

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

**ACTION:** Proposed rule

**SUMMARY:** The Environmental Protection Agency (EPA) today proposes to designate one ocean dredged material disposal site (ODMDS), the Isles of Shoals North Disposal Site (IOSN), located approximately 10.8 nautical miles (nmi) east of Portsmouth, New Hampshire, pursuant to the Marine Protection, Research and Sanctuaries Act, as amended (MPRSA). This action is necessary to serve the long-term need for an ODMDS for the possible future disposal of suitable dredged material from harbors and navigation channels in southern Maine, New Hampshire, and northern Massachusetts.

The proposed action is described in a Draft Environmental Assessment and Evaluation Study (DEA) also being released today for public comment. The DEA recommends designation of the proposed IOSN pursuant to the MPRSA as the preferred alternative from the range of options considered. The draft Site Management and Monitoring Plan (SMMP) is provided as Appendix G of the DEA.

**DATES:** Written comments must be received on or before October 18, 2019.

**ADDRESSES:** You may submit your comments, identified by Docket ID No. EPA-R01-OW-2019-0521, through the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary

submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**Docket:** Publicly available docket materials are available either electronically at [regulations.gov](https://www.regulations.gov) or on the EPA Region 1 Ocean Dumping web page at <https://www.epa.gov/ocean-dumping/managing-ocean-dumping-epa-region-1>. They are also available in hard copy during normal business hours at the EPA Region 1 Library, 5 Post Office Square, Boston, MA 02109.

The supporting document for this site designation is the *Draft Environmental Assessment and Evaluation Study for Designation of an Ocean Dredged Material Disposal Site for the Southern Maine, New Hampshire, and Northern Massachusetts Coastal Region*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Olga Guza-Pabst, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Mail Code: 06-1, Boston, MA 02109-3912, telephone: (617) 918-1542; fax: (617) 918-0542; email address: [Guza-Pabst.Olga@epa.gov](mailto:Guza-Pabst.Olga@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

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

- I. Background
- II. Purpose and Need
- III. Potentially Affected Entities
- IV. Disposal Site Description
- V. Compliance With Statutory and Regulatory Authorities
  - A. Marine Protection, Research, and Sanctuaries Act and Clean Water Act
  - B. National Environmental Policy Act
  - C. Coastal Zone Management Act
  - D. Endangered Species Act
  - E. Magnuson-Stevens Fishery Conservation and Management Act
- VI. Restrictions
- VII. Proposed Action
- VIII. Supporting Documents
- IX. Statutory and Executive Order Reviews

#### **I. Background**

Section 102(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. 1412, gives EPA the authority to designate sites where ocean disposal may be permitted. On October 1, 1986, the Administrator delegated the authority to designate ocean dredged material disposal sites (ODMDS) to the Regional Administrator of the Region in which the sites are located. The preferred alternative site, IOSN, is located within

the area assigned to EPA Region 1, *see* 40 CFR 1.7(b)(1); therefore, this designation is being proposed pursuant to the EPA Region 1 Administrator's delegated authority.

EPA regulations (40 CFR 228.4(e)(1)) promulgated under the MPRSA require, among other things, that EPA designate ocean disposal sites by promulgation in 40 CFR part 228. Designated ocean disposal sites are codified at 40 CFR 228.15. EPA-designated sites require a SMMP that will help ensure environmentally sound monitoring and management of the sites. Section 103(b) of the MPRSA, 33 U.S.C. 1413(b), provides that any ocean disposal of dredged material should occur at EPA-designated sites to the maximum extent feasible. In the absence of an available EPA-designated ocean disposal site, however, the USACE is authorized to "select" appropriate ocean disposal sites under MPRSA section 103(b). MPRSA section 103(b) restricts the use of USACE-selected sites to two separate five-year terms. There are no EPA-designated dredged material disposal sites off the coast of southern Maine, New Hampshire, and northern Massachusetts. There is one USACE-selected site in this area, the Cape Arundel Disposal Site (CADS), but it will no longer be available after December 31, 2021, when its Congressionally-authorized term of use expires.

Regulations implementing MPRSA are set forth at 40 CFR parts 220 to 229 (Ocean Dumping Regulations). With few exceptions, the MPRSA prohibits the transportation of material from the United States for the purpose of ocean dumping except as may be authorized by a permit or authorization issued under the MPRSA. The MPRSA divides permitting responsibility between EPA and the U.S. Army Corps of Engineers (USACE). Under section 102 of the MPRSA, EPA has responsibility for issuing permits for all materials other than dredged material (*e.g.*, vessels, fish wastes, burial at sea).<sup>1</sup> Under section 103 of the MPRSA, the Secretary of the Army has the responsibility for issuing permits and authorizations (in the case of USACE projects) for the ocean dumping of dredged material. This permitting authority has been delegated to the District Engineer of the USACE New England District. The USACE makes determinations whether to issue permits and authorizations for dredged material based on the application of, among other things, EPA's ocean

dumping criteria regulations. *See* 40 CFR 227.4, 227.5 and 227.6. MPRSA permits and federal projects involving ocean dumping of dredged material are subject to EPA review and concurrence in accordance with 33 U.S.C. 1413(c). EPA may concur with or without conditions or decline to concur on the permit, *i.e.*, non-concur. If EPA concurs with conditions, the final permit must include those conditions. If EPA declines to concur (non-concurs) on an ocean dumping permit for dredged material, USACE cannot issue the permit.

This rule proposes to designate the proposed IOSN for the ocean disposal of suitable dredged material. EPA has conducted the disposal site designation process consistent with the requirements of the MPRSA, the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and other relevant statutes and regulations. The site designation is intended to be effective for an indefinite period of time.

It is important to understand that the designation of an (ODMDS) by EPA does not by itself authorize the disposal at that site of dredged material from any particular dredging project. For example, designation of the proposed IOSN would only make that ocean site available to receive dredged material from a specific project if no environmentally preferable, practicable alternative for managing that dredged material exists, and if analysis of the dredged material indicates that it is suitable for ocean disposal under the MPRSA. *See* 40 CFR 227.1(b), 227.2 and 227.3; 40 CFR part 227, subparts B and C.

Thus, each proposed dredging project will be evaluated on a case-by-case basis to determine whether there are practicable, environmentally preferable alternatives to ocean disposal (*i.e.*, whether there is a need for ocean disposal). *See* 40 CFR 227.16. In addition, the dredged material from each proposed disposal project will be subject to MPRSA sediment testing requirements to determine its suitability for possible ocean disposal at an approved site. *See* 40 CFR 227.6. Alternatives to ocean disposal that will be considered include upland disposal and beneficial uses such as beach nourishment. If environmentally preferable, practicable disposal alternatives exist, ocean disposal will not be allowed. EPA also will not approve dredged material for ocean disposal if it determines that the material has the potential to cause unacceptable adverse effects to the marine environment or human health.

<sup>1</sup> The MPRSA also bans ocean disposal of certain types of materials, such as, for example, chemical weapons and medical waste. *See* 33 U.S.C. 1412(a).

See 40 CFR 227.4. The review process for proposed disposal projects is discussed in more detail below and in the draft SMMP.

Dredged material disposal sites designated by EPA under the MPRSA are subject to detailed management and monitoring protocols to track site conditions and prevent the occurrence of unacceptable adverse effects. See 33 U.S.C. 1412(c)(3)–(5). The management and monitoring protocols for the proposed IOSN are described in the Draft SMMP. EPA is authorized to close or limit the use of these sites to further disposal activity if their use causes unacceptable adverse impacts to the marine environment or human health.

## II. Purpose and Need

The purpose of the proposed action is to designate an ocean disposal site that will provide a long-term dredged material disposal option for dredged material from harbors and navigation channels in southern Maine, New Hampshire, and northern Massachusetts. This is necessary to ensure the viability of dredging projects needed to maintain international commerce and navigation through authorized federal navigation projects and to ensure safe vessel passage for public and private entities. The appropriateness of ocean disposal for any specific, individual dredging project will be determined on a case-by-case basis under the permit and authorization (in the case of Corps projects) process under MPRSA.

The need for this effort derives from the following facts: (1) The availability of an ODMDS in the vicinity of southern Maine, New Hampshire, and northern Massachusetts is necessary to help maintain safe navigation of authorized federal channels and permitted actions; (2) projected dredging needs for the area were calculated to be approximately 1.5 million cubic yards (mcy) of material over the next 20 years, which significantly exceeds the capacity of available practicable alternatives to ocean disposal; (3) the states of Maine and New Hampshire have expressed concern that available, practicable dredged material disposal capacity is insufficient to meet projected dredging needs and they requested this designation from EPA; (4) the historically used, in the 1960s and early 1970s, former Isles of Shoals Disposal Site (IOSH) was examined for potential designation, however, this former site is located in an area that contains a diversity of habitats that are not compatible with the ocean disposal of dredged material; and (5) the possibility of expanding the existing CADS to

accommodate the region's dredging needs is infeasible, as studies revealed that suitable areas with the capacity for an ODMDS are limited at that site. The existing CADS is a USACE short-term selected site under MPRSA section 103(b) and is scheduled to close on December 31, 2021.

In addition, the closest EPA-designated ODMDSs outside the "Zone of Siting Feasibility," (or ZSF, which is discussed in Section 4 of the DEA), are the Portland Dredged Material Disposal Site (PDS) and the Massachusetts Bay Disposal Site (MBDS). The draw area (*i.e.*, the area from which dredged material would come) for the proposed IOSN disposal site would encompass any projects closer to that site than to either the PDS or MBDS. The center of the ZSF is located about 42 miles from the MBDS and 43 miles from the PDS.

While PDS and MBDS are environmentally sound sites for receiving suitable dredged material, EPA does not consider them to be truly viable options for the southern Maine, New Hampshire, and northern Massachusetts region given their distance from the ZSF, which would significantly increase the transport distance for, and duration of, ocean disposal for dredging projects from that region. This, in turn, would greatly increase the cost of such projects and would likely render many dredging projects too expensive to conduct, thus threatening safe navigation and interfering with marine recreation and commerce. Furthermore, the greater transport distance would also be environmentally detrimental because it would entail greater energy use, increased air emissions, and increased risk of spills or disposal outside of the prescribed ocean dumping zone ("short dumps") (DEA, Section 7.0). Regarding air emissions, increased hauling distances may require using larger scows with more powerful tug boats, which would use more fuel and cause more emission of air pollutants.

Congress has directed that the disposal of dredged material should take place at EPA-designated sites, rather than USACE-selected sites, when EPA-designated sites are available (*see* MPRSA 103(b)). With the CADS (a USACE-selected site under MPRSA section 103 for short-term use) nearing capacity and expiring on December 31, 2021, EPA's ocean disposal site designation studies were designed to determine whether this site or any other sites should be designated for continued long-term use.

MPRSA criteria for selecting and designating sites require EPA to consider previously used disposal sites

or areas, with active or historically used sites given preference in the evaluation assuming all other things equal (40 CFR 228.5(e)). This preference is intended to concentrate the effects, if any, of disposal practices to relatively smaller, discrete areas that have already received dredged material, and avoid distributing any effects over a larger geographic area.

Periodic dredging of harbors and channels and, therefore, dredged material management, are essential for ensuring safe navigation and facilitating marine commerce. This is because the natural processes of erosion and siltation result in sediment accumulation in federal navigation channels, harbors, port facilities, marinas, and other important areas of our water bodies. Unsafe navigational conditions not only threaten public health and safety, but also pose an environmental threat from an increased risk of spills from vessels involved in accidents.

Economic considerations also contribute to the need for dredging (and the environmentally sound management of dredged material). There are many important navigation-dependent businesses and industries in the southern Maine, New Hampshire, and northern Massachusetts region, ranging from shipping (especially the transportation of petroleum fuels and bulk materials), to recreational boating-related businesses, marine transportation, commercial and recreational fishing, interstate ferry operations, and U.S. Navy and U.S. Coast Guard facilities. These businesses and industries contribute substantially to the region's economic output, the gross state product (GSP) of the bordering states, and tax revenue. Continued access to harbors, berths, and mooring areas in the ZSF is vital to ensuring the continued economic health of these industries, and to preserving the ability of the region to import fuels, bulk supplies, and other commodities at competitive prices and to preserve ocean access for the commercial fishing fleet that exists within the ZSF. In addition, preserving navigation channels, marinas, harbors, berthing areas, and other marine resources, improves the quality of life for residents and visitors to the southern Maine, New Hampshire, and northern Massachusetts region by facilitating recreational boating and associated activities, such as fishing and sightseeing.

## III. Potentially Affected Entities

Entities potentially affected by this proposed action are persons, organizations, or government bodies seeking to dispose of dredged material

in ocean waters off the coast of southern Maine, New Hampshire, and northern Massachusetts, subject to the requirements of the MPRSA and their implementing regulations. This proposed rule is expected to be primarily of relevance to:

(a) Parties seeking MPRSA permits from to transport dredged material for disposal into the ocean waters off the coast of southern Maine, New Hampshire, and northern Massachusetts, and (b) to the USACE itself for its own dredged material projects involving ocean disposal.

Potentially affected entities and categories of entities that may seek to use the proposed ocean dredged material disposal site and would be subject to the proposed rule include:

| Category                              | Examples of potentially affected entities                                                                                                                                        |
|---------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Federal government.                   | USACE (Civil Works Projects), U.S. Navy, U.S. Coast Guard, and other federal agencies.                                                                                           |
| State, local, and tribal governments. | Governments owning and/or responsible for ports, harbors, and/or berths, government agencies requiring ocean disposal of dredged material associated with public works projects. |
| Industry and general public.          | Port authorities, shipyards and marine repair facilities, marinas and boat-yards, and berth owners.                                                                              |

This table is not intended to be comprehensive, but rather provides a guide for readers regarding the types of entities that could potentially be affected should the proposed rule become a final rule. EPA notes that nothing in this proposed rule alters the jurisdiction or authority of EPA, the USACE, or the types of entities regulated under the MPRSA. Questions regarding the applicability of this proposed rule to a particular entity should be directed to the contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

IV. Disposal Site Description

Today’s proposed rule is to designate the IOSN for ocean disposal of suitable dredged material. A DEA and draft SMMP have been prepared for the proposed IOSN and are available for review and comment by the public. Copies may be obtained by request from the **FOR FURTHER INFORMATION CONTACT** listed in the introductory section to this proposed rule. Use of the proposed IOSN would be subject to any restrictions included in the site designation and the approved SMMP.

These restrictions will be based on a thorough evaluation of the proposed site pursuant to the Ocean Dumping Regulations, potential disposal activity expected at the site, and consideration of public review and comment. Additional restrictions may be placed on any permit or authorization to use the site.

The proposed IOSN is located off the coast southern Maine, New Hampshire, and northern Massachusetts, approximately 10.8 nmi east of Portsmouth, New Hampshire and 5.25 nmi east-northeast of the former IOSH site. This new potential disposal site is currently defined as an 8,500-foot (2590-meter) diameter circle on the seafloor with its center located at 70° 26.995’ W and 43° 1.142’ N. The sediments at the site are predominately soft, fine-grained silts and clays. Water depths at proposed IOSN vary from 255 feet to 340 feet and gradually slope from approximately 295 feet on the western boundary to 328 feet in the southeastern portion of the site. The area is generally flat soft-bottom.

V. Compliance With Statutory and Regulatory Authorities

In proposing to designate the IOSN for the ocean disposal of dredged material from harbors and navigation channels in southern Maine, New Hampshire, and northern Massachusetts, EPA has conducted the dredged material disposal site designation process consistent with the requirements of the MPRSA, NEPA, CZMA, the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and all other applicable legal requirements.

A. Marine Protection, Research, and Sanctuaries Act

Section 102(c) of the MPRSA, 33 U.S.C. 1412(c), gives the Administrator of EPA authority to designate sites where ocean disposal of dredged material may be permitted. See also 33 U.S.C. 1413(b) and 40 CFR 228.4(e). The statute places no specific time limit on the term for use of an EPA-designated ocean disposal site. EPA may, however, place various restrictions or limits on the use of a site based on the site’s capacity to accommodate dredged material or other environmental concerns. See 33 U.S.C. 1412(c). In addition, EPA may, if appropriate, close a previously designated dredged material disposal site. See 33 U.S.C. 1412(c)(3)(E). See also 40 CFR 228.3(a).

The Ocean Dumping Regulations, see generally 40 CFR Subchapter H, prescribe general and specific criteria at 40 CFR 228.5 and 228.6, respectively, to

guide EPA’s choice of disposal sites for final designation. EPA regulations at 40 CFR 228.4(e)(1) provide, among other things, that EPA will designate any disposal sites by promulgation in 40 CFR part 228. Ocean dumping sites designated on a final basis are promulgated at 40 CFR 228.15. Section 102(c) of the MPRSA, 33 U.S.C. 1412(c), and 40 CFR 228.3 also establish requirements for EPA’s ongoing management and monitoring, in conjunction with the USACE, of dredged material disposal sites designated by EPA to ensure that unacceptable, adverse environmental impacts do not occur. Examples of such management and monitoring include the following: Regulating the times, rates, and methods of disposal, as well as the quantities and types of material that may be disposed; conducting pre- and post-disposal monitoring of sites; conducting disposal site evaluation and designation studies; and, if warranted, recommending modification of site use and/or designation conditions and restrictions. See also 40 CFR 228.7, 228.8, 228.9.

Finally, a disposal site designation by EPA does not actually authorize any dredged material to be disposed of at that site. It only makes that site available as a possible management option if various other conditions are met first. Use of the site for dredged material disposal must be authorized by the USACE under MPRSA section 103(b), subject to EPA review and concurrence, and such disposal at the site can only be authorized if: (1) It is determined that there is a need for ocean disposal for that project (i.e., that there are no practicable alternatives to such disposal that would cause less harm to the environment); and (2) the dredged material satisfies the applicable environmental impact criteria specified in ocean dumping regulations at 40 CFR part 227. See 40 CFR 227.1(b), 227.2, 227.4, 227.5, 227.6 and 227.16. Furthermore, the authorization for disposal also is subject to review for compliance with other applicable legal requirements, which may include the ESA, the MSFCMA, the CWA (including any applicable state water quality standards), NEPA, and the CZMA. The following describes EPA’s evaluation of the proposed IOSN alternatives pursuant to the applicable site evaluation criteria, and its compliance with site management and monitoring requirements.

EPA undertook its evaluation of whether to designate any dredged material disposal sites in the southern Maine, New Hampshire, and northern Massachusetts region pursuant to its authority under MPRSA section 102(c) in response to several factors. These factors include the following:

- The determination by EPA, based on the evaluation of projected dredging needs over the 20-year planning horizon and alternatives to open-water disposal conducted for the DEA, that the potential alternatives to open-water disposal do not provide sufficient capacity to accept the quantity of dredged material expected to be generated over the next 20 years in the region;

- Recognition that use of the CADS will cease after December 31, 2021, pursuant to the USACE site selection authority under MPRSA section 103(b) and the closure date for the site as established by Congress under Public Law 115–270, Title I, Sec 1312;

- The understanding that in the absence of an EPA-designated disposal site or sites, any necessary ocean disposal would either be stymied, despite the importance of dredging for ensuring navigational safety and facilitating marine commercial and recreational activities, or the USACE would have to undertake additional short-term ocean disposal site selections under MPRSA section 103 in the future;
- The clear Congressional preference expressed in MPRSA section 103(b) that any ocean disposal of dredged material take place at EPA-designated sites, if feasible; and

- The fact that the two closest EPA-designated ocean disposal sites to this region, the PDS and MBDS, are 42 nmi and 43 nmi respectively from the ZSF dredging center, which would significantly increase transportation costs and project durations, which would likely render some dredging projects infeasible, while also projects that went forward would involve increased energy use, air emissions, and the risk of spills or short-dumps.

EPA's evaluation considered whether there was a need to designate one or more ocean disposal sites for long-term dredged material disposal, including an assessment of whether other dredged material management methods could reasonably be judged to obviate the need for such designations. Having concluded that there was a need for ocean disposal sites, EPA then assessed whether there were sites that would satisfy the applicable environmental criteria to support a site designation under MPRSA section 102(c). The MPRSA and EPA regulations

promulgated thereunder address the designation of dredged material disposal sites. The law and regulations specify criteria for use in site evaluations and indicate that a SMMP must be developed for all designated sites. As discussed below, EPA complied with all of these provisions of the statute and regulations in proposing to designate the IOSN.

#### 1. Procedural Requirements

MPRSA sections 102(c) and 103(b) indicate that EPA may designate ocean disposal sites for dredged material. EPA regulations at 40 CFR 228.4(e) specify that dredged material disposal sites will be “designated by EPA promulgation in this [40 CFR] part 228 . . . .” EPA regulations at 40 CFR 228.6(b) direct that if an environmental assessment and evaluation is prepared by EPA to assess the proposed designation of one or more disposal sites, it should include the results of an environmental evaluation of the proposed disposal site(s), the environmental assessment should be presented to the public along with a proposed rule for the proposed disposal site designation(s), and that a Final Environmental Assessment should be provided at the time of final rulemaking for the site designation. EPA has complied with all procedural requirements related to the publication of this proposed rule and associated DEA. The Agency has prepared a thorough environmental evaluation of the recommended alternative site being proposed for designation, other alternatives sites, and other courses of action (including the option of not designating open-water disposal sites). This evaluation is presented in the DEA (and related documents) and this proposed rule.

#### 2. Disposal Site Selection Criteria

EPA regulations under the MPRSA identify four general criteria and 11 specific criteria for evaluating locations for the potential designation of dredged material disposal sites. See 40 CFR 228.4(e), 228.5 and 228.6. The evaluation of the proposed IOSN with respect to the four general and 11 specific criteria is discussed in detail in the DEA and supporting documents and is summarized below.

##### General Criteria (40 CFR 228.5)

As described in the DEA, and summarized below, EPA has determined that the proposed IOSN satisfies the four general criteria specified in 40 CFR 228.5. This is discussed in more detail in Chapter 4 of the DEA.

*i. Sites must be selected to minimize interference with other activities in the*

*marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation (40 CFR 228.5(a)).*

EPA's evaluation determined that use of the proposed IOSN would cause minimal interference with the activities identified in the criterion. EPA and USACE used information from a variety of sources to determine what activities might be interfered with by the disposal of dredged material at the proposed IOSN. EPA considered recreational activities, commercial fishing areas, cultural or historically significant areas, commercial and recreational navigation, and existing scientific research activities. EPA and USACE used mapped Geographic Information System (GIS) data to overlay the locations of various uses and natural resources of the marine environment on the disposal site location and surrounding areas (including their bathymetry). Analysis of this data indicated that use of the site would have minimal potential for interfering with other existing or ongoing uses of the marine environment in and around the proposed IOSN, including lobster harvesting or fishing activities. While the site is located in an area where periodic fishing activity occurs, it is not considered a unique fishing ground or highly significant fishery harvest area. Finally, the site is not located in shipping lanes or any other region of heavy commercial or recreational navigation. Furthermore, the site is located in an area where any other vessels could easily navigate around any disposal vessels at or near the site, and the significant water depths at the site mean that material placed there will not interfere with navigation by extending up too high into the water column.

*ii. Sites must be situated such that temporary perturbations to water quality or other environmental conditions during initial mixing caused by disposal operations would be reduced to normal ambient levels or to undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery (40 CFR 228.5(b)).*

EPA's analysis concludes that the proposed IOSN satisfies this criterion. First, the site will be used only for the disposal of dredged material determined to be suitable for ocean disposal by application of the MPRSA's ocean dumping criteria. See 40 CFR part 227. These criteria include provisions related to water quality and account for initial mixing. See 40 CFR 227.4, 227.5(d), 227.6(b) and (c), 227.13(c), 227.27, and

227.29. Data evaluated during development of the DEA, indicates that any temporary perturbations in water quality or other environmental conditions at the site during initial mixing from disposal operations will be limited to the immediate area of the site and will neither cause any significant environmental degradation at the site nor reach any beach, shoreline, marine sanctuary, or other important natural resource area. Second, the site is a significant distance from any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery.

*iii. The sizes of disposal sites will be limited in order to localize for identification and control any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-range impacts. Size, configuration, and location are to be determined as part of the disposal site evaluation (40 CFR 228.5(d)).*

EPA has determined, based on the information presented in the DEA, that the proposed IOSN alternative is sufficiently limited in size to allow for the identification and control of any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-range impacts. The proposed IOSN covers approximately 2.4 nmi<sup>2</sup> of bottom, which is approximately 0.007% of the bottom surface area of the Gulf of Maine. The long history of dredged material disposal site monitoring in New England, and specifically at active and historic dredged material disposal sites elsewhere in the Gulf of Maine, provides ample evidence that these surveillance and monitoring programs are effective at determining physical, chemical, and biological impacts at sites of the size of the options considered in this case.

The proposed IOSN is identified by specific coordinates spelled out in the DEA, and the use of precision navigation equipment in both dredged material disposal operations and monitoring efforts will enable accurate disposal operations and contribute to effective management and monitoring of the sites. Detailed plans for the management and monitoring of the proposed IOSN are described in the draft SMMP (Appendix G of the DEA). Finally, as discussed herein and in the DEA, EPA has tailored the size of the proposed IOSN based on site characteristics, such as bottom sediment type and bottom features, so that the area and boundaries of the sites are

optimized for environmentally sound dredged material disposal operations.

*iv. EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used (40 CFR 228.5(e)).*

EPA has determined that designation of the proposed IOSN is consistent with this criterion. EPA evaluated sites beyond the edge of the continental shelf and historical disposal sites in the Gulf of Maine as part of the alternatives analysis conducted for the DEA. Potential disposal areas located off the continental shelf would be a significant distance offshore, and impracticable for dredging projects from the area under evaluation. The nearest point on the continental shelf/slope boundary to Portsmouth Harbor is more than 230 miles south, about 96 miles southeast of Nantucket. The distance to the slope due east is even greater at about 270 miles. The haul distance to an off-shelf disposal site is therefore much greater than the average operational limit of the southern Maine, New Hampshire, and northern Massachusetts projects, making an off-shelf site infeasible for all projects. Additionally, the cost for evaluation and monitoring and the uncertainty of the environmental effects of off-shelf placement makes that option undesirable. Environmental concerns include increased risk of encountering endangered species during transit, increased fuel consumption and air emissions, and greater potential for accidents in transit that could lead to dredged material being dumped in unintended areas.

USACE dredging and disposal records do not show evidence of dredged material ever having been placed at the area that encompasses the proposed IOSN. The only sites within the ZSF that have been used historically are the former IOSH which, according to USACE files, was used in the 1960s and early 1970s, or at the CADS, a USACE-selected MPRSA Section 103 site located off of Cape Arundel, Maine. However, both the IOSH and the CADS are limited in their capacity to accept new material if they were to be designated and have remaining seafloor areas that are incompatible with dredged material disposal.

#### Specific Criteria (40 CFR 228.6)

In addition to the four general criteria discussed above, 40 CFR 228.6(a) lists eleven specific factors to be used in evaluating the impact of using the site(s) for dredged material disposal under the MPRSA. Consistency with the eleven specific criteria is discussed below. This

is also discussed in more detail in Chapter 4 of the DEA.

*i. Geographical Position, Depth of Water, Bottom Topography and Distance From Coast (40 CFR 228.6(a)(1)).*

Based on analyses in the DEA, EPA has concluded that the geographical position (*i.e.*, location), water depth, bottom topography (*i.e.*, bathymetry), and distance from coastlines of the proposed IOSN will facilitate containment of dredged material within site boundaries and reduce the likelihood of material being transported away from the site to adjacent seafloor areas. As described in the preceding Disposal Sites Description section and in the above discussion of compliance with general criteria iii and iv (40 CFR 228.5(c) and (d)), the proposed IOSN is located far enough from shore and in deep enough water to avoid adverse impacts to the coastline.

The proposed IOSN is a containment area, so dredged material placed there is expected to stay in the site and not cause adverse effects to adjacent seafloor areas. The closest point of land to the proposed IOSN is Portsmouth, New Hampshire, which is located approximately 10.8 nmi (20 km) to the west. The shoreward edge of the site is approximately nine nmi from the nearest beaches in Rye, NH, and the site is located in waters ranging from 255 to 340 feet deep. As discussed in the DEA, the proposed IOSN is of a sufficient depth to allow the disposal of the amount of material that is projected over the 20-year planning horizon without exceeding any depth threshold. As a result, any short-term impacts from dredged material disposal will be localized and this, together with other regulatory requirements described elsewhere in this document, will facilitate prevention of any adverse impacts at and around the proposed IOSN.

*ii. Location in Relation to Breeding, Spawning, Nursery, Feeding, or Passage Areas of Living Resources in Adult or Juvenile Phases (40 CFR 228.6(a)(2)).*

EPA considered the proposed IOSN in relation to breeding, spawning, nursery, feeding, and passage areas for adult and juvenile phases (*i.e.*, life stages) of living resources in the Gulf of Maine. From this analysis, EPA concluded that, while disposal of suitable dredged material at the proposed IOSN would cause some short-term, localized effects, overall it would not cause adverse effects to the habitat functions and living resources specified in the above criterion. As previously noted, the proposed IOSN covers approximately 2.4 nmi<sup>2</sup> of bottom, which is approximately 0.007%

of the bottom surface area of the Gulf of Maine.

Generally, there are three primary ways that dredged material disposal could potentially adversely affect marine resources. First, disposal can cause physical impacts by injuring or burying less mobile fish, shellfish, and benthic organisms, as well as their eggs and larvae. Second, tug and barge traffic transporting the dredged material to a disposal site could possibly collide or otherwise interfere with marine mammals and reptiles. Third, contaminants in the dredged material could potentially bioaccumulate through the food chain. However, EPA and the other federal and state agencies that regulate dredging and dredged material disposal have responsibilities and authorities to impose requirements that prevent or greatly limit the potential for these types of impacts to occur.

Dredged material disposal will have some localized impacts to fish, shellfish, and benthic organisms, such as clams and worms, that are present at an ocean disposal site (or in the water column directly above the site) during a disposal event. The sediment plume may entrain and smother some fish in the water column, and may bury some fish, shellfish, and other marine organisms on the sea floor. It also may result in a short-term loss of forage habitat in the immediate disposal area, but recolonization of disposal mounds by benthic infauna within 1–3 years after disposal is expected at the proposed IOSN. As discussed in the DEA (section 7.5.2), over time, disposal mounds recover and develop abundant and diverse biological communities that are healthy and able to support species typically found in the ambient surroundings. Some organisms may burrow deeply into sediments, often up to 20 inches, and are more likely to survive a burial event.

To further reduce potential environmental impacts associated with dredged material disposal, the dredged material from each proposed dredging project will be subjected to the MPRSA sediment testing requirements set forth at 40 CFR part 227 to determine its suitability for ocean disposal. Suitability for ocean disposal is determined by testing the proposed dredged material for toxicity and bioaccumulation and by quantifying the risk to human health that would result from consuming marine organisms that are exposed to the dredged material and its associated contaminants using a risk assessment model. If it is determined that the sediment is unsuitable for ocean disposal—that is, that it may

unreasonably degrade or endanger human health or the marine environment—it cannot be disposed at disposal sites designated under the MPRSA. *See* 40 CFR 227.6. Therefore, EPA does not anticipate significant effects on marine organisms from dredged material disposal at the sites under evaluation.

Regarding the potential for impacts to endangered species, EPA is complying with the ESA by consulting with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) concerning EPA's determination that the designation of the proposed IOSN would not likely adversely affect federally-listed species under their respective jurisdictions or any habitat designated as critical for such species. EPA also is coordinating with NMFS under the MSFCMA on potential impacts to essential fish habitat (EFH). Further details on these consultations are provided in the DEA and the sections below describing compliance with the ESA and MSFCMA.

EPA recognizes that dredged material disposal causes some short-term, localized adverse effects to marine organisms in the immediate vicinity of each disposal event. But because dredged material disposal would be limited to suitable material (see above regarding compliance with the general criterion at 40 CFR 228.5(d), EPA concludes that designating proposed IOSN would not cause unacceptable or unreasonable adverse impacts to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases. There is no evidence of long-term effects on benthic processes or habitat conditions.

*iii. Location in Relation to Beaches and Other Amenities Areas (40 CFR 228.6(a)(3)).*

EPA's analysis concludes that the proposed IOSN satisfies this criterion. The proposed IOSN is located approximately 10.8 nmi (20 km) east of Portsmouth, New Hampshire. The shoreward edge of the site is approximately nine nautical miles off the nearest beaches in Rye, NH, and is located in waters ranging in depth from 255 to 340 feet. The proposed IOSN is far enough away from beaches, parks, wildlife refuges, and other areas of special concern to prevent adverse impacts to these amenities. Based on information presented in section 6.3 of the DEA, and past monitoring of actual disposal activities, this distance is beyond any expected movement of dredged material due to tidal motion or currents. As noted above, any temporary perturbations in water quality or other

environmental conditions at the sites during initial mixing from disposal operations will be limited to the immediate area of the sites and will not reach any beaches, parks, wildlife refuges, or other areas of special concern.

Thus, EPA does not anticipate that the use of the proposed IOSN would cause any adverse impacts to beaches or other amenity areas.

*iv. Types and Quantities of Wastes Proposed To Be Disposed of, and Proposed Methods of Release, Including Methods of Packing the Waste, if Any (40 CFR 228.6(a)(4)).*

Dredged material subject to the MPRSA is not classified as a waste, and the proposed IOSN is only being considered for the disposal of dredged material; disposal of other types of material will not be allowed. It also should be noted that the disposal of certain other types of material is expressly prohibited by the MPRSA and EPA regulations (e.g., industrial waste, sewage sludge, chemical warfare agents, insufficiently characterized materials) (33 U.S.C. 1414b; 40 CFR 227.5).

Sites that are designated will receive dredged material transported by either government or private contractor hopper dredges or scows. Current hopper dredges or scows available for use have hopper capacities ranging from 800 to 6,000 cubic yards (cy). This would be the likely volume range of dredged material deposited in any one dredging placement cycle.

The volume of dredged material to be removed from federal projects in the southern Maine, New Hampshire, and northern Massachusetts region varies greatly from year to year depending upon need and funding. The majority of the dredged material to be disposed of in the ocean would come from shoals in the channels, anchorages, and turning basins in projects within the study area and would consist primarily of fine-grained marine sediments that have been transported into the projects by tidal currents, riverine deposition, and upland erosion. The fine-grained material undergoes rigorous testing to confirm that the material is suitable for unconfined ocean placement. The proposed site has been sized to accommodate the quantity of material expected to be placed there over the 20-year planning horizon. As previously discussed, dredging in southern Maine, New Hampshire, and northern Massachusetts is projected to generate approximately 1.5 million mc of dredged material over the next 20 years.

For all these reasons, no significant adverse impacts are expected to be associated with the types and quantities

of dredged material that may be disposed at the sites.

*v. Feasibility of Surveillance and Monitoring (40 CFR 228.6(a)(5)).*

Monitoring and surveillance are expected to be feasible at the proposed IOSN. Upon designation of a site, monitoring would be conducted according to the most current approved SMMP. As a containment site, the proposed IOSN is conducive to the type of monitoring most commonly conducted at dredged material disposal sites, including side-scan sonar, sediment profile imaging, and sediment grab sampling. The draft SMMP for the proposed IOSN is included as Appendix G of the DEA.

*vi. Dispersal, Horizontal Transport and Vertical Mixing Characteristics of the Area, Including Prevailing Current Direction and Velocity, if Any (40 CFR 228.6(a)(6)).*

The proposed IOSN site meets this criterion. The proposed IOSN is located in federal waters in water depths ranging from approximately 255 to 340 feet. Water circulation in the vicinity of the proposed IOSN is strongly influenced by the counterclockwise flow, or gyre, normally occurring in the Gulf of Maine. The circulation of the Gulf consists of two circular gyres, one counterclockwise within the interior of the Gulf, and the second, clockwise over Georges Bank. Maine coastal waters are included as the western portion of the counterclockwise gyre within the Gulf. Current patterns in the vicinity of the proposed IOSN are typified by coastal-parallel, non-tidal southerly drift currents generated by the overall circulation of the Gulf of Maine.

The fine-grained sediments that dominate the area of the proposed IOSN indicate that the site is in a depositional area. Consequently, any material placed at the proposed site would likely remain within the site and not be significantly affected or transported away from the site by currents.

*vii. Existence and Effects of Current and Previous Discharges and Dumping in the Area (Including Cumulative Effects) (40 CFR 228.6(a)(7)).*

USACE dredging and disposal records do not show evidence of dredged material ever having been disposed of in the area that encompasses the proposed IOSN. Dredged material from within the ZSF was historically disposed of at either the CADS or the former, historically used IOSH, which was used in the 1960s and early 1970s.

In general, results from decades of monitoring of current and historically used ocean disposal sites in the New England region indicate that the disposal of dredged material found

suitable for ocean disposal do not significantly alter the long-term functions and values of seafloor bottom as potential habitat for biological communities or contribute to long-term changes in water quality or water circulation at the disposal sites. EPA would expect this also to be the case for the proposed IOSN.

*viii. Interference with Shipping, Fishing, Recreation, Mineral Extraction, Desalination, Fish and Shellfish Culture, Areas of Special Scientific Importance and Other Legitimate Uses of the Ocean (40 CFR 228.6(a)(8)).*

In evaluating whether disposal activity at the sites could interfere with shipping, fishing, recreation, mineral extraction, desalination, fish or shellfish culture, areas of scientific importance, and other legitimate uses of the ocean, EPA considered both the effects of placing dredged material on the bottom at the proposed IOSN, and any effects from vessel traffic associated with transporting the dredged material to the disposal site. From this evaluation, EPA concluded there would be no unacceptable or unreasonable adverse effects on the considerations noted in this criterion. Some of the factors listed in this criterion have already been discussed above due to the overlap of this criterion with aspects of certain other criteria. Nevertheless, EPA will address each point below.

EPA does not anticipate conflicts with commercial navigation at the proposed IOSN. The Portsmouth Pilots and the USACE discussed the proposed IOSN disposal site location and its anticipated use with respect to navigation transit impacts (as discussed in more detail in section 4.4.1 of the DEA). Vessels transiting to and from Portsmouth Harbor from the south and southeast follow a route inshore of the Isles of Shoals which will avoid proposed IOSN Vessels approaching or departing to and from the east and northeast (toward Maine and Canada) do cross the general area of the proposed IOSN disposal site. The pilots stated that conflicts between dredge disposal operations and shipping for large and small projects can be avoided, however, by adequate notice to mariners of disposal activities and frequent marine communication between the disposal tugs and the Portsmouth Pilots. Given the open-water conditions around the site and the relatively infrequency of dredged material disposal operations, EPA concludes that any conflicts with vessels traveling in the area of the proposed IOSN should be easily managed in a safe, efficient manner.

EPA also carefully evaluated the potential effects of designating the

proposed IOSN on commercial and recreational fishing for both finfish and shellfish (including lobster) and concluded that there would be no unreasonable or unacceptable adverse effects. As discussed above in relation to other site evaluation criteria, dredged material disposal will only have short-term, incidental, and insignificant effects on organisms in the disposal sites and no appreciable effects beyond the sites. Indeed, since past dredged material disposal has been determined to have no significant adverse effects on fishing, the similar projected levels of future disposal activities at the designated site are not expected to have any significant adverse effects.

The four main reasons that EPA concluded that no unacceptable adverse effects would occur from disposal of dredged material at the proposed site are discussed below. First, EPA has concluded that any contaminants in material permitted for ocean disposal—having satisfied the dredged material criteria in the regulations that restrict any toxicity and bioaccumulation—will not cause any significant adverse effects to fish, shellfish, or other aquatic organisms. Because the proposed IOSN is a containment area, dredged material disposed at the site is expected to remain there.

Second, the disposal sites do not encompass any especially important, sensitive, or limited habitat for the Gulf of Maine's fish and shellfish, such as key spawning or nursery habitat for species of finfish. Numerous studies and data reviewed by EPA and the USACE indicate that there is low potential for any future incremental risk from the ocean disposal of dredged sediments at the proposed IOSN, either in the long- or short-term.

Third, while EPA found that a small number of demersal fish (e.g., winter flounder), shellfish (e.g., clams and lobsters), benthic organisms (e.g., worms), and zooplankton and phytoplankton could be lost due to the physical effects of disposal (e.g., burial of organisms on the seafloor by dredged material and entrainment of plankton in the water column by dredged material upon its release from a disposal barge), EPA also determined that these minor, temporary adverse effects would be neither unreasonable nor unacceptable. This determination was based on EPA's conclusion that the numbers of organisms potentially affected represent only a minuscule percentage of those in the Gulf of Maine, and findings from past monitoring in the region consistently show the rapid recovery of the benthic community in an area that has received dredged material.

Fourth, EPA has determined that vessel traffic associated with dredged material disposal will not have any unreasonable or unacceptable adverse effects on fishing. There currently are no mineral extraction activities or desalinization facilities in the Gulf of Maine region with which disposal activity could potentially interfere. No finfish aquaculture currently takes place in the southeastern Gulf of Maine. Finally, the proposed IOSN is not in an area of special scientific importance; in fact, areas with such characteristics were screened out very early in the alternatives screening process. Accordingly, disposing of dredged material at the proposed IOSN will not interfere with any of the activities described in this criterion or other legitimate uses of this part of the Gulf of Maine.

In addition, the designation and use of the proposed IOSN site has been determined by the EPA to be consistent with the Maine, New Hampshire, and Massachusetts coastal zone management programs (Appendix A of the DEA). The Maine, New Hampshire and Massachusetts coastal zone management programs will review this consistency determination and EPA has requested that they provide written notification of their findings.

*ix. The Existing Water Quality and Ecology of the Sites as Determined by Available Data or by Trend Assessment or Baseline Surveys (40 CFR 228.6(a)(9)).*

EPA's analysis of existing water quality and ecological conditions at the site, which was based on available data, trend assessments, and baseline surveys, indicates that use of the proposed IOSN will cause no unacceptable or unreasonable adverse environmental effects. Considerations related to water quality and various ecological factors (e.g., sediment quality, benthic organisms, fish and shellfish) have already been discussed above in relation to other site selection criteria and are discussed in detail in the DEA and supporting documents. In considering this criterion, EPA considered existing water quality and sediment quality data collected in the Gulf of Maine, including from the USACE's Disposal Area Monitoring System (DAMOS), as well as water quality data from EPA's coastal nutrient criteria and trend monitoring efforts. As discussed herein, EPA has determined that disposal of suitable dredged material at the proposed IOSN should not cause any significant adverse environmental effects to water quality or to ecological conditions at the site. EPA and the USACE have prepared a draft SMMP for

the proposed IOSN to guide future monitoring of site conditions (Appendix G of the DEA).

*x. Potentiality for the Development or Recruitment of Nuisance Species in the Disposal Sites (40 CFR 228.6(a)(10)).*

Monitoring at disposal sites elsewhere in the Gulf of Maine over the past 35 years has shown no recruitment of nuisance (invasive, non-native) species and no such adverse effects are expected to occur at the proposed IOSN in the future. EPA and the USACE will continue to monitor EPA-designated sites in the Gulf of Maine under their respective SMMPs, which include a "management focus" on "changes in composition and numbers of pelagic, demersal, or benthic biota at or near the disposal sites" (SMMP, Appendix G of the DEA).

In addition, source materials from projects in southern Maine, New Hampshire, and northern Massachusetts to be dredged and transported to the disposal site historically have been classified as marine silts and clays, which are similar to the sediments found at the proposed IOSN site. Any material proposed for ocean disposal at the proposed IOSN site would be subject to sediment quality evaluation. Therefore, it is highly unlikely that any nuisance species could be established at the proposed disposal site since habitat (i.e., sediment type) or contaminant levels are unlikely to change over the long-term use of the site.

*xi. Existence at or in Close Proximity to the Sites of Any Significant Natural or Cultural Feature of Historical Importance (40 CFR 228.6(a)(11)).*

There are no natural features of historical importance in the proposed IOSN, and the cultural resources that have the greatest potential for being impacted in this area are shipwrecks. Jeffery's Ledge, located to the east of the proposed IOSN, is an important feeding ground for humpback whales and right whales in the summer and fall months and serves as a prime recreational whale watching area. No impacts to this area are expected based on disposal of suitable dredged material at the proposed IOSN. Procedures outlined in the draft SMMP (Appendix G of the DEA) will be followed to further protect this feature.

As discussed in section 6.7 of the DEA, sidescan sonar of the proposed IOSN was conducted and no potential shipwrecks or other cultural feature were noted. The cultural resource literature search conducted for the proposed IOSN area did not identify any shipwrecks in the vicinity. While undiscovered shipwrecks could occur in the area, it is unlikely based on the

results of the sidescan survey of the area. Based on this information, it is unlikely that any significant cultural resources will be affected from the designation and use of the disposal site.

*3. Disposal Site Management (40 CFR 228.3, 228.7, 228.8 and 228.9)*

The proposed IOSN would be subject to specific management requirements to ensure that unacceptable adverse environmental impacts do not occur. Examples of these requirements include: (1) Restricting use of the sites to the disposal of dredged material that has been determined to be suitable for ocean disposal under the requirements of the MPRSA; (2) monitoring the disposal site and associated reference site, the latter of which is not used for dredged material disposal, to assess potential impacts to the marine environment by providing a point of comparison to an area unaffected by dredged material disposal; and (3) retaining the right to limit or close these sites to further disposal activity if monitoring or other information reveals evidence of unacceptable adverse impacts to the marine environment. As mentioned above, dredged material disposal will not be allowed when weather and sea conditions could interfere with safe, effective placement of any dredged material at a designated site.

In accordance with the requirements of MPRSA section 102(c) and 40 CFR 228.3, EPA and the USACE have developed a draft SMMP for the proposed IOSN.

*B. National Environmental Policy Act*

The NEPA, 42 U.S.C. 4321 *et seq.*, requires the public analysis of the potential environmental effects of proposed federal agency actions and reasonable alternative courses of action to ensure that these effects, and the differences in effects among the different alternatives, are understood. The goal of this analysis is to ensure high quality, informed, and transparent decision-making, to facilitate avoiding or minimizing any adverse effects of proposed actions, and to help restore and enhance environmental quality. See 40 CFR 6.100(a) and 1500.1(c) and 1500.2(d) through (f). NEPA requires public involvement throughout the decision-making process. See 40 CFR 6.400(a) and 40 CFR 1503 and 1501.7, 1506.6.

EPA disposal site designation evaluations conducted under the MPRSA have been determined to be "functionally equivalent" to NEPA reviews, so that they are not subject to NEPA analysis requirements as a matter of law. Nevertheless, as a matter of

policy, EPA voluntarily uses NEPA procedures when evaluating the potential designation of ocean dumping sites. *See* 63 FR 58045 (Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents, October 29, 1998). While EPA voluntarily uses NEPA review procedures in conducting MPRSA disposal site designation evaluations, EPA also has explained that “[t]he voluntary preparation of these documents in no way legally subjects the Agency to NEPA’s requirements” (63 FR 58046).

In this case, EPA and the USACE prepared a “Draft Environmental Assessment and Evaluation Study for Designation of an Ocean Dredged Material Disposal Site to serve the Southern Maine, New Hampshire, and Northern Massachusetts Region” (DEA). If EPA decides to proceed with this proposed action after full consideration of public comments, the Agency will publish a final rule for the site designation. In addition, EPA will also publish a Responses to Comments document in conjunction with publication of a Final Environmental Assessment (FEA). The Responses to Comments will identify and respond to comments received on the DEA and proposed rule. If, after full consideration of public comments, EPA and the USACE determine that the designation of the proposed IOSN will not have significant environmental impacts, the EPA and the USACE will issue a Finding of No Significant Impact (FONSI). A FONSI is a document that presents the reasons why the agency has concluded that there are no significant environmental impacts projected to occur upon implementation of the action.

If the FEA determines that the environmental impacts of the proposed IOSN designation will be significant, an Environmental Impact Statement will be prepared.

#### 1. Cooperating Agencies

The USACE was a “cooperating agency” in the development of the DEA because of its knowledge concerning the region’s dredging needs, its technical expertise in monitoring dredged material disposal sites and assessing the environmental effects of dredging and dredged material disposal, its history in the regulation of dredged material disposal in the Gulf of Maine and elsewhere, and its ongoing legal role in regulating dredging, dredged material disposal, and the management and monitoring of disposal sites. To take advantage of expertise held by other entities, and to promote strong inter-

agency communications, EPA also consulted and/or coordinated with the USFWS; the NMFS; the Maine Department of Environmental Protection; the Maine Department of Marine Resources; the Maine Geological Service; the Maine SHPO; the New Hampshire Department of Environmental Services; the New Hampshire Department of Fish and Game; and the Massachusetts Office of Coastal Zone Management.

Throughout the DEA development process, EPA communicated with the cooperating federal and state agencies to keep them apprised of progress on the project and to solicit input. EPA conducted two interagency meetings between May 2016 and December 2018 to solicit data sources and concerns, to review progress, and to receive feedback on the proposed action. EPA also was in regular contact with representatives of these agencies throughout the DEA development process via multiple state and regional dredging taskforce team meetings.

#### 2. Public Participation

Consistent with the public participation provisions of the NEPA regulations, EPA is conducting a public review process by the release of this proposed rule and the DEA for public comment. Comments received as a result of the public review process will be considered, addressed, and documented in detail in an appendix of the Final Environmental Assessment.

#### 3. Zone of Siting Feasibility

As one of the first steps in the DEA process, EPA, in cooperation with other federal and state agencies, delineated a ZSF. The ZSF is the geographic area from which reasonable and practicable open-water dredged material disposal site alternatives should be selected for evaluation. EPA’s 1986 site designation guidance manual describes the factors that should be considered in delineating the ZSF and recommends locating open-water disposal sites within an economically and operationally feasible radius from areas where dredging occurs. Other factors to be considered include navigational restrictions, political or other jurisdictional boundaries, the distance to the edge of the continental shelf, the feasibility of surveillance and monitoring, and operation and transportation costs. The ZSF analyzed in this DEA includes the coastal waters of the southern Maine, New Hampshire, and northern Massachusetts region between Cape Porpoise, Maine and Cape Ann, Massachusetts. These boundaries were chosen as they are the limits of

equidistant points on the coast to either the PDS to the north off Cape Elizabeth, Maine, or the MBDS to the south off Boston Harbor, Massachusetts. The PDS and the MBDS are the nearest EPA-designated ocean disposal sites in the region and are located about 85.5 miles apart.

#### 4. Draft Environmental Assessment and Evaluation Study

The DEA evaluates whether an ODMDS should be designated to serve the southern Maine, New Hampshire, and southern Maine coastal region. The DEA describes the purpose and need for any such designation, and evaluates several alternatives to this action, including the option of “no action” (*i.e.*, no designation). Based on this evaluation, EPA concludes that designation of the proposed IOSN under the MPRSA is the preferred alternative.

As stated in the Purpose and Need section, the purpose of this designation is to provide a long-term, open-water dredged material disposal site as a potential option for the future disposal of such material. The action is necessary because periodic dredging and dredged material disposal is unavoidably necessary to maintain safe navigation and marine commerce in ports and harbors in the southern Maine, New Hampshire, and northern Massachusetts coastal region. As previously noted, dredging in southern Maine, New Hampshire, and northern Massachusetts is projected to generate approximately 1.5 mcy of dredged material over the next 20 years.

EPA evaluated potential alternatives to open-water disposal in the southern Maine, New Hampshire, and northern Massachusetts coastal region but determined that none were sufficient to meet the projected regional dredging needs. In accordance with EPA regulations, use of alternatives to ocean disposal will be required for dredged material management when they provide a practicable, environmentally preferable option for the dredged material from any particular disposal project. *See* 40 CFR 227.16. When no such practicable alternatives exist, however, EPA’s designation of the proposed IOSN will provide an ocean disposal site as a potential management option for dredged material regulated under the MPRSA that has been tested and determined to be environmentally suitable for ocean disposal. Sediments found to be unsuitable for ocean disposal will not be authorized for placement at a disposal site designated by EPA under the MPRSA and will have to be managed in other ways.

EPA's initial screening of alternatives, which involved input from other federal and state agencies led to the determination that the ocean disposal sites were the most environmentally sound, cost-effective, and operationally feasible options for the full quantity of dredged material expected to be found suitable for ocean disposal over the 20-year planning horizon. Regardless of this conclusion, in practice, each individual dredging project will be analyzed on a case-specific basis and ocean disposal of dredged material at a designated site would only be authorized when there is a need for such disposal (*i.e.*, there are no practicable, environmentally preferable alternatives). See 40 CFR 227.2(a)(1), 227.16(b). EPA analyzed alternatives for the management of dredged material from navigation channels and harbors in the southern Maine, New Hampshire, and northern Massachusetts coastal region. This analysis evaluated several different potential alternatives, including ocean disposal sites, upland disposal, beneficial uses, sediment treatment, and the no-action alternative. From this analysis, EPA determined that at least one ocean disposal site, such as the proposed IOSN, was necessary to provide sufficient capacity to meet the long-term dredged material disposal needs of the region in the event that practicable alternatives to ocean disposal are not available for all the material.

### C. Coastal Zone Management Act

The CZMA, 16 U.S.C. 1451, *et seq.*, authorizes states to establish coastal zone management programs to develop and enforce policies to protect their coastal resources and promote uses of those resources that are desired by the state. These coastal zone management programs must be approved by the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), which is responsible for administering the CZMA. Sections 307(c)(1)(A) and (C) of the CZMA require federal agencies to provide relevant states with a determination that each federal agency activity, whether taking place within or outside the coastal zone, that affects any land or water use or natural resource of the state's coastal zone, will be carried out in a manner consistent to the maximum extent practicable with the enforceable policies of the state's approved coastal zone management program. EPA's compliance with the CZMA is described below.

Based on the evaluations presented in the DEA and supporting documents, and a review of the federally approved

Maine, Massachusetts, and New Hampshire coastal zone programs and policies, EPA has determined that designation of the proposed IOSN for ocean dredged material disposal under the MPRSA would be fully consistent or consistent to the maximum extent practicable with the enforceable policies of the coastal zone management programs of Maine, Massachusetts, and New Hampshire. EPA will provide a written determination to that effect to each of the three states within the statutory and regulatory mandated timeframes.

In EPA's view, there are several broad reasons why the proposed designation of the IOSN would be consistent with the applicable, enforceable policies of the states' coastal zone programs. First, the designation is not expected to cause any significant adverse impacts to the marine environment, coastal resources, or uses of the coastal zone. Indeed, EPA expects the designation to benefit uses involving navigation and berthing of vessels by facilitating needed dredging, and to benefit the environment by concentrating any open-water dredged material disposal at a single, environmentally appropriate site designated by EPA and subject to the previously described SMMP, rather than at a potential proliferation of USACE-selected disposal sites. Second, designation of the site does not actually authorize the disposal of any dredged material at the site, since any proposal to dispose dredged material from a particular project at a designated site will be subject to case-specific evaluation and be allowed only if: (a) The material satisfies the requirements of the MPRSA and Ocean Dumping Regulations; and (b) no practicable alternative method of management with less adverse environmental impact can be identified. Third, the designated disposal site will be managed and monitored pursuant to a SMMP and if adverse impacts are identified, use of the site will be modified to reduce or eliminate those impacts. Such modification could further restrict, or even terminate, use of the site, if appropriate. See 40 CFR 228.3, 228.11.

### D. Endangered Species Act

Under section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), federal agencies are required to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species, which is determined to be critical." Depending on the species involved, a federal agency is required to consult with the NMFS and/or USFWS if the

agency's action "may affect" an endangered or threatened species or its critical habitat (50 CFR 402.14(a)). Thus, the ESA requires consultation with NMFS and/or USFWS to adequately address potential impacts to threatened and endangered species that may occur at the proposed dredged material disposal site from any proposal to dispose of dredged material.

To comply with the ESA, EPA has coordinated with NMFS and USFWS and will request consultation concurrent with the release of the DEA. EPA has determined that the designation of a disposal site will not result in adverse impacts to threatened or endangered species, species of concern, marine protected areas, or essential fish habitat. In addition, the USACE would coordinate with the NMFS and USFWS for individual permitted projects to further ensure that impacts would not adversely impact any threatened or endangered species.

### E. Magnuson-Stevens Fishery Conservation and Management Act

The MSFCMA, 16 U.S.C. 1801 *et seq.*, requires the designation of essential fish habitat (EFH) for federally managed species of fish and shellfish. The goal of these provisions is to ensure that EFH is not adversely impacted by fishing or other human activities, including dredged material disposal, and to further the enhancement of these habitats, thereby protecting both ecosystem health and the fisheries industries. Pursuant to section 305(b)(2) of the MSFCMA, federal agencies are required to consult with NMFS regarding any action they authorize, fund, or undertake that may adversely affect EFH. An adverse effect has been defined by the Act as, "[a]ny impact which reduces the quality and/or quantity of EFH [and] may include direct (*e.g.*, contamination or physical disruption), indirect (*e.g.*, loss of prey, reduction in species' fecundity), site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions" (50 CFR 600.810(a)).

EPA is coordinating with NMFS to ensure compliance with the EFH provisions of the MSFCMA and has prepared an essential fish habitat assessment in compliance with the Act. EPA will incorporate any conservation recommendations from NMFS or explain why it has not done so in its final action.

### VI. Restrictions

Disposal shall be limited to dredged material suitable for ocean disposal.

## VII. Proposed Action

EPA is proposing this rule to designate the IOSN for the purpose of providing an environmentally sound, ocean disposal option for possible use in managing dredged material from harbors and navigation channels in the southern Maine, New Hampshire, and northern Massachusetts coastal region. Without this ocean dredged material disposal site designation, there will not be a cost-effective ocean disposal site available to serve this region after December 31, 2021, when the current Congressionally-authorized term of use for the CADS expires. In developing the DEA, described previously in several sections, the USACE and EPA conducted a “dredging needs” assessment that estimated that a total volume of 1.5 mcy of dredged material that would come from southern Maine, New Hampshire, and northern Massachusetts over the 20-year planning horizon.

The site designation process has been conducted consistent with the requirements of the MPRSA, NEPA, CZMA, and other applicable federal and state statutes and regulations. The basis for this federal action is further described in the DEA that identifies EPA designation of the proposed IOSN as the preferred alternative. The DEA also is being released for public comment in conjunction with the publication of this proposed rule. Upon completion of the public comment period and EPA’s consideration of all comments received, EPA will publish a Responses to Comments document in conjunction with publication of a FEA and final rule. The Responses to Comments will identify and respond to comments received on the DEA and proposed rule. If, after full consideration of public comments, EPA and the USACE determine that the designation of the proposed IOSN will not have significant environmental impacts, the EPA and the USACE will issue a FONSI with the FEA. A FONSI is a document that presents the reasons why the agency has concluded that there are no significant environmental impacts projected to occur upon implementation of the action.

If the FEA determines that the environmental impacts of the proposed IOSN designation will be significant, an Environmental Impact Statement will be prepared.

If designated, the proposed IOSN is subject to management and monitoring protocols to prevent the occurrence of unacceptable adverse environmental impacts. These protocols are spelled out in a draft SMMP for the site. The SMMP

is included as Appendix G to the DEA. Under 40 CFR 228.3(b), the Regional Administrator of EPA Region 1 is responsible for the overall management of this site. As previously explained, the designation of a disposal site does not constitute or imply EPA’s approval of ocean disposal at that site of dredged material from any specific project. Disposal of dredged material will not be allowed at the proposed IOSN until the proposed disposal operation first receives proper authorization from the USACE under MPRSA section 103. All MPRSA permits and federal projects involving ocean disposal of dredged material are subject to EPA review and concurrence under MPRSA section 103(c). EPA may concur (with or without conditions) or decline to concur on the MPRSA permit/authorization) in accordance with MPRSA section 103(c). If EPA concurs with conditions, the final permit/authorization must include those conditions. If EPA declines to concur (*i.e.*, non-concurs), the USACE cannot issue the permit/authorize itself to implement the MPRSA directly in USACE project involving ocean dumping. In order to properly obtain authorization to dispose of dredged material at the proposed IOSN disposal site under the MPRSA, the dredged material proposed for disposal must first satisfy the applicable criteria for testing and evaluating dredged material specified in EPA regulations at 40 CFR part 227, and it must be determined in accordance with EPA regulations at 40 CFR part 227, subpart C, that there is a need for ocean disposal (*i.e.*, that there is no practicable dredged material management alternative to ocean disposal with less adverse environmental impact).

## VIII. Supporting Documents

1. *EPA Region 1/USACE NAE. 2019. Draft Environmental Assessment and Evaluation Study for Designation of an Ocean Dredged Material Disposal Site for the Southern Maine, New Hampshire, and Northern Massachusetts Coastal Region. U.S. Environmental Protection Agency, Region 1, Boston, MA and U.S. Army Corps of Engineers, New England District, Concord, MA. August 2019.*
2. *EPA Region 1/USACE NAE. 2004. Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters. U.S. Environmental Protection Agency, Region 1, Boston, MA, and U.S. Army Corps of Engineers, New England District, Concord, MA. April 2004. EPA/USACE. 1991.*

3. *Evaluation of Dredged Material Proposed for Ocean Disposal-Testing Manual. U.S. Environmental Protection Agency, Washington, DC, and U.S. Army Corps of Engineers, Washington, DC. EPA—503/8–91/001. February 1991.*

## IX. Statutory and Executive Order Reviews

1. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action, as defined in the Executive Order, and was therefore not submitted to the Office of Management and Budget (OMB) for review.

2. *Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA because it would not require persons to obtain, maintain, retain, report, or publicly disclose information to or for a federal agency.

3. *Regulatory Flexibility Act (RFA)*

This action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). Rather, this action would provide a cost-effective, environmentally acceptable alternative for the disposal of dredged material for many small marina and boat yard operators in the region.

4. *Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

5. *Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government.

6. *Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 because the proposed restrictions will not have substantial direct effects on Indian tribes, on the relationship between the federal

government and Indian Tribes, or the distribution of power and responsibilities between the federal government and Indian Tribes. EPA consulted with the potentially affected Indian tribes in making this determination.

**7. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks**

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

**8. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use**

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

**9. National Technology Transfer and Advancement Act (NTTAA)**

This rulemaking does not involve technical standards.

**10. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations**

The EPA believes the human health or environmental risk addressed by this action will not have a disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations.

**11. Executive Order 13158: Marine Protected Areas**

Executive Order 13158 (65 FR 34909, May 31, 2000) requires EPA to “expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment.” EPA may take action to enhance or expand

protection of existing marine protected areas and to establish or recommend, as appropriate, new marine protected areas. The purpose of the Executive Order is to protect the significant natural and cultural resources within the marine environment, which means, “those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law.”

The EPA expects that this proposed rule will have no significant adverse impacts on the ocean and coastal waters off southern Maine, New Hampshire, and northern Massachusetts or the organisms that inhabit them.

**12. Executive Order 13840: Regarding the Ocean Policy To Advance the Economic, Security, and Environmental Interests of the United States**

The policies in section 2 of Executive Order 13840 (83 FR 29341, June 19, 2019) include, among others, the following: “It shall be the policy of the United States to: (a) Coordinate the activities of executive departments and agencies (agencies) regarding ocean-related matters to ensure effective management of ocean, coastal, and Great Lakes waters and to provide economic, security, and environmental benefits for present and future generations; [ . . . and] (d) facilitate the economic growth of coastal communities and promote ocean industries, which employ millions of Americans, advance ocean science and technology, feed the American people, transport American goods, expand recreational opportunities, and enhance America’s energy security. . . .” EPA, in developing this proposed rule, coordinated extensively with other federal and state agencies, and potentially affected stakeholders, to ensure effective management of dredging and dredged material by providing a cost-effective, environmentally acceptable alternative

for the disposal of such material. The availability of such an ocean disposal site supports the economic growth of coastal communities and ocean industries, which will be able to maintain safe and efficient navigation through the ports and channels in a cost-effective manner.

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

Environmental protection, Water pollution control.

Dated: August 29, 2019.

**Deborah A. Szaro,**

*Acting Regional Administrator, EPA Region 1.*

For the reasons stated in the preamble, title 40, Chapter I, of the Code of Federal Regulations is proposed to be amended as set forth below.

**PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING**

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 33 U.S.C. 1412 and 1418.

■ 2. In § 228.15 add paragraph (b)(7) to read as follows:

**§ 228.15 Dumping sites designated on a final basis.**

(b) \* \* \*

(7) Isles of Shoals North Dredged Material Disposal Site (IOSN).

(i) *Location:* A 8,500-foot (2590-meter) diameter circle on the seafloor with its center located at 70° 26.995’ W and 43° 1.142’ N.

(ii) *Size:* 1,311 acres (57,142,000 square feet).

(iii) *Depth:* Ranges from 255 to 340 feet (78 to 104 m).

(iv) *Primary use:* Dredged material disposal.

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

(vi) *Restrictions:* Limited to disposal of dredged material suitable for ocean disposal.

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