RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

(FRL-4687-7)

Ocean Dumping: Final Designation of Site

Tuesday, August 10, 1993

***42496** AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is designating a dredged material disposal site in Massachusetts Bay. This action is necessary to provide an acceptable ocean disposal site to be considered as an alternative for the current and future disposal of dredged material.

EFFECTIVE DATE: August 10, 1993.

ADDRESSES: U.S. Environmental Protection Agency, Region I, JFK Federal Building (WQE), Boston, MA 02203-2211.

The files supporting this site designation are available for public inspection at EPA Region I's library located at: 1 Congress Street, 11th Floor, Boston, MA.

FOR FURTHER INFORMATION CONTACT: Kymberlee Keckler, (617) 565-4432.

SUPPLEMENTARY INFORMATION:

A. Background

Section 102(c) of the Marine Protection Research and Sanctuaries Act of 1972, as amended, 33 U.S.C. 1401 et seq. (“MPRSA”), gives the Administrator of EPA the authority to designate sites where ocean dumping may be permitted. On December 23, 1986, the Administrator delegated the authority to designate ocean dredged material disposal sites to Regional Administrators. This site designation is being made pursuant to that authority.

The EPA Ocean Dumping Regulations (40 CFR chapter 1, subchapter H, §228.4) state that ocean dumping sites will be designated by promulgation in this part 228. A list of “Approved Interim and Final Ocean Dumping Sites” was published on January 11, 1977 (42 FR 2461 et seq.) and was last extended on August 19, 1985 (50 FR 33338 et seq.). That list established an interim site in Massachusetts Bay approximately 15 nautical miles off the coast of Marblehead, MA and extended its period of use until July 31, 1988, or until final rulemaking is completed. This final rulemaking action will move the site boundary toward the southwest (approximately 1 nautical mile westward and 1/2 nautical mile southward).

B. EIS Development

Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (“NEPA”), requires that Federal agencies prepare an EIS on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. The object of NEPA is to incorporate careful consideration of all environmental aspects of proposed actions into the decision-making processes.

Although NEPA does not apply to many EPA activities, it is EPA's voluntary policy to prepare EISs for site designations under the MPRSA (39 FR 16187 (May 7, 1974)), and EPA has prepared draft, supplemental, and final EISs entitled, “Evaluation of Continued Use of the Massachusetts Bay Dredged Material Disposal Site,” “Alternative Site Screening,” and “Designation of an Ocean Dredged Material Disposal Site in Massachusetts Bay,” respectively. On ***42497** September 29, 1989, EPA published in the Federal Register (54 FR 40177) a notice of availability of the draft EIS for public review and comment. On July 6, 1990, EPA published a Federal Register (55 FR 27886) notice of availability of the draft SEIS for public review and comment. On July 24, 1992, EPA published a notice of availability for public review and comment of the final EIS in the Federal Register (57 FR 32988). The public comment periods closed November 13, 1989; August 20, 1990; and August 28, 1992 for the draft EIS, the draft SEIS, and the FEIS, respectively. Many reviewers including Federal and State agencies, and environmental groups commented on these EISs.

The action currently being proposed is the final designation for continued use of an environmentally acceptable ocean dredged material disposal site in Massachusetts Bay. However, site designation does not indicate or constitute approval to dispose any dredged material at the site. Material disposition is determined on a case-by-case basis as part of the U.S. Army Corps of Engineers' (“COE”) permit-issuing process under section 103 of the MPRSA, 33 U.S.C. 1413(a).

The EISs discuss the need for site designation and examine ocean disposal site alternatives. Information needed to evaluate the suitability of ocean areas for final designation is presented. Regional land-based alternatives were rejected because of the lack of available land area near dredging proposals, the lack of information on possible construction of marshlands, and greater costs. Additional analysis of specific land-based alternatives will be performed as part of any application for a permit to use the site. The environmental studies and final designation process are being conducted in accordance with requirements of the MPRSA, EPA's Ocean Dumping Regulations, and other applicable Federal environmental legislation.

C. Final Site Designation

The proposed area has been used since the 1940s for the ocean disposal of dredged material and industrial waste.

The center coordinate for the MBDS is located at 42degrees 25.1'N and 70degrees 35.0'W, which is approximately 1 nautical mile westward and 1/2 nautical mile southward of the existing interim site (North American Datum of 1983). The site is approximately 22 nautical miles offshore from Boston and is two nautical miles in diameter. Water depths average 90 meters.

D. Regulatory Requirements

In accordance with EPA policy, EPA has evaluated this site designation for consistency with the State's approved coastal zone management program. EPA determined that the designation of the MBDS is consistent to the maximum extent practicable with the State coastal management program and submitted this determination on

July 2, 1992 to the State for review. EPA also consulted with the State regarding the effects of the dumping at the site on the Massachusetts coastal zone as part of the NEPA process. On November 13, 1992, the Massachusetts Coastal Zone Management (“MCZM”) office determined that the MBDS designation is consistent with State policies provided that disposal of contaminated sediments will not occur under any circumstances. It should be noted that EPA's EISs made clear that only materials that satisfied EPA's ocean dumping criteria could be disposed at the MBDS in accordance with section 103(c) of the MPRSA, 33 U.S.C. 1413(c), and that based on current information EPA did not accept that the environment could effectively be protected from contaminated dredged material by trying to cap the material on the ocean floor at a site such as the MBDS. EPA also stated its view that if capping pilot studies are proposed, they should utilize clean dredged material to ensure the protection of the marine environment in case of failure.

The general criteria for the selection of sites are given in 40 CFR 228.5 of the EPA Ocean Dumping Regulations. Five general criteria are used in the selection and approval for continued use of an ocean disposal site. Selection of sites incorporates minimizing interference with other marine activities, preventing any temporary perturbations of water quality from the dumping from causing impacts outside the disposal site, and monitoring to detect any adverse impacts at an early stage. Where feasible, locations off the Continental Shelf are chosen. Based on the information presented in the EISs, EPA has determined that no environmental benefit would be obtained by selecting a site off the Continental Shelf versus that proposed in this action. The MBDS conforms to the five general criteria. Moreover, if at any time, disposal operations at the MBDS cause unacceptable adverse impacts, further use of the MBDS will be restricted or terminated.

EPA established eleven factors, at 40 CFR 228.6, to use in evaluating alternative disposal sites to ensure that the general criteria are met and to assess the impact of using each site for disposal. The criteria are used to make comparisons between sites and are the bases for final site selection. The characteristics of the MBDS are reviewed below in terms of the eleven factors. Detailed information is presented in the EISs.

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

The site's center coordinate, size, and distance from shore are listed under part C, Final Site Designation. Water depths at the site average 90 meters. The sediment composition in Massachusetts Bay is dominated by heterogeneous sediments composed primarily of glacial till. The floor of western Massachusetts Bay is characterized by outcroppings of bedrock interspersed with areas of cobble, gravel, and sand, grading into fine mud with a high clay content in the deeper depositional areas in Stellwagen Basin. The MBDS is located within the northwestern corner of the Stellwagen Basin, an area dominated by fine silts and clays. Because of its depth, the basin is considered to be a low-energy environment and is not significantly affected by waves and currents. Consequently, the majority of the disposed dredged material is likely to remain in the immediate area.

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

Areas for breeding, spawning, nursery and/or passage of commercially and recreationally important finfish and shellfish species occur on a seasonal basis across the western shelf of the Gulf of Maine. Past disposal of dredged material at the site has not been shown to cause detectable, significant, or irreversible adverse impacts on living marine resources.

Most species spawn during a period of several months, and over a wide geographical area. Species common to

Massachusetts Bay include American plaice, cod, pollack, haddock, silver hake, witch flounder, and Atlantic mackerel.

The present MBDS is located on the western edge of an apparent whale migratory corridor extending from George's Bank north to Jeffrey's Ledge. The area directly east of the site is used on a regular basis by a number of whales including humpback, right, and finback whales. Other whales, marine mammals, and turtles are occasionally seen in the general area. Both the National Marine Fisheries Service and the U.S. Fish and ***42498** Wildlife Service have determined that designation of the MBDS will not jeopardize any threatened or endangered species.

Impacts of dredged material disposal on demersal fish at the site are expected to be restricted to temporary changes in abundance, numbers of species, mean size, and food preferences. It is unlikely that disposal activities will interfere with commercially valuable fish because of their mobility and the limited area in which disposal occurs. Two species of commercial fish that lay demersal eggs are not expected to be adversely affected since the substrate and offshore locale of the site are not preferred spawning areas for these fish.

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

Use of the MBDS is not considered to have any potential for coastal impacts because the site is approximately 15 miles from the nearest beach and has a relatively low probability of resuspension and transport to this area. Distance from shore, water depth, configuration of the basin, and net southeast transport are factors that minimize the possibility of dredged material reaching beaches or other amenity areas. Studies reported in the EIS indicate that most of the dredged material disposed at the site remains within the disposal area.

4. 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 released at approved sites must conform to the EPA criteria in the ocean dumping regulations (40 CFR part 227). Sediments presently being dredged from the Massachusetts coastal area are composed of fine sand, silt, and clay, and are similar in grain size to natural sediments in the central basin of the MBDS. The dredged material is transported in bulk by a barge equipped with a bottom dump mechanism. Future dredging projects, if determined to be suitable for ocean disposal, may contribute approximately three million cubic yards of dredged material to the MBDS in the next decade.

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

The COE currently conducts on-board surveillance to ensure that disposal operations occur at the proper location. Monitoring by EPA, the COE, and permittees will continue for as long as the site remains active. In order to detect any transport of dredged material outside the site, sediments will be monitored at the site and along transects of possible transport. Benthic communities will be monitored to detect changes that extend beyond the site.

Periodic bioaccumulation and toxicity analyses of benthic invertebrates and fishes collected from the disposal site and bioassays will be used to determine whether dredged material disposal has adversely affected any marine resources. If evidence of significant adverse environmental effects is found, EPA will take appropriate steps to restrict or terminate dumping at the site.

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

Current velocities range from 0 to 30 centimeters per second at the site. Currents are influenced by tides in a rotational manner, but net water movement is to the southeast. The COE reports that regional dredged material (primarily fine sand, silt, and clay) is generally cohesive and should fall as a single mass. As a result, rapid settling of the released sediments should occur. Minimal horizontal mixing or vertical stratification of disposal materials should occur, resulting in low suspended sediment concentrations.

Previous studies have demonstrated the relative immobility of dredged material at the site.

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

Several industrial and municipal wastewater discharges are located in the western area of Massachusetts Bay. Although the closest proposed discharge is approximately 13 nautical miles from the MBDS, it represents the closest point source discharge of pollutants. Because of the distance involved, dispersion, and dilution associated with mixing, discharges in Massachusetts Bay are not expected to have a measurable effect on the site.

Although EPA agrees that it is possible that previous dredged material disposal may have resulted in some environmental degradation, other sources of pollution exist and disposal at the existing site has not been definitively shown to produce significant adverse effects on sediment or water quality. Changes in water quality as a result of disposal operations have been of short duration (minutes) and have been confined to relatively small areas inside the MBDS boundary. No major differences in finfish and/or shellfish species or numbers were found in recent surveys within and adjacent to the site.

Recent disposal of dredged material has produced localized and reversible impacts of smothering of the benthos, and possible temporary impacts on demersal fish.

Sediment collected by EPA and the COE from the disposal area in 1985, 1986, and 1987 contain higher levels of chromium, copper, lead, zinc, polyaromatic nuclear hydrocarbons, and polychlorinated biphenyls than do sediments at control stations near the site. These higher trace metal and hydrocarbon concentrations are believed to reflect contaminants present in dredged material previously disposed at the site. However, concentrations of these contaminants at the site were not definitively shown to cause any adverse ecological or human health effects. Trace metal concentrations in tissues of benthic organisms collected at the site were well below FDA action levels.

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

Extensive shipping, fishing, recreational activities, and scientific investigations take place in the Massachusetts Bay throughout the year. However, previous dredged material disposal operations are not known to have interfered with these activities. The Bureau of Land Management has not announced plans to lease any areas on the nearshore Continental Shelf adjacent to the site for oil and gas exploration. Mineral extraction, desalination, and aquaculture activities do not presently occur near the site.

The Stellwagen Bank national marine sanctuary is located adjacent to the MBDS. EPA and the National Oceanic

and Atmospheric Administration ("NOAA") concluded that designation of the MBDS should not interfere with the Stellwagen Bank national marine sanctuary.

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

Investigations of dredged material disposal operations at the site have not indicated that disposal has had any significant adverse effects on water quality (e.g., dissolved nutrients, trace metals, dissolved oxygen, or pH).

***42499** Diatoms, nannoplankton, and phytoflagellates are the major types of phytoplankton within the coastal areas of Massachusetts Bay, and their population dynamics are closely correlated with annual cycles of nutrients, light energy, and temperature. Population cycles of zooplankton often are closely correlated with seasonal cycles of phytoplankton since many zooplankters use phytoplankton as food. Zooplankton numbers peak in July and October in the coastal areas of the Gulf of Maine.

The infaunal community at the disposal site is highly variable because of active dredged material disposal. Each area is in a different stage of recovery. Some epibenthic invertebrates do occur at MBDS on both muddy bottoms and rocky surfaces. Principle epibenthic forms include anemones, crustaceans, assorted shellfish, and sea stars. Many fish frequent the area, but several species of demersal fish dominate the population.

Site surveys have detected no significant differences in water quality among areas within the site and adjacent reference areas. Therefore, dredged material disposal at the site does not appear to significantly alter water quality.

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

There are no known components of this dredged material or consequences of its disposal which would attract or result in recruitment or development of nuisance species at the site. Previous surveys at the site did not detect the development or recruitment of nuisance species, and the similarity of the dredged material with the existing sediments suggests that the development or recruitment of nuisance species is unlikely.

11. Existence at or in Close Proximity to the Site of Any Significant Natural or Cultural Features of Historical Importance (40 CFR 228.6(a)(11))

The Massachusetts Board of Underwater Archeology reported that no known historical shipwrecks exist at or near the site.

E. Proposed Action

The MBDS has been used for ocean disposal activities since the 1940s. In 1977, EPA promulgated the ocean dumping regulations, and subsequently granted interim site designation status to sites which have been historically used.

Alternative ocean sites which were evaluated and rejected from consideration were approximately 25 nautical miles further offshore and approximately 15 nautical miles south of the preferred location. Disposing dredged material in these sites would not have any appreciable benefits. Alternative deep water sites on the Continental Shelf beyond the Gulf of Maine were rejected from consideration for several reasons. The greater distance from

shore (approximately 250 nautical miles) increases the potential for short dumping due to possible emergencies during adverse weather conditions. Greater water depth (over 200 meters) would result in the deposition of dredged materials over a larger area than projected for the MBDS. Finally, costs to transport the dredged material would be excessive.

EPA has concluded that the MBDS is compatible with the general criteria and specific factors used for site evaluation. Designating a site other than the MBDS offers no clear environmental benefit or economic advantage. The MBDS has been previously used for dredged material disposal without apparent significant adverse effects.

The designation of the MBDS as an EPA-Approved Ocean Dumping Site is being published as final rulemaking. Management authority over this site will be a joint responsibility of EPA, Region I and the COE, New England Division.

Final site designation will serve to clarify the site's status for the long-term, including its availability as an ocean disposal alternative to consider during case-by-case permit reviews for future dredging projects. It should be emphasized that if an ocean dumping site is designated, such a site designation does not constitute or imply EPA's approval of actual disposal of dredged material at the site. Before any particular proposal to ocean dump dredged material may be put into practice, the COE must issue a permit in accordance with EPA's Ocean Dumping Criteria. Federal projects are also evaluated in accordance with those criteria. In either case, once a project has been approved by the COE, EPA must evaluate compliance with the Ocean Dumping Criteria and EPA is authorized to disapprove the actual dumping if it determines that environmental concerns under the MPRSA have not been met.

F. Regulatory Assessments

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this action will not have a significant impact on small entities since the site designation will only have the effect of providing a disposal option for dredged material. Consequently, this proposal does not necessitate preparation of a Regulatory Flexibility Analysis.

Under Executive Order 12291, EPA must judge whether a regulation is “major” and therefore subject to the requirement of a Regulatory Impact Analysis. This action will not result in an annual effect on the economy of $100 million or more or cause any of the other effects which would result in its being classified by the Executive Order as a “major” rule. Consequently, this final rule does not necessitate preparation of a Regulatory Impact Analysis.

This final rule does not contain any information collection requirements subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

G. Response to Public Comments on the Proposed Rule

A number of commentors prepared comments on EPA's Proposed Rule (58 FR 10999 et seq.). Written comments were received from government agencies and private individuals and organizations. In order to be responsive to commentors and address comments in an efficient manner, EPA has conducted a review of all comments received and developed a complete list of the issues raised by commentors. Categorizing issues and responses in this manner allows all aspects of an issue to be discussed comprehensively and also allows for a clear presenta-

tion of the particular issues of concern. A summary of the comments on each of these issues is presented below, followed by EPA's detailed response.

1. Site Location. One commentor believed that EPA should explain the basis for shifting the MBDS boundary in the Final Rule.

EPA Response: The bases for relocating the MBDS boundary were explained in Section 4.1 of the FEIS and in Section II of the ROD. EPA is currently proposing to designate an area southwest of the existing MBDS, a two nautical mile diameter circle centered at 70degrees 35.0' west longitude and 42degrees 25.1' north latitude (please note that there was a typographical error on these coordinates for the proposed site in the Proposed Rule). EPA's proposal to revise the existing MBDS boundary by moving it slightly to the southwest will have several advantages. First, the revised MBDS boundary will not encompass the relatively pristine eastern portion of the existing MBDS, ***42500** including the toe of Stellwagen Bank. This area has not been used historically for dumping and it also will not be used according to the proposed MBDS boundary. Second, although the new boundary would overlap the IWS in part, the proposed MBDS boundary avoids the northern area within the IWS where most of the waste barrels and debris are concentrated. Relocation of the MBDS boundary to the southwest area will not result in disposing dredged material on top of previously disposed barrels or debris. Given the uncertainty as to the condition, and methods for proper management, of these waste containers, EPA is not currently proposing (and in fact has never proposed) to dispose dredged material on top of these barrels, as has been suggested by some commentors. The potential public health and environmental risk from past disposal at the IWS and other sites in Massachusetts Bay is the subject of ongoing studies by EPA and other Federal and State agencies. Third, the new MBDS boundary encompasses an area just outside the existing MBDS where contaminated sediments have been identified, probably as a result of past short-dumping. Relocating the MBDS boundary will enable EPA and the U.S. Army Corps of Engineers (“COE”) to eventually cover this contaminated area with cleaner sediments. Fourth, the revised disposal site boundary will not encroach onto the boundaries of the Stellwagen Bank national marine sanctuary as proposed by the NOAA.

2. Site Management. One commentor believed that EPA should describe the Federal Water Resources Development Act of 1992 (“WRDA”) requirements for development of a site management plan, including an explanation of public involvement.

EPA Response: The WRDA became federal law in October 1992, after EPA had completed its EISs. Section 506 of the WRDA requires the Administrator to develop site management plans for all disposal sites by January 1, 1997. It should be noted, however, that EPA and the COE already engage in extensive site monitoring to ensure that use of the existing MBDS is not causing harm. EPA is dedicated to fulfilling this requirement. EPA explained in Section 3.9.1.3 of the FEIS that it plans to share its monitoring plans with the Dredged Material Task Force. Additionally, EPA is committed to developing and sharing the management plan with the public under a separate process.

3. Role of Massachusetts Coastal Zone Management (“MCZM”). One commentor thought that the responsibility for regulating dredged material disposal at the MBDS is a shared responsibility between EPA and the COE which should not be abrogated either directly or indirectly. This same commentor stated that the role of the MCZM was unclear, and further stated that a federal consistency determination cannot be conditional as it appeared to be in this case.

EPA Response: EPA has been steadfast in stating that capping proposals will not be relied upon to ensure the

environmental safety of disposal proposals until the efficacy and legality of capping at the MBDS has been clearly demonstrated. The Massachusetts Coastal Zone Management Office (“MCZM”) has reinforced this restriction by stating in its consistency determination that disposal of contaminated sediments, under any circumstances, would not be consistent with MCZM policies. Therefore, MCZM stated in its consistency finding that the MBDS site designation was consistent with MCZM policies as long as EPA expressly indicated that its designation barred the capping of materials violating the ocean dumping criteria. EPA's EISs clearly had not approved the disposal of contaminated sediments at the MBDS even if capping of the sediments was proposed. Nevertheless, in order to obtain MCZM certification, EPA made the requested express conditions part of the conditions of the site designation. The MCZM office has agreed that the certification conditions can be revisited if new information demonstrates the efficacy of capping. Therefore, the situation after EPA's adoption of the MCZM conditions is no different than it was throughout the designation process. Both before and after EPA's issuance of the Record of Decision, EPA did not allow disposal and capping of otherwise prohibited materials at the MBDS, but if capping is shown to be technically and legally supportable it can ultimately be permitted. Thus, EPA's statements concerning the efficacy of capping at the MBDS have been consistent and the MCZM office has determined that the MBDS designation, as currently proposed, is consistent with State CZM Policies. The responsibilities of federal and state agencies under the Coastal Zone Management Act, 16 U.S.C. 1451 et seq. (CZMA), are governed by section 307 of the CZMA, 16 U.S.C. 1456. MCZM indicated in this case that unless EPA expressly prohibited dumping-and-capping of otherwise unsuitable materials, MCZM would not concur that the designation was consistent to the maximum extent practicable with State CZM Policies. While federal agencies may seek mediation of serious disputes with state CZM offices, EPA is not obliged to do so in this case or any other case. EPA chose not to challenge MCZM's consistency determination in this case because it was not inconsistent with our past position on this issue and EPA does not presently have any reason to believe that the MCZM's action did not comport with CZMA.

4. Testing Protocol Use. One commentor believed that EPA was setting a precedent by requiring use of the Green Book. Another commentor believed that EPA should either delete the Green Book citation or add a reference to other management guidance manuals.

EPA Response: Use of dredged material testing procedures approved by EPA and the COE is required by the Ocean Dumping Regulations per §§227.6(c)&(e) and 227.27(b). Since the Ocean Dumping Regulations specifically refer to procedures that are acceptable to EPA and the COE, such as those detailed in EPA's and the COE's Green Book, EPA agrees that an additional reference to these testing protocols is not necessary here. Thus, the reference to the Green Book will be omitted. Federal regulations do not require use of other management guidance documents, and thus EPA believes that requiring use of them for this site would be inappropriate and might have an undesirable impact of limiting the catalog of alternatives available for dredged material disposal. EPA has therefore chosen not to include a reference to other management guidance manuals.

5. Capping. Several commentors believed that EPA should specifically state that capping is prohibited. One commentor did not understand that capping was banned at the MBDS.

EPA Response: EPA's site designation now specifically states that the prohibition on disposal of contaminated dredged materials may not be overcome by proposals to cap these materials. EPA had never stated in its EISs that such capping proposals would be permissible at the MBDS. Indeed, EPA has consistently stated its strong doubts about the efficacy of such capping proposals at the MBDS. Furthermore, as discussed above, the Massachusetts Coastal Zone Management Office certified the MBDS designation as consistent with State Coastal Zone policies only as long as the prohibition on the dumping-and-capping of contaminated sediments at the

MBDS was expressly stated in the site designation. EPA has, therefore, included this express condition in the ***42501** site designation. It should also be noted that in order for capping to be allowed at the MBDS, an additional federal consistency review process must be initiated if the prohibition on capping is to be repealed. Specifically, the Massachusetts Executive Office of Environmental Affairs has indicated in a letter that should "* * * new data become available, it is possible to reopen the federal consistency review on this matter at some future date* * *." Thus, the acceptability of capping could be revisited in the future on the basis of technical data considered through the regulatory process.

6. Endangered Species. One commentor thought that EPA should state that NMFS's Biological Opinion was only for disposal of uncontaminated sediments. Another commentor believed that the MBDS designation was not protective of endangered species, including marine mammals, and should specifically include NMFS's recommendations.

EPA Response: EPA's designation of the MBDS was based on the premise that only sediments which met the requirements of the MPRSA and its implementing regulations would be disposed. NMFS did not object to the proposed site designation and did not find that it would threaten or harm endangered species. Because the Biological Opinion prepared by NMFS was included in Appendix C of the FEIS, EPA does not believe that it is necessary to repeat it here. Moreover, EPA stated that the conservation measures recommended by the NMFS are currently being implemented (see Section 3.10 of the FEIS).

7. NOAA Consultation. One commentor stated that the COE needs to do separate consultation with NOAA on discrete disposal actions proposed for the MBDS because of the recent designation of the Stellwagen Bank national marine sanctuary.

EPA Response: The National Marine Sanctuaries Program Amendments Act of 1992 became law in November 1992. In Section 2202 of this Act, Congress legislatively designated the Stellwagen Bank national marine sanctuary. Section 2202(e) of the Act addresses the responsibility of federal agencies to consult with NOAA concerning certain actions in the vicinity of the sanctuary. Also, section 2104(d) generally imposes a consultation requirement on federal agencies with respect to certain actions that could affect sanctuaries.

8. Inconsistency. One commentor believed that the option of disposal of "clean" sediments only was not studied by EPA and that the option of capping was eliminated without any evidence. Further, this same commentor believed that EPA's Proposed Rule contradicts findings reported in EPA's EISs.

EPA Response: EPA's EISs were directed at studying whether there was a need to designate a dredged material disposal site in the Massachusetts Bay area. The EISs did not study alternatives of whether "clean" or "contaminated" materials should be allowed to be disposed; rather, the EISs studied disposal site alternatives and the alternative of no site. However, the EISs did evaluate sites in light of how they would be used and the EISs clearly stated that the MBDS would only be used for materials that are "clean" in the sense of satisfying the technical and legal requirements of the MPRSA and the Ocean Dumping Criteria regulations (see DEIS on pages 215, 217, and 230; see FEIS on pages 52, 57, 61, and 76). While the EISs were not directed at studying whether or not dumping-and-capping of contaminated materials should be allowed, EPA did clearly state that based on EPA's review of current information it did not believe that such dumping-and-capping would be effective at the MBDS. It was quite clear that until the technical and legal appropriateness of such dumping-and-capping is established it is not permissible. Then, as is discussed above, the Massachusetts Coastal Zone Management Office indicated that its certification that the MBDS designation is consistent with State Coastal

Zone Management Policies was contingent on EPA specifying in the site designation that dumping-and-capping of contaminated materials would be prohibited. In order to complete the designation, EPA adopted the requested condition. EPA disagrees with the comment that the final designation is inconsistent with the findings of the EISs. The EISs in no way endorsed disposal-and-capping of contaminated materials at the MBDS and the designation prohibiting disposal-and-capping of such materials does not contradict the EISs.

EPA does not believe that inconsistent statements have been made regarding the quality of sediments allowed for ocean disposal at the MBDS. In fact, the entire EIS process was based on the disposal of clean sediments, or more specifically, those that meet the requirements of the MPRSA and its implementing regulations. Further, EPA has been operating under the existing ocean dumping regulations since 1977 and the regional and national testing protocols since 1989 and 1991, respectively. This final designation is consistent with the existing regulations and guidance.

9. Economic Burden. One commentor believed that limiting disposal to solely “clean” sediments would impair the ability of U.S. ports to compete.

EPA Response: EPA cannot allow materials that do not comply with the requirements of the MPRSA and applicable regulations to be dumped in the ocean. Section 103(d) of the MPRSA, 33 U.S.C. 1413(d), provides for a waiver from mandatory compliance with the ocean dumping criteria in certain circumstances. If the COE believes that there are no economically feasible alternatives to a particular dumping proposal, the MPRSA authorizes the COE to seek a project-specific waiver from EPA from the application of the environmental ocean dumping criteria. The MPRSA directs EPA to grant such waivers unless certain unacceptable environmental harms would result. The waiver process is described at §§225.4 and 227.1(b).

10. Sanctuary Designation Issues. One commentor believed that the Final Rule should reflect the legal responsibilities of EPA and the NOAA under title III of the MPRSA. In particular, they thought that the need for formal notification and consultation should be discussed. One commentor informed EPA that the boundary of the Stellwagen Bank National Marine Sanctuary depicted in the Record of Decision (“ROD”) was incorrect.

EPA Response: In response to the comment which identified an incorrect boundary of the Stellwagen Bank National Marine Sanctuary, EPA did not receive the proper coordinates of the Stellwagen Bank national marine sanctuary until after the ROD was published. However, final designation of the Stellwagen Bank national marine sanctuary has not affected EPA's designation of the MBDS, as the potential designation of the marine sanctuary was considered in EPA's EISs. In response to the comment which requested EPA to discuss the need for formal notification and consultation, the National Marine Sanctuaries Program Amendments Act of 1992 became law in November 1992, after EPA completed the EISs. In section 2202 of that Act, Congress legislatively designated the Stellwagen Bank national marine sanctuary. Section 2202(e) addresses the responsibility of federal agencies to consult with NOAA concerning actions that could harm the Stellwagen Bank national marine sanctuary, while section 2104 of the Act imposes a general consultation requirement on federal agencies with respect to actions that might harm sanctuary resources. The COE, NOAA, EPA, and other agencies will need to implement these ***42502** requirements in the future. The coordinates for the Stellwagen Bank National Marine Sanctuary and the requirements for consultation are discussed in detail in the Congressional Record, Public Law 102-587.

11. Impact Status. One commentor believed that the MBDS should be categorized as an “Impact Category I” site under EPA's regulations.

EPA Response: EPA concurs with this recommendation. However, the reason EPA has elected to place the

MBDS into Impact Category I is because the MBDS is situated within 12 miles of the Stellwagen Bank National Marine Sanctuary, not because there have been any identifiable adverse impacts to the marine ecosystem from present dredged material disposal operations. EPA's regulations at 40 CFR 228.10(c)(1)(i) state that a "disposal site shall be categorized in Impact Category I when * * * (t)here is identifiable * * * accumulation, in detectable concentrations above normal ambient values, of any waste or waste constituent from the disposal site within 12 nautical miles of any * * * marine sanctuary designated under title III of the Act * * *." Although we do not believe materials will migrate from the MBDS to the Stellwagen Bank Sanctuary, the MBDS will by definition be a Category I site because dredged materials will accumulate there and within 12 miles of the Sanctuary since the entire site is within 12 miles of the Sanctuary. EPA's regulations at 40 CFR 228.11(c) direct EPA to impose such conditions on the use of Category I sites as are needed to ensure that impacts from site use will be acceptable. In this case, conditions are being imposed on the use of the MBDS to ensure that its use is acceptable. EPA believes that application of existing restrictions on the quality of materials to be disposed at the MBDS will be adequate to ensure there are no unacceptable impacts. These restrictions are imposed by the MPRSA and EPA's Ocean Dumping Criteria regulations. Also, as discussed above, the present designation prohibits the dumping-and-capping of materials that otherwise do not satisfy the regulations. EPA is not currently planning to place any additional limitations on site use, such as limiting times or rates of disposal, beyond those in the regulations. While EPA has acknowledged that past use of the site for the disposal of various wastes may have resulted in some environmental degradation at the site, EPA has also concluded that use of the MBDS under the current, proper management approach will not result in significant unacceptable adverse impacts on the marine environment. Indeed, EPA is confident that environmental conditions at the MBDS will improve in the future for several reasons. First, only dredged material that meets the requirements of the regulations, and the national and regional testing protocols designed to implement the regulations, is allowed to be disposed at the MBDS. In particular, sediments allowed for ocean disposal are those that do not exhibit significant mortality or the potential to cause significant undesirable effects, whether from sublethal impacts or chronic toxicity, as a result of bioaccumulation of contaminants. Second, disposal of contaminated materials with capping, a mitigation measure sometimes proposed as method for isolating contaminated sediments, is prohibited until the efficacy of capping at the MBDS has been demonstrated. Third, even tighter constraints on the disposal of dredged material have been imposed at the MBDS. These constraints include: (i) Stricter requirements in the dredged material testing protocol, (ii) relocation of the reference site to a cleaner area near Stellwagen Bank, (iii) the requirement by the COE for disposal inspectors on every trip to the MBDS, and (iv) the use of a taut-wire moored buoy. Moreover, by relocating the MBDS boundary the eastern portion of the existing MBDS will remain pristine and previously disposed dredged material can eventually be covered with newer deposits. All of these factors lead EPA to believe that conditions at the proposed MBDS will improve. Further, EPA and the COE are committed to monitoring the MBDS to ensure that the marine environment is not degraded from future disposal activities.

List of Subjects in 40 CFR Part 228

Water pollution control.

Dated: July 30, 1993.

Paul G. Keough,

Acting Regional Administrator, Region I.

In consideration of the foregoing part 228 of chapter I of title 40 shall be amended as set forth below:

Part 228—(Amended)1. The authority citation for part 228 continues to read as follows:

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

40 CFR § 228.12

§228.12 (Amended)

40 CFR § 228.12

2. Section 228.12 is amended by revising the section heading, removing from paragraph (a)(3) the entry for Marblehead, MA, dredged material disposal site, and adding paragraph (b)(92) to read as follows:

40 CFR § 228.12

§228.12 Delegation of management authority for ocean dumping sites.

* * * * *

(b) * * *

(92) Massachusetts Bay Disposal Site, Region I

Center coordinates (NAD 1983): 42degrees 25.1' north latitude; 70degrees 35.0' ‘ west longitude

Size: 2 nautical mile diameter

Depth: Average 90 meters

Exclusive Use: Dredged material

Period of Use: Continuing

Restriction: Disposal shall be limited to dredged material which meets the requirements of the MPRSA and its accompanying regulations. Disposal-and-capping is prohibited at the MBDS until its efficacy can be effectively demonstrated.

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