

opinion, the Register concluded that “nothing in the statute limits the [Judges] from considering comments filed by non-participants if those nonparticipant commenters argue that the proposed provisions are contrary to statutory law.” *Id.* According to the Register’s Opinion, which is binding precedent for the Judges, the Judges may decline to adopt portions of the agreed regulations that would be “contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.” *Id.*

The Judges received two comments on the proposed rules before the June deadline. Joint Sports Claimants (JSC),⁴ participants and the proponents of the settlement, supported adoption of the final rule and offered a correction of a misstated cross reference within the rule.

Major League Soccer, L.L.C. (MLS) also commented. In the present proceeding, MLS did not file a Petition to Participate; thus MLS is a not a participant.⁵ Nonetheless, MLS states that it would be “[a]ffected by these proposed rules and their terms.” MLS Comment at 2. MLS contends that, even though it is not a participant in this proceeding, it clearly meets the [Judges’] description of ‘Joint Sports Claimants’⁶ in that MLS owns copyrights in “live telecasts of professional teams’ sports broadcasts by U.S. and Canadian television stations. . . .” *Id.* As MLS asserted in its comment, the definition of “eligible professional sports event” “unfairly excludes MLS, and any other [unnamed] eligible, professional league that broadcasts live team sports.” *Id.* at 3. In its comment, MLS contends that its omission results in unfair treatment. *Id.* at 2, 4.

According to MLS, “[s]ince JSC are representatives for, and custodians of the funds of, all programs falling within that agreed [Joint Sports Claimants] category, [JSC] should represent the interests of the entire category, not only

those it deems *members*. The benefits of the regulation should apply to a [sic] who fall into the Joint Sports Claimants category.” *Id.* at 3.

Although MLS generally states that adoption of the proposal would be unfair or inequitable to MLS and certain other omitted professional leagues that broadcast live team sports, MLS does not expressly contend that the proposal is “contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law,” which, under the Register’s Opinion, would permit the Judges to decline to adopt portions of the agreed regulations. In the interests of developing a more complete record to support the Judges’ decision, however, the Judges seek further comment specifically addressing the issue of whether they must adopt the rules as contained in the settlement agreement and published for comment in May 2017, consistent with Section 801(b)(7)(A) of the Copyright Act, or whether any provision in the proposed rules is contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.

The Judges hereby solicit Reply Comments limited to legal analysis of the issue as the Judges express it. Any party in interest may file Reply Comments addressing the issue the Judges present in this Notice. Commenters that believe any provision of the proposed rules is contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law should specify the provision or provisions in question, explain why the provision(s) is contrary to the applicable license or applicable statutory law, and provide supporting legal analysis. Reply commenters should focus particular attention on whether any entities not expressly addressed in the proposal would nonetheless be bound by the rates and terms of the proposal or otherwise affected by the proposed rules and how, if at all, the affect should dictate action by the Judges. If any entities other than those expressly included in the proposed provisions are bound by the proposal, are the Judges effectively adopting a zero sports surcharge rate with respect to those entities? If so, what factors justify the different rates for the entities that would have a zero rate from those that would receive the proposed sports surcharge rate?

Any commenter may thereafter file Surreply Comments addressing specifically the legal analysis of a party or parties filing Reply Comments.

Dated: September 18, 2017.

Suzanne M. Barnett,

Chief U.S. Copyright Royalty Judge.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[EPA–R01–OW–2017–0528; FRL–9967–82–Region 1]

Ocean Disposal; Temporary Modification of an Ocean Dredged Material Disposal Site in Massachusetts Bay

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a temporary modification of the currently-designated Massachusetts Bay Dredged Material Disposal Site (MBDS) pursuant to the Marine Protection, Research, and Sanctuaries Act, as amended (MPRSA). The purpose of this temporary site modification is to allow for the environmental restoration of a particular area adjacent to the currently-designated MBDS (Potential Restoration Area) by temporarily expanding the boundaries of the existing MBDS. The temporary expansion is a circular area that contains the Potential Restoration Area, which includes most of the historic Industrial Waste Site (IWS). Decades ago, the IWS was used for the disposal of barrels containing industrial, chemical and radioactive waste, as well as for the disposal of munitions, ordnance, construction equipment, and contaminated dredged material. The proposed modification of the disposal site boundary will enable the U.S. Army Corps of Engineers (USACE) to place suitable dredged material from Boston Harbor generated during the Deep Draft Navigation Project at the Potential Restoration Area in order to cover the barrels and other wastes disposed there in the past. The Deep Draft Navigation Project includes maintenance dredging in the inner harbor, which includes the expansion of a confined aquatic disposal (CAD) cell and will generate approximately 1 million cubic yards (cy) of dredged material, as well as improvement dredging of the main ship channel, which will generate approximately 11 million cy of dredged material. The existing MBDS will continue to be used for disposal of other dredging projects as usual. The expansion area would be permanently

802(f)(1)(D). Decisions of the Register are binding as precedent upon the Judges in proceedings subsequent to the Register’s opinion. *Id.*

⁴ The Joint Sports Claimants (JSC) consists of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, and the Women’s National Basketball Association.

⁵ MLS asserted without evidence that it made “attempts to join the JSC “on a formal basis,” but that it had “not yet been recognized as a JSC member.” MLS Comment at 2.

⁶ See Notice of Participant Groups . . . and Scheduling Order, Consolidated Proceeding No. 14–CRB–0010–CD (2010–13) (Nov. 25, 2015), Ex. A. By its terms, this order limited application of the agreed participant groups to the proceeding in which it was adopted. The Judges nonetheless consider the categories informative for purposes of determining distribution in the present proceeding.

closed upon completion of the Boston Harbor maintenance and improvement projects, while the existing MBDS will remain open for the disposal of suitable dredged material. Like the MBDS, however, the expansion would be subject to ongoing monitoring and management to ensure continued protection of the marine environment.

DATES: Comments must be received on or before October 23, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R01-OW-2017-0528, at <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://www2.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 modification is the *Draft Environmental Assessment on the Expansion of the Massachusetts Bay Ocean Dredged Material Disposal Site (ODMDS)*, September 2017, which was prepared by EPA.

FOR FURTHER INFORMATION CONTACT: Alicia Grimaldi, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Mail Code: OEP 6-1, Boston, MA 02109; telephone—(617) 918-1806; fax—(617) 918-0806; email address—grimaldi.alicia@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Potentially Affected Persons

The expansion of the MBDS is a temporary modification made in order to improve environmental conditions at the Potential Restoration Area by allowing suitable dredged material from the USACE Boston Harbor maintenance and improvement projects only to be placed over wastes dumped in the past at the historic IWS. Therefore, the persons potentially affected by this action would be limited to the USACE, who are responsible for the Boston Harbor Deep Draft Navigation Project and the disposal of dredged material into ocean waters under MPRSA. The existing MBDS will continue to be used for the disposal of dredged material suitable for ocean disposal pursuant to the MPRSA.

II. Background

A. History of Disposal Sites in Massachusetts Bay

The IWS is a disposal site in Massachusetts Bay approximately 20 nautical miles (nmi) east of Boston that was used in the past for disposal of a variety of wastes that would not be permitted for disposal today. The IWS is a circular cite with a center of 42°25.7' N., 70°35.0' W. and a radius of 1 nmi. It is believed that disposal of derelict vessels, construction debris, commercial waste, and dredged material at the area may have begun as early as the early 1900s. There are records dating back to the 1940s for the disposal of radioactive, chemical and hospital waste, ordnance, munitions, etc. Use of the IWS was discontinued in 1977 and the site was officially de-designated in 1990 (55 FR 3688). From 1977 through 1993, there was an Interim Massachusetts Bay Disposal Site for dredged material disposal with a center 1 nmi east of the IWS at 42°25.7' N., 70°34.0' W. and a radius of 1 nmi. In 1993, the existing MBDS was designated by EPA with a center at 42°25.1' N., 70°35.0' W. and a radius of 1 nmi, an area of 3.14 nmi², and depth ranges from 82 to 92 m. The MBDS overlaps the IWS to the south, but avoids the known densest concentration of barrels, also known as the barrel field. The MBDS is used solely for the disposal of dredged material, primarily from Boston Harbor.

The USACE will begin the Boston Harbor maintenance and improvement dredging projects in the fall of 2017. The project is expected to generate approximately 12 million cubic yards of dredged material consisting primarily of Boston blue clay. EPA and USACE are proposing to use this dredged material beneficially by covering the area in and around the historic IWS barrel field.

This will be accomplished utilizing a method of disposal developed and tested by the USACE, which is designed to prevent direct impact of sediment onto waste containers, which could potentially break them or cause the resuspension of potentially contaminated sediment on the seafloor.

Before any entity can dispose of dredged material at the MBDS, EPA and the USACE must evaluate the project according to the ocean dumping regulatory criteria (40 CFR 227) and determine whether to authorize the disposal. EPA independently evaluates proposed disposal projects and has the right to restrict and/or reject the disposal of dredged material if it determines that the environmental protection requirements under the MPRSA have not been met. This proposed modification to the MBDS site boundaries does not constitute an approval by EPA or USACE for open water disposal of dredged material from any specific project.

B. Location and Configuration of Modified Ocean Dredged Material Disposal Site

EPA proposes the temporary expansion of the MBDS boundaries to include the Potential Restoration Area, which encompasses the IWS barrel field. The expansion will be temporary, opening upon the effective date of the Final Rule and closing upon completion of the Boston Harbor maintenance and improvement dredging projects. The temporarily expanded site will consist of two overlapping circles:

- Center 1—42°25.1' N., 70°35.0' W., 1 nautical mile radius (existing MBDS)
- Center 2—42°26.417' N., 70°35.373' W., 0.75 nautical mile radius (temporary expansion)

The area of the temporarily modified MBDS is 4.60 nmi² and the western edge is approximately 19 nmi east of Boston. Water depths at the modified site range from 70 to 91m. Like the existing MBDS, the modified MBDS will not overlap, and is not expected to impact, the Stellwagen Bank National Marine Sanctuary (SBNMS).

C. Management and Monitoring of the Site

Under the proposal, there would be two distinct areas of the modified MBDS: The existing MBDS and the temporary expansion. The existing MBDS will continue to be utilized as a dredged material disposal site for those projects generating dredged material suitable for open water disposal under the MPRSA. The temporary expansion will solely be used for the disposal of

suitable material generated during the Boston Harbor maintenance and improvement dredging projects. Disposal of dredged material in both the existing MBDS and temporary expansion would be required to abide by the Site Management and Monitoring Plan (SMMP) for the MBDS. The SMMP includes management and monitoring requirements to ensure that the any dredged material placed at the sites is suitable for ocean disposal and that the adverse impacts of disposal, if any, are addressed to the maximum extent practicable. The SMMP for the MBDS includes restrictions on time-of-year for disposal and disposal vessel speeds, requirements for the presence of a marine mammal observer for each disposal event, and other guidelines to minimize any potential conflicts with threatened or endangered species.

D. MPRSA Criteria

EPA has assessed the proposed temporary modification to the MBDS according to the criteria of the MPRSA, with particular emphasis on the general and specific regulatory criteria of 40 CFR 228.5 and 228.6, to determine whether the proposed site modification satisfied those criteria. The *Draft Environmental Assessment of the Expansion of the Massachusetts Bay Ocean Dredged Material Disposal Site (ODMDS)* provides an extensive evaluation of the site selection criteria and other related factors considered in deciding to propose the modification of the MBDS.

1. General Criteria (40 CFR 228.5)

(a) *The dumping of materials into the ocean will be permitted only at sites or in areas selected to minimize the interference of disposal activities with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation.*

Since its designation in 1993, disposal at the MBDS has not interfered with other activities in the marine environment. It is anticipated that this will also be the case for the temporarily modified MBDS. The IWS has been closed by the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) since 1980 to the harvesting of surf clams and ocean quahogs. There is also a warning from NOAA and the Food and Drug Administration (FDA) on all nautical charts against harvesting fish and shellfish in the area. The expanded MBDS area has low recreational boater density and does not

overlap with the shipping lanes into and out of Boston Harbor.

(b) *Locations and boundaries of disposal sites will be so chosen that temporary perturbations in water quality or other environmental conditions during initial mixing caused by disposal operations anywhere within the site can be expected to be reduced to normal ambient seawater levels or to undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery.*

The modified MBDS will be used only for dredged material suitable for ocean disposal under the MPRSA. USACE also models disposal projects to evaluate their potential to violate water quality standards. The nearest shoreline to the modified MBDS is approximately 8 nmi to the north. The prevailing current is not expected to transport dredged material to surrounding beaches or shores. Temporary changes caused by the physical movement of sediment through the water column will be reduced to ambient conditions before reaching any environmentally sensitive area. SBNMS is immediately east of the site, but a steep bathymetric rise between the two features provides containment of dredged material in the deeper area containing the modified MBDS, known as Stellwagen Basin. There are no known geographically-limited fisheries or shellfisheries in the project area.

(d) *The sizes of ocean disposal sites will be limited in order to localize for identification and control any immediate adverse impacts and permit the implementation of effective monitoring and surveillance programs to prevent adverse long-range impacts. The size, configuration, and location of any disposal site will be determined as a part of the disposal site evaluation or designation study.*

The size and configuration of the temporarily modified MBDS is specifically designed to allow for the IWS barrel field to be covered by suitable dredged material generated during the USACE Boston Harbor maintenance and improvement projects. The MBDS area has been monitored under the USACE Disposal Area Monitoring System (DAMOS) program since the late 1970s. Monitoring will continue at the MBDS and temporary expansion to prevent adverse long-range impacts.

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

The continental shelf is over 220 nmi east of Boston. Therefore, transporting material to, and performing long-term monitoring at, a site located off the continental shelf is not economically or operationally feasible. The project area has been used for ocean disposal since at least the early 1900s.

2. Specific Criteria (40 CFR 228.6(a))

(1) *Geographical position, depth of water, bottom topography and distance from coast.*

The temporarily expanded MBDS is located in an area of Massachusetts Bay known as Stellwagen Basin and is approximately 8 nmi from the nearest coastline in Gloucester, MA. The depth of the temporarily expanded site ranges from 70–91 meters. The seafloor in the area is primarily flat and primarily made up of silt and clay. There are two glacial knolls included within the boundaries of the temporary expansion, both roughly 20 m high. These knolls are not included in the Potential Restoration Area and, therefore, no disposal will take place on them.

(2) *Location in relation to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases.*

The MBDS area contains Essential Fish Habitat (EFH) for various fish species, and certain threatened and endangered species of whale and sea turtle have been sighted in the vicinity of the MBDS. Furthermore, the entirety of Massachusetts Bay, and most of the larger Gulf of Maine, are designated as a critical foraging habitat for the North Atlantic Right Whale by NMFS. At the same time, NMFS has previously determined that dredged material disposal at the MBDS would not impact any of these species and restrictions are in place to ensure their safety, including vessel speed and disposal time-of-year limitations and the requirement that marine mammal observers accompany the USACE on vessels during disposal operations. Furthermore, any risk of contaminants entering the food web is expected to be minimized by the covering of the IWS barrel field.

(3) *Location in relation to beaches and other amenity areas.*

The closest beach to the temporarily expanded MBDS is 10 nmi away. The SBNMS is just east of the MBDS. Past dredged material disposal has not impacted the SBNMS and no impact to the SBNMS is expected with the temporary expansion of the MBDS.

(4) *Types and quantities of wastes proposed to be disposed of, and proposed methods of release, including methods of packing the waste, if any.*

The MBDS is only to be used for the disposal of dredged material that is suitable for ocean disposal under the MPRSA. The temporary expansion of the MBDS will only be used for suitable dredged material generated during the USACE Boston Harbor maintenance and navigation projects. Disposal within the temporary expansion will utilize a berm-building technique devised by the USACE in order to minimize the risk of barrel breakage or resuspension of potentially contaminated seafloor sediment.

(5) *Feasibility of surveillance and monitoring.*

The MBDS is monitored through the DAMOS program under the guidance of the SMMP. Disposal is also monitored through the National Dredging Quality Management Program to confirm accurate placement of dredged material. The area of temporary expansion will be included in the monitoring of the MBDS under the DAMOS program from the time of first disposal for as long as MBDS monitoring continues.

(6) *Dispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction and velocity, if any.*

Current velocities range from 0–30 cm/s in the MBDS area. Currents are influenced by tides in a rotational manner, but net water movement is to the southeast. Regional dredged material is primarily made up of fine sand, silt, and clay. Dredged material generated during the USACE Boston Harbor maintenance and improvement projects is primarily Boston blue clay, which is cohesive and, therefore, settles rapidly. Minimal horizontal mixing or vertical stratification of dredged material occurs, resulting in low suspended sediment concentrations. Previous modeling of initial disposal indicates no adverse impacts in the water column or violations of water quality criteria. Previous studies have demonstrated the relative immobility of dredged material at the MBDS. Storms with the potential to cause sediment resuspension are rare in Massachusetts Bay.

(7) *Existence and effects of current and previous discharges and dumping in the area (including cumulative effects).*

Beginning in the early 1900s, the historic IWS was used for the disposal of industrial, chemical, medical, low-level radioactive, and other hazardous wastes, in addition to contaminated dredged material, construction debris, derelict vessels, etc. An Interim MBDS was designated in 1977 for the disposal of dredged material and it was closed in 1993, which is when the existing MBDS was designated. Studies and monitoring

of the area have shown no significant impacts on water quality, sediment quality, or marine resources. More information regarding the effects of disposal in the area can be found in the *Draft Environmental Assessment on the Expansion of the Massachusetts Bay Ocean Dredged Material Disposal Site*. The berm-building disposal technique designed by USACE is intended to limit the resuspension of potentially contaminated seafloor sediment or hazardous materials in the area. Furthermore, placing dredged material generated during the USACE Boston Harbor maintenance and improvement projects on top of potentially contaminated materials dumped at the IWS in the past will isolate these potential contaminants under a protective layer of suitable sediments, consisting primarily of clay.

(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.*

Extensive shipping, fishing, recreational, and scientific research activities take place in Massachusetts Bay throughout the year. Dredged material disposal operations at the MBDS have not interfered with these activities and the temporary expansion of the MBDS would also not interfere with these activities. Due to the hazardous nature of material historically disposed in the IWS, a warning to fishermen against fishing and shellfishing in the area is already included on all nautical charts and the area is closed for the harvesting of ocean quahogs and surf clams. Therefore, disposal operations in the area would not interfere with any existing fishing activity.

(9) *The existing water quality and ecology of the site as determined by available data or by trend assessment or baseline surveys.*

Monitoring at the disposal area has taken place since the late 1970s under the DAMOS program. Surveys at the MBDS have detected no significant differences in water quality or biological characteristics in the disposal site and adjacent reference areas. A Baseline Seafloor Assessment Survey for the Proposed Expansion of the MBDS was completed by the USACE in anticipation of this project and it is available on the USACE DAMOS site at <http://www.nae.usace.army.mil/Missions/Disposal-Area-Monitoring-System-DAMOS/>.

(10) *Potentiality for the development or recruitment of nuisance species in the disposal site.*

There are no known components of dredged material or consequences of its disposal that would attract or result in the recruitment or development of nuisance species at the expanded MBDS. Nuisance species have not been detected in any survey of the area.

(11) *Existence at or in close proximity to the site of any significant natural or cultural features of historical importance.*

There are two known shipwrecks within the boundaries of the existing MBDS: A Coast Guard vessel and a 55-foot fishing boat. Both were intentionally sunk in 1981 and are not considered to be historically significant. Additional shipwrecks have been revealed in the area during subsequent surveys, although there are no identified shipwrecks within the Potential Restoration Area. Disposal operations have avoided and will continue to avoid any shipwrecks in the project area by implementing a fifty-meter buffer around known shipwrecks within which no disposal will occur.

III. Environmental Statutory Review

A. National Environmental Policy Act (NEPA)

Section 102 of the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 to 4370f, requires Federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the human environment. NEPA does not apply to EPA designations of ocean disposal sites under the MPRSA because EPA's actions under the MPRSA are exempt from the procedural requirements of NEPA through the functional equivalence doctrine. Nevertheless, as a matter of policy, EPA undertakes a NEPA review for certain of its regulatory actions, including the designation of dredged material disposal sites under Section 102 of the MPRSA. The EPA's "Notice of Policy and Procedures for Voluntary Preparation of NEPA Documents" (Voluntary NEPA Policy), 63 FR 58045 (October 29, 1998), sets out both the policy and procedures the EPA uses when preparing such environmental review documents.

The EPA's primary voluntary NEPA document addressing the proposed temporary expansion of the MBDS is the *Draft Environmental Assessment on the Expansion of the Massachusetts Bay Ocean Dredged Material Disposal Site (ODMDS)* [September 2017] (Draft EA), prepared by EPA in cooperation with USACE. Anyone desiring a copy of the Draft EA may obtain one using the methods provided above in the Docket

section. The comment period for the Draft EA runs concurrently with the comment period for this Proposed Rule. The Draft EA provides the threshold environmental review for the temporary modification of the MBDS. Information from the Draft EA is used in the above discussion of the ocean dumping criteria.

The proposed action discussed in the Draft EA is the temporary modification of the MBDS. The purpose of this proposed action is to physically isolate potentially contaminated material dumped at the IWS in the past by placing suitable dredged material generated during the USACE's Boston Harbor maintenance and navigation projects. By covering much or all of the barrel field in and around the historic IWS, environmental conditions at the site will be improved.

USACE and EPA will continue to evaluate all federal dredged material disposal projects in the MBDS pursuant to the EPA criteria set forth in the Ocean Dumping Regulations (40 CFR 220–229) and the USACE regulations (33 CFR 209.129 and 335–338). After compliance with regulations is determined, USACE issues MPRSA permits to applicants for the transport of dredged material intended for disposal. Under Section 103(c) of the MPRSA, EPA can disapprove or add conditions to a project proposing the ocean disposal of dredged material if, in its judgement, the relevant regulatory criteria would not be met.

The following alternatives were considered, but eliminated from detailed evaluation, in the Draft EA:

1. Geographic Alternative 2: Expansion Into Historic IWS

This Geographic Alternative would have expanded the MBDS only to the legal boundaries of the historic IWS. The modified site would consist of two overlapping circles, both with a radius of 1 nmi centered at 42°25.1' N., 70°35.0' W. (MBDS) and 42°25.7' N., 70°35.0' W. (IWS). This Alternative would have increased the size of the MBDS from 3.14 nmi² to 4.13 nmi². The western boundary of the modified site would have been only 0.02 nmi from the SBNMS. It also would not have included a large portion of the barrel field located just north of its boundaries, leaving part of the Potential Restoration Area with its waste barrels and potentially contaminated sediment exposed on the seafloor. As a result, EPA rejected this alternative.

2. Temporal Alternative 2: Expansion for Three Years

This Temporal Alternative would have limited the expansion of the MBDS to a three-year period, opening with the publication of the Final Rule for the site modification and closing exactly three years later. The Boston Harbor Deep Draft Navigation Project is contingent on the availability of funding, various approvals, technical planning, weather, etc., making it difficult to estimate the duration of the project. This uncertainty could lead to delays in the maintenance and improvement dredging and cause the MBDS expansion to close before the dredging project is complete. This could leave a portion of the Potential Restoration Area uncovered. The remaining dredged material would be disposed in the existing MBDS instead of being used beneficially. For these reasons, EPA rejected this option.

3. Temporal Alternative 3: Permanent Expansion

This Temporal Alternative would permanently expand the boundaries of the MBDS. The dredged material from the Boston Harbor maintenance and navigation projects would be disposed in the expansion, covering the Potential Restoration Area. Once that disposal is complete, the expansion could be used in the future for dredged material generated in other projects. Careful planning to ensure dredged material is not disposed directly onto waste containers or potentially contaminated seafloor sediment is necessary. In order to limit this risk, it would be preferable to cease disposal in the expansion after the restoration project in the event that individual barrels remain exposed. In addition, EPA site selection criteria favor minimizing the size of disposal sites, in general. See 40 CFR 228.5(d). Therefore, once the potentially contaminated materials are covered, EPA favors changing MBDS site boundaries back to their earlier configuration.

4. No Action Alternative

Under the No Action Alternative, the dredged material generated during the Boston Harbor maintenance and improvement projects would not be used beneficially to cover the barrel field in and around the historic IWS. It would, instead, continue to be disposed in the existing MBDS in multiple mounds.

5. Preferred Alternative

The Preferred Geographic and Temporal Alternative would expand the boundaries of the MBDS for the entire duration of the Boston Harbor Deep

Draft Navigation Project. This temporary expansion consists of two overlapping circles: 42°25.1' N., 70°35.0' W. with a 1 nautical mile radius (MBDS) and 42°26.417' N., 70°35.373' W. with a 0.75 nautical mile radius (expansion). This area contains the entirety of the Potential Restoration Area, which means that the barrel field can be covered. Keeping the expansion open only during the Boston Harbor maintenance and improvement projects ensures that all of the suitable dredged material can be used beneficially over the Potential Restoration Area and the area will not be subject to future disposal with the potential to disturb potentially contaminated areas outside the Potential Restoration Area. For these reasons, a site restriction is being put in place directing that the expansion only be used for the disposal of suitable dredged material from the Boston Harbor Deep Draft Navigation Project using the berm-building technique designed by the Corps and will automatically close upon the completion of that Project.

The Draft EA presents the information needed to evaluate the suitability of the proposed modification and is based on a series of disposal site environmental studies. The environmental studies and final designation were and are being conducted in accordance with the requirements of MPRSA, the Ocean Dumping Regulations, and other applicable Federal environmental legislation.

B. Magnuson-Stevens Fishery Conservation & Management Act (MSA)

EPA has integrated the EFH assessment into the Draft EA, pursuant to Section 305(b), 16 U.S.C. 1855(b)(2), of the Magnuson-Stevens Act, as amended (MSA), 16 U.S.C. 1801–1891d. EPA is coordinating with NMFS to ensure compliance with EFH provisions and will attempt to incorporate any conservation recommendations from NMFS.

C. Coastal Zone Management Act (CZMA)

EPA has determined that the proposed modification of the MBDS is consistent to the maximum extent practicable with the enforceable policies of the Massachusetts coastal management program and has submitted this determination to the State for review in accordance with the CZMA.

D. Endangered Species Act (ESA)

The Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 to 1544, requires Federal agencies to consult with NMFS and the Fish & Wildlife

Service (FWS) to ensure that any action authorized, funded, or carried out by the Federal agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any critical habitat. The EPA incorporated an assessment of the potential effects of temporarily modifying the MBDS on aquatic and wildlife species, including any species listed under the ESA, into the Draft EA, and EPA has submitted that document to NMFS and FWS. EPA concluded that the proposed action would not affect any threatened or endangered species, nor would it adversely modify any designated critical habitat. EPA is coordinating with NMFS and FWS to ensure compliance with the ESA.

E. National Historic Preservation Act (NHPA)

The National Historic Preservation Act, as amended (NHPA), 16 U.S.C. 470 to 470a–2, requires Federal agencies to take into account the effect of their actions on districts, sites, buildings, structures, or objects, included in, or eligible for inclusion in, the National Register of Historical Places. EPA is coordinating with the Massachusetts State Historic Preservation Officer (SHPO) to ensure compliance with NHPA.

IV. Statutory and Executive Order Reviews

This rulemaking proposes the modification of an ODMDS pursuant to Section 102 of the MPRSA. This proposed action complies with applicable Executive Orders and statutory provisions as follows:

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This proposed action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 3, 1993) and is, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This proposed site modification does not require persons to obtain, maintain, retain, report, or publically disclose information to or for a Federal agency.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (businesses, organizations, or jurisdictions). EPA has determined that this proposed action will not have a significant economic impact on small entities.

D. Unfunded Mandates Reform Act

This proposed action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1531 to 1538, for State, local, or tribal governments or the private sector. This action imposes no new enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small government entities. Those entities are already subject to existing permitting requirements for the disposal of dredged material in ocean waters.

E. Executive Order 13132: Federalism

This proposed action does not have federalism implications. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and State and local governments, EPA has coordinated with, and specifically solicited comments from, State and local officials with regard to this proposed action.

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

This proposed action does not have tribal implications, as specified in Executive Order 13175. The modification of the MBDS will not have a direct effect on Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the

distribution of power and responsibilities between the federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health & 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 EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed action is not subject to Executive Order 13211 (66 FR 28355) because it is not a “significant regulatory action” as defined under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards that are developed or adopted by voluntary consensus bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed action includes environmental monitoring and measurement as described in the MBDS SMMP. The EPA will not require the use of specific, prescribed analytic methods for monitoring and managing the MBDS. EPA plans to allow the use of any method, whether it constitutes a voluntary consensus standard or not, that meets the monitoring and measurement criteria discussed in the SMMP.

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

Executive Order 12898 (59 FR 7629) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their

mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. The EPA determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This action is expected to be protective of human health because the potential contaminants within the Potential Restoration Area will be isolated under a protective layer of sediment. This should help prevent any accidental recovery of barrels by fishermen and prevent contaminants from the historic disposal from entering the food web. The EPA has assessed the overall protectiveness of modifying the MBDS against the criteria established pursuant to the MPRSA to ensure that any adverse impact to the environment will be mitigated to the greatest extent practicable. Indeed, no adverse impacts are expected. The proposed action is expected to improve environmental conditions in Massachusetts Bay by enabling contaminated material dumped at the IWS in the past to be covered with suitable dredged material so as to isolate the former from the environment.

K. 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 with the marine environment, which includes, “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.”

EPA anticipates that the proposed action will afford additional protection to the waters of Massachusetts Bay and organisms that inhabit them. By covering the barrel field and

surrounding seafloor sediment of the historic IWS, potential contaminants should be prevented from entering the water column or food web in Massachusetts Bay.

L. Executive Order 13547: Stewardship of the Ocean, Our Coasts, and the Great Lakes

Section 6(a)(i) of Executive Order 13547, (75 FR 43023, July 19, 2010) requires, among other things, EPA and certain other agencies “. . . to the fullest extent consistent with applicable law [to] . . . take such action as necessary to implement the policy set forth in section 2 of this order and the stewardship principles and national priority objectives as set forth in the Final Recommendations and subsequent guidance from the Council.” The policies in section 2 of Executive Order 13547 include, among other things, the following: “. . . it is the policy of the United States to: (i) Protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources; [and] (ii) improve the resiliency of ocean, coastal, and Great Lakes ecosystems, communities, and economies. . . .” As with Executive Order 13158 (Marine Protected Areas), the overall purpose of the Executive Order is to promote protection of ocean and coastal environmental resources.

EPA anticipates that the proposed action will afford additional protection to the waters of Massachusetts Bay and organisms that inhabit them. By covering the barrel field and surrounding seafloor sediment of the historic IWS, potential contaminants should be prevented from entering the water column or food web in Massachusetts Bay.

M. Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs

This proposed action would not be a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 3, 1993) and is, therefore, not subject to review under Executive Order 13771. See OMB, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (M–17–21) (April 5, 2017), p. 3 (“An ‘EO 13771 Regulatory Action’ is: (i) A significant regulatory action as defined in section 3(f) of EO 12866 that

has been finalized and that imposes total costs greater than zero . . .”).

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: September 6, 2017.

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. Amend § 228.15 by revising paragraphs (b)(2)(i),(ii), (iii), and (vi) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(b) * * *

(2) * * *

(i) *Location:* Two overlapping circles: Center of existing MBDS: 42°25.1' N., 70°35.0' W., 1 nautical mile radius; Center of temporary expansion: 42°26.417' N., 70°35.373' W., 0.75 nautical mile radius (NAD 1983).

(ii) *Size:* 4.60 sq. nautical miles.

(iii) *Depth:* Range from 70 to 91 meters.

* * * * *

(vi) *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. The temporary expansion of the MBDS shall be used solely for the disposal of suitable dredged material generated during the Boston Harbor Deep Draft Navigation Project using the berm-building method devised and tested by the U.S. Army Corps of Engineers. The temporary expansion will automatically close upon completion of the Boston Harbor Deep Draft Navigation Project.

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