UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROSSANA ROSADO, in her official capacity as NEW YORK STATE SECRETARY OF STATE, BASIL SEGGOS, in his official capacity as COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and the STATE OF NEW YORK	:	
Plaintiffs,	:	CASE NO.: 17-cv-04843
TOWN OF SOUTHOLD, NEW YORK, and the COUNTY OF SUFFOLK, NEW YORK	:	(Korman, J.) (Mann, Ch. M.J.)
Plaintiffs – Intervenors,	:	
v.	:	
ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency, the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and DEBORAH SZARO, in her official capacity as Acting Regional Administrator of EPA Region 1,	:	
Defendants,	:	
CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,	:	
Defendant - Intervenor	:	

CONNECTICUT'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSTION TO THE MOTIONS FOR SUMMARY JUDGMENT OF NEW YORK SECRETARY OF STATE, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE COUNTY OF SUFFOLK AND TOWN OF SOUTHOLD

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56, and Local Rules of Civil Procedure 7 and 56, the Defendant-Intervenor, the Connecticut Department of Energy and Environmental Protection ("DEEP" or the "Department") respectfully submits this Memorandum of Law in support of its Cross-Motion for Summary Judgment affirming the final decision of the United States Environmental Protection Agency ("EPA"), dated November 4, 2016, designating the Eastern Long Island Sound Disposal Site, (the "ELDS") as a dredged material disposal site, pursuant to Sections 102(c) and 106(f) of the Marine Protection, Research and Sanctuaries Act ("MPRSA"), 33 U.S.C. §§ 1412(c) and 1416(f). Defendant-Intervenor further submits this memorandum in opposition to the motions for summary judgment filed by the New York Secretary of State and New York Department of Environmental Conservation ("New York Plaintiffs" or the "State of New York") and County of Suffolk and Town of Southold, ("Plaintiffs-Intervenor," together with the New York Plaintiffs, the "Plaintiffs"), which seek vacatur of the EPA's decision pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"). The EPA's final decision should be affirmed, and the action dismissed, because the EPA's decision was not arbitrary, capricious, an abuse of discretion or contrary to law.

I. FACTUAL BACKGROUND

Connecticut has 322 miles of coastline and three major ports (Bridgeport, New Haven and New London) as well as numerous smaller docking areas and marinas which periodically need to be dredged to function. Long Island Sound is Connecticut’s largest and most important maritime natural resource and is vital to Connecticut’s economy. Hundreds of marine and water dependent businesses in Connecticut depend on periodic dredging. Maritime business accounts for approximately $5 billion in state economic output, and provides 30,000 jobs and tens of millions of dollars in state and local taxes. AR-A 148, pp. 1-2.

Prior to 1970, there were no restrictions on open water disposal and material was disposed of in a number of places. Following passage of the Clean Water Act, 33 U.S.C. § 1251, *et seq*., dredged material disposal was regulated and, in the Long Island Sound, disposal was limited to specific sites. AR-082, ES-1.

In 2005, EPA issued a rule designating the Central and Western Long Island Sound dredged material disposal sites ("CLDS" and "WLDS," respectively). The 2005 rule required that the U.S. Army Corps of Engineers ("USACE"), in collaboration with EPA and the states of New York and Connecticut, prepare a Dredged Material Management Plan ("DMMP") for Long Island Sound. AR-082. On July 7, 2016, EPA published in the Federal Register (81 Fed. Reg. 44220) a final rule to amend the 2005 site designation in support of the goal of reducing or eliminating open-water disposal in Long Island Sound, including standards and procedures, pursuant to the DMMP, for development and use of practicable alternatives to open-water disposal. EPA published a final rule to designate the Eastern Long Island Sound Dredged Material Disposal Site ("ELDS") on December 6, 2016 (81 Fed. Reg. 87820). AR-002.

In addition to the MPRSA, disposal of dredged material may also be reviewed by states under the Federal Coastal Consistency provisions of the CZMA. Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq*. In the CZMA, Congress moved to protect coastal natural resources, and explicitly determined that the beneficial use and enjoyment of the coastal resources of the United States is in the national interest. The CZMA allows eligible coastal states to submit coastal zone management plans ("CZMPs") to the Secretary of Commerce for approval.[1] Once approved, state or federal actions, permits or licenses for coastal activities that have reasonably foreseeable effects on coastal resources or

[1] Connecticut's CZMP was set forth in a Final Environmental Impact Statement on July 31, 1980. It was approved by the Commerce Secretary on September 29, 1980. 45 Fed. Reg. 71640-01 (October 29, 1980).

uses must be consistent with that state's CZMP. Long Island Sound is a state waterway bordered by the states of Connecticut and New York, each of which has an approved CZMP.

Under the statutory umbrella of the Connecticut Coastal Management Act ("CCMA")[2], Conn. Gen. Stat. § 22a-90 *et seq.*, Connecticut's CZMP seeks to: achieve balanced growth along the coast; preserve and enhance coastal resources; improve public access; protect and enhance water-dependent uses, public trust waters and submerged lands; promote harbor management; and facilitate research. The policies of the CCMA guide all federal and state planning, development, acquisition and regulatory activities that are subject to the CZMP. These policies guide program implementation through state regulatory programs for coastal activities. The State of Connecticut has long led regional efforts to promote and protect the natural resources of the Sound, and through strong regulatory programs and investment of huge sums of money, has addressed historic contamination in, and reduced discharges of pollutants to, its lakes and rivers that empty into the Sound.

The number and extent of water-dependent activities regulated under the CCMA is significant. Port facilities and other regulated water-dependent uses in Connecticut include the submarine manufacturer Electric Boat, the U.S. Navy Submarine Base, numerous marinas, commercial fishing and shellfishing businesses, as well as recreational boating. AR-A 148, pp. 1-2. Each of these depends upon access to navigational channels that must be maintained by dredging. DEEP anticipates, and the DMMP provides, that federally-maintained navigation projects and numerous water-dependent uses in Connecticut will require dredging of substantial volumes of dredged material in the near term and over the next 30 years. *Id*. The availability of economical, environmentally sound methods of disposing of dredged material is needed to support Connecticut's water dependent industries and uses. *Id*.

[2] The CCMA is Connecticut's statutory implementation of the CZMA.

A. The 2005 Rule and the Dredged Materials Management Plan

Federal law divides dredging project disposal authorization initially between the EPA and the Army Corps of Engineers. Additional authorizations are required from state officials and other federal agencies as needed.

The primary federal law governing EPA's designation of the ELDS is the MPRSA. MPRSA § 102(c), 33 U.S.C. § 1412(c). MPRSA directs EPA to designate ocean disposal sites for dredged material. In 1980, MPRSA was amended to add what is known as the "Ambro Amendment". As a result of this provision, the disposal in Long Island Sound of dredged material from federal projects (both projects carried out by the Corps and the actions of other federal agencies), or from non-federal projects involving 25,000 cubic yards of material or more, must satisfy the requirements of both CWA § 404 and the MPRSA. Disposal from non-federal projects involving less than 25,000 cubic yards however, is subject only to CWA § 404. Thus, Long Island Sound became the only estuary to be regulated under the MPRSA.

Under MPRSA §§ 103(a)-(e), 33 U.S.C. §§ 1413(a)-(e), each proposed project involving the ocean disposal of dredged material must be separately authorized by the U.S. Army Corps of Engineers ("USACE"), subject to EPA review and concurrence. Permits and authorizations from the USACE are also subject to various other types of federal and state review (*e.g.*, federal consistency review under the CZMA; Endangered Species Act ("ESA") consultation; essential fish habitat consultation under the Magnuson-Stevens Fishery Conservation and Management Act ("MSFCMA"); and water quality review under CWA § 401, 33 U.S.C. § 1341, etc.).

Due to the complexities of meeting the regulatory requirements of multiple laws, and in order to give stakeholders such as the states of New York and Connecticut, as well as numerous harbor and marina owners, the opportunity to evaluate the plan and offer comment, EPA began the process over ten

years ago of preparing a rule governing the disposal of dredged materials in Long Island Sound under the MPRSA and related statutes. As a result of that lengthy cooperative effort, the EPA finalized in 2005 a heavily negotiated rule ("Final Rule") which established the WLDS and CLDS disposal sites and set forth the parameters for the implementation of dredged material disposal at these sites in the Sound. The Army Corps of Engineers was tasked with developing a planning level document to evaluate and address dredging needs and materials management options for future sites in what came to be known as the Dredged Materials Management Plan ("DMMP").[3]

After almost eight years of stakeholder negotiations, the USACE completed the DMMP in early 2016. EPA had 120 days to consider the DMMP and incorporate standards and procedures for use of the WLDS and CLDS sites from the DMMP into a rule amending the 2005 rule, which became final in mid-2016. The DMMP and appendices alone is more than 6000 pages long and was extensively researched, documented, and detailed. AR-082. The various governmental and private stakeholders involved in the 2005 designation rule, DMMP development, 2016 amendment, and the 2016 designation of ELDS attended numerous meetings and reviewed countless documents and reports. A key issue was, and continues to be, the need to protect the shared resources of the Sound and to find the most appropriate means of disposing of dredged material.

It is important to note that the DMMP was designed to identify dredging needs *over a thirty-year span of time*, and it requires the USACE and EPA to evaluate sediment and water quality characteristics, disposal alternatives, and environmental impacts on a harbor-by-harbor basis. The DMMP also included the development of project management plans and dredging assessment surveys, in which the coastal towns and facility owners, both private and public, participated. The DMMP does not itself authorize the disposal of any dredged materials; rather, it identifies an array of potential disposal alternatives. The

[3] The DMMP was prepared after the 2005 designation of the WLDS and CLDS. However, EPA was obligated to apply the restrictions of the DMMP to all sites in the Sound once it was finalized.

EPA site designation rules provide the standards and procedures for determining if any dredged material from a specific project is safe, appropriate and eligible for disposal. *See,* 40 CFR Parts 227 and 228.

Over the years and working under the Final Rule and the DMMP, EPA along with the USACE, in conjunction with many stakeholders including Connecticut DEEP, New York agencies, and others, conducted extensive investigations and reviewed numerous studies and ultimately designated three disposal sites: western, central and eastern. The other two other historic sites were closed. The western and central sites have been approved by all parties.[4] NYDOS only objects to the EPA's designation of the eastern site.

EPA's rationale for continuing to study, and ultimately approve, the third site is succinct:

> EPA finds that is necessary to proceed with the site designation process at this point. EPA has been working to designate needed dredged material disposal sites for a very long time, and this particular project began in 1999 with scoping hearings under the National Environmental Policy Act. . . . . Therefore, unless designation of the ELDS goes forward, there will be no EPA-designated dredged material disposal site in the eastern Region of Long Island Sound. This could pose a threat both to safe navigation in the eastern Sound, whether for recreational, commercial, or military and public safety purposes, and could result in less than optimal environmental protection if dredged material requires management under emergency conditions.

AR-023, p.17.

B. The Eastern Disposal Site

The designated ELDS is in the eastern region of Long Island Sound. The site lies south of the mouth of the Thames River, approximately halfway between Connecticut and New York. Final Rule, AR-001A, p. 15; *See also,* 81 Fed. Reg. 24751-24752. The closest upland points to the ELDS are Harkness Memorial State Park, approximately 1.1 nautical miles (nmi) to the north, and Fishers Island,

[4] EPA designated the CLDS and WLDS under the MPRSA for potential use for the placement of suitable dredged material in 2005 without objection from New York. *See* 70 Fed. Reg. 32498-32520 (June 3, 2005) (Final Rule) ("EPA's 2005 Final Rule"). 40 C.F.R. 228.15(b)(4) and (b)(5)(2006). In designating the CLDS and WLDS, EPA applied the MPRSA's site designation criteria. *See* 40 C.F.R. §§ 228.4, 228.5, and 228.6. *See*, AR-023, p.4.

New York, approximately 2.3 nmi to the southeast. *Id.* The original dimensions of the proposed ELDS were 1 × 2 nmi, for a total area of 2 square nautical miles.

As initially proposed, the site was almost entirely in Connecticut waters, however, EPA, at New York's request, redrew the boundary so that the site is now entirely within Connecticut waters and the overall size is now about 1.3 square nautical miles. The ELDS is adjacent to, and contiguous with, the existing, closed New London Disposal Site ("NLDS").

C. New York's Complaint

The Complaint includes five Claims for Relief. The First Claim is that the EPA arbitrarily inflated the projected volumes of dredged materials in order to justify the need for the ELDS in violation of the APA. The Second Claim is that the EPA arbitrarily minimized the ELDS' potential for interfering with navigation in the Sound in violation of the APA. The Third Claim is that EPA's designation of an unused and "pristine" site was arbitrary and capricious in violation of the APA. The Fourth is that EPA failed to explain that smaller dredging projects are tested under different, and less stringent, criteria than larger projects and that this would result in greater release of contaminants than described by EPA. The Fifth Claim is that the designation of the ELDS was not consistent with New York's Coastal Zone Management Program and thus is in violation of New York's CZMA and the APA. None of these claims has merit.

II. STANDARD OF REVIEW FOR A MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "when there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law." *S/N1 REO Ltd. Liab. Co. v. City of New London*, 127 F. Supp. 2d 287, 289 (D. Conn. 2000) (Hall, J.). The parties, working together, have agreed that their summary judgement motions will dispense with a

Rule 56.1 statement of material facts and will rely instead upon the administrative record. Thus, there are no material facts in dispute in this case and, accordingly, summary judgement is appropriate.

In addition, the typical summary judgment standard does not apply in cases involving review of final agency action under the APA '"because of the limited role of a court in reviewing the administrative record.'" *ViroPharma, Inc. v. Hamburg*, 916 F. Supp. 2d 76, 79 (D.D.C. 2013) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006)). In such cases, "the agency resolves factual issues to arrive at a decision that is supported by the administrative record," and summary judgment is "the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the [Administrative Procedure Act] standard of review." *Coal. for Common Sense in Gov't Procurement v. United States*, 821 F. Supp. 2d 275, 280 (D.D.C. 2011), *aff'd*, 707 F.3d 311 (D.C. Cir. 2013). Summary judgment is "an appropriate procedure for resolving a challenge to a federal agency's administrative decision" when, as here, "review is based upon the administrative record." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995)(citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977).

III. ARGUMENT

Defendants should be granted summary judgment because the EPA's Final Rule is neither arbitrary nor capricious and is fully supported by the extensive administrative record. Further, all parties, including the New York Plaintiffs and Plaintiffs-Intervenors, have had ample opportunity for notice and comment on the administrative record as required by the APA. The New York Plaintiffs' and Plaintiffs-Intervenors' arguments also fail because they have not, and cannot, point to any relevant evidence contradicting the EPA's record.

A. Standard of Review for Claims Under the APA

Under the Administrative Procedures Act ("APA"), courts review contested agency action to determine if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 119 (2d Cir.2013) (quoting 5 U.S.C. § 706(2)(A)); *see also Karpova v. Snow*, 497 F.3d 262, 267 (2d Cir.2007) (same).). "Under this deferential standard of review, [courts] cannot substitute [their] judgment for that of the agency." *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 549, 555 (2d Cir. 2009); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (holding that under the "narrow" arbitrary and capricious standard of review, "a court is not to substitute its judgment for that of the agency. . . ." (quotations and citation omitted)); *Karpova*, 497 F.3d at 268 ("[S]o long as the agency examines the relevant data and has set out a satisfactory explanation [,] including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action . . . .") "[T]he agency's decision must reveal a rational connection between the facts found and the choice made." *Brodsky*, 704 F.3d at 119 (quoting *Natural Res. Def. Council v. U.S. EPA*, 658 F.3d 200, 215 (2d Cir.2011)); *see also Fed. Aviation Admin.*, 564 F.3d at 555 (accord). "[A]n agency determination will only be overturned when the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Karpova*, 497 F.3d at 267–68 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(*"State Farm"*). An agency regulation is arbitrary and capricious if, among other reasons, the agency "entirely failed to consider an important aspect of the problem," *State Farm* at 43, or "ignores or countermands its earlier factual findings without reasoned explanation for doing so." *FCC v. Fox Television Stations, Inc*., 556 U.S.

502, 537. The APA mandates that, before adoption of a final rule, a federal agency must engage in a notice-and-comment process that "give[s] interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The public must be given a "meaningful opportunity" to comment on "relevant and significant issues" and be provided adequate time to comment. *North Carolina Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012) (*NC Growers*).

However, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resource Council,* 490 U.S. 360, 378 (1989). "[W]hile a court can uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, it may not itself supply a reasoned basis for the agency's action than the agency itself has not given." *Brodsky,* 704 F.3d at 119 (quotations and citation omitted). "An agency's decision is accorded a presumption of regularity," *Coal. on W. Valley Nuclear Wastes v. Bodman,* 625 F.Supp.2d 109, 116 (W.D.N.Y.2007), *aff'd sub nom. Coal. on W. Valley Nuclear Wastes v. Chu,* 592 F.3d 306 (2d Cir.2009) (quotations and citation omitted), "and the party challenging the decision has the burden of proof." *Id.; see also Natural Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs,* 457 F.Supp.2d 198, 220 (S.D.N.Y. 2006); *Boatmen v. Gutierrez,* 429 F.Supp.2d 543, 548 (E.D.N.Y.2006) ("Plaintiffs bear the burden of showing, by citation to evidence in the administrative record, that an agency's actions are arbitrary and capricious.")

1. EPA Properly Evaluated The Need For A Disposal Site In The Eastern Long Island Sound

Plaintiffs' first claim is essentially a challenge to EPA's conclusion that there is a public need for the ELDS, and more specifically, that the EPA inflated the amount of dredged material to be disposed of at the eastern site. As stated by New York in its brief, the "gravamen of this claim is that EPA's

determination that a third permanent disposal site in Long Island Sound with a disposal capacity of 20 million cubic yards is needed is arbitrary because the Army Corps of Engineers issued two inconsistent estimates of remaining capacity at the permanently designated Central Site, where the dredge materials from the area of the Eastern Long Island Sound may be disposed." New York's Memorandum of Law in Support of Motion for Summary Judgement ("New York Mem."), pp. 35-38.

Plaintiffs' first claim is incorrect because: (1) the EPA and USACE provided a comprehensive analysis of the potential total volumes of dredged material and EPA correctly reviewed and applied that data in its designation and (2) there is a distinct need for the ELDS in addition to the WLDS and CLDS under any total volume analysis scenario.

a. The Public Need For Dredging in Long Island Sound

While the Plaintiffs' first count is framed in the context of alleged factual discrepancies in the record, the Plaintiffs' real challenge is to the EPA's determination of public need. In this regard, the record is abundantly clear that there is a need for dredging of harbors and ports in Long Island Sound and that EPA's determination of need was neither arbitrary nor capricious:

> Over time, the movement and accretion of silt and sand in the waters of Long Island Sound, and rivers tributary to the Sound, leads to the buildup of sediment on the bottom of these waters. The resulting buildup can interfere with navigation and the berthing and docking of vessels. This, in turn, can threaten public safety and interfere with marine commerce and recreation, and can even impact national defense-related activities due to the need for adequate navigation channels and berthing areas for U.S. Navy and Coast Guard vessels that use these waters. Therefore, it is periodically necessary to dredge Long Island Sound's navigational channels, port and docking areas, marinas, tributary rivers and other areas requiring vessel access. (The need for dredging is not unique to Long Island Sound; it is a necessity for waterways all over the Nation.)

AR 023, p. 18.

The Corps of Engineers' public notice of its Final Dredged Material Management Plan stated: "Dredging is necessary for the continued maintenance, and occasional improvement of . . . harbors to maintain safe navigation." AR-082, p.1. USACE added:

> Maintenance of adequate navigation depth in Federally dredged general navigation features . . . and non-Federally dredged local service facilities (LSF – marine terminals, berths, port facilities, and private marinas and boat yards, public landings, etc.), are vital to the national and regional economy. Commercial shipping and recreational boating industries throughout New England rely on the continued viablity of these facilities. To ensure continued use, economic viability, and safety of the region's navigation channels and navigation-dependent facilities, periodic dredging must be performed to remove accumulated sediment, and when warranted, to periodically improve navigation infrastructure.

AR-082, p. 1-1.

Stakeholders repeatedly and unequivocally identified the need for dredging on the record in this case. For example, the Connecticut Port Authority has stated: "Connecticut's maritime industry contributes more than $9 billion to the state's economy and employs more than 40,000 people." AR-A 148. The Port Authority added: "In 2014, over 12,000,000 [million tons] of import and export cargo passed through the state's three major ports. . . . Without a sustained effort to dredge channels and basins, the free flow of commerce at these ports and harbors is certain to be impeded." *Id*.

Similarly, the Connecticut Harbor Management Association ("CHMA") filed a letter dated March 21, 2005 stating: "It is demonstrated that the lack of timely maintenance dredging of Connecticut's ports and harbors will have far-reaching economic, social and environmental impacts." AR-082, p. 3295-96, A-3-181 – A-3-182. This letter continued: "Timely maintenance dredging is clearly needed to maintain and enhance the viability of the State's marine-related economies, the beneficial quality of life associated with the Connecticut coast, and opportunities for public access to LIS." *Id*. The Harbor Management Association submitted another letter dated October 15, 2015, reiterating its 2005 position:

> [C]urrently active federal navigation projects authorized by Acts of Congress and maintained by the USACE, are found in 28 Connecticut waterways. These navigation projects, including channels and, in some locations, anchorage basins, are subject to naturally occurring siltation (shoaling). As a result, they require timely and economical maintenance dredging to maintain beneficial use by industrial, commercial, and recreational users.

AR-A 146, p.2.

USACE independently studied the economic impact to the both region and Connecticut specifically and its conclusions were included in the Final Environmental Impact Statement as Appendix F. USACE concluded that navigation-dependent industries are vital to the region and that:

> collectively, these industries across the three states in the study area account for in excess of 52,000 jobs through their direct, indirect and induced impacts. These workers produce nearly six billion dollars of gross state product (GSP) and earn nearly seven billion dollars in personal income. In the absence of navigation- dependent industries, government coffers would be more than $850 million lighter. The impact on taxes includes state and local government receipts from income and sales taxes.

AR-037, p. 3-1.

As for the State of Connecticut, the USACE found that:

> The total economic impact of navigation-dependent industries in Connecticut is just over one percent of the state's $164.5 billion GSP. Compared to the other states in the study area, Connecticut sees a disproportionate navigation-dependent industry impact on manufacturing even though its estimated 2001 employment level is the lowest of the three states in the study area. This is due in large part to the production of submarines for the military in Groton. **Without dredging, the ability to launch (and therefore build) submarines of the size currently in use would be eliminated.** (Emphasis added.)
>
> The transportation and public utility sector is the second most impacted industry as shown in Table 4. This is expected given the importance of Connecticut's seaports.

AR-037, p. 3-4. Of course, the total impact to maritime commerce from the failure to site the ELDS will extend far beyond Connecticut. The Corps of Engineers carefully examined the economic impacts to the entire region and concluded:

> The contribution of navigation-dependent activity to economic output in the LIS region is approximately $9.4 billion per year. Navigation-dependent activity is estimated to contribute $5.5 billion per year and 55,720 jobs to the regional economy of the three states whose harbors depend on the Sound. This navigation-dependent activity accounts for an estimated $1.6 billion per year in Federal and State tax revenues.

AR-082, p. 1-10; AR-081, p. ES-1, AR-008, p. 47.

Battelle, an independent contractor, provided a separate report in 2003 to USACE to be included in the FEIS and focused on detailing the socio-economic impacts to the region from a "No Action Alternative," that is, what impacts could be expected if appropriate disposal sites were not selected. As the Battelle report stated:

> The purpose of this study is to evaluate the economic impacts of the No Action Alternative over the next twenty years. The EIS process requires the examination of the probable economic consequences of a No Action Alternative, where dredging is no longer possible due to the high costs of other disposal alternatives resulting in the absence of appropriate open water disposal facilities. If dredging of channels and harbors were to cease, navigation channels and access to marine waterfront businesses and marinas would gradually be limited. As access was reduced, ships and recreational boats would be unable to use the harbors, and costs of alternative routes of travel for commerce would impact businesses and the communities around them.
>
> In Connecticut, the Study Area includes 19 of the 51 harbors, which were part of the Original Study Area examined in ENSR Report 20001a. All of these are Federal projects and/or private maintenance projects expected to generate over 25,000 cy.

AR – 038, p. vii.

> Having exhaustively analyzed data from numerous sources, Battelle concluded:
>
> The results indicate that two-thirds of the harbors are in Connecticut. Eleven of the fourteen Connecticut harbors are experiencing channel depth reductions now, which are projected to continue through the year 2020. Three of New York's seven harbors show this current problem.
>
> It is projected that the Study Area will experience $398 million in losses likely to occur to GSP under the No Action Alternative by the year 2020, using the regional designations assigned in the ENSR 2001a study. In addition, there will be sales and income losses of $7.4 million to recreational boating, and over $11 million in losses to freight transportation.
>
> Consistent with the shoaling impacts, the economic impact of the No Action Alternative would be most seriously felt in Central Connecticut, where every harbor within this regional designation is projected to be significantly affected by shoaling. About 80% of GSP losses and recreation related sales and income lost in the Study Area in 2020 would be lost in Central Connecticut.

AR 038, p. viii.

> Income losses are expected to increase from almost $33 million in 2005 to over $216 million in 2020. Related impacts are employment losses and lost tax revenues. Over the 20-year period, employment losses increase from over 1,200 jobs lost to more than 7,600 in 2020. . . . These impacts include the direct, indirect and induced effects of shoaling's impact on the regional economy.

AR 038, p. viii. Thus, the record clearly includes important evidence that failure to dredge would have direct adverse impacts to Connecticut's coastal interests protected by the CZMA.

The record does not simply list the overall adverse impacts to the state. Individual employers have been fully engaged in this process and have provided direct testimony to the EPA and USACE. Two major employers, Electric Boat and the U.S. Navy, would be unable to operate without timely maintenance dredging and, particularly, a disposal site in the eastern Long Island Sound.

b. U.S. Navy Submarine Base and Electric Boat

The United States Navy Submarine Base at New London, Connecticut, (SUBASENLON) is a major employer in eastern Connecticut which relies on having a properly maintained harbor and channel. This is both a near term and long term concern for base operations and the consideration of the base in potential base closing rounds. The Naval Submarine Base New London fully supports the ELDS and has stated on the record:

> SUBASENLON commends the U.S. Environmental Protection Agency (EPA) on conducting a rigorous analysis and evaluation of the alternatives for designating a dredge materials disposal site in ELIS. Submarine operations at SUBASENLON are critical to national defense and SUBASENLON depends on dredging and having access to a nearby dredge materials disposal site to maintain required depths to homeport Ohio and Virginia class submarines and provide access to our piers to support our mission.

AR-A 099, p.1. More specifically, EPA noted in the Final Supplemental Environmental Impact Statement:

> For example, maintenance dredging of the U.S. Navy Submarine Base berths planned for 2016–2020 is expected to generate about 75,000 cy of suitable material; the estimated cost of disposal at the ELDS is $31/cy for a total cost of $2,325,000, while disposal at the CLDS is estimated at $64/cy for a total of 4,800,000. An improvement (deepening) project to accommodate a larger class of submarine planned for 2016–2025 is expected to

> generate about 350,000 cy; the estimated cost of disposal at the ELDS is $26/cy for a total cost of $9,100,000, while disposal at the CLDS is estimated at $57/cy for a total of $19,950,000 (USACE, 2016b). Thus, the longer haul distance more than doubles the cost to the public . . . .

AR-002, 81 Fed. Reg. 87822.

Electric Boat, the one of the largest employers in the state, plans a major dredging project to accommodate its construction of the new *Columbia* class nuclear submarine. The company was sufficiently concerned that it filed a letter with EPA on July 14, 2016 stating:

> Electric Boat's shipyard is located on the Thames River in Connecticut, downstream of the Naval Submarine Base. Electric Boat has built submarines for the U.S. Navy for more than 100 years, and is the only shipyard in the United States focused primarily on building submarines. We currently employ more than 10,400 people in our Groton and New London, CT, locations.
>
> A significant part of Electric Boat's operations depends on the water-depth maintenance that dredging provides. Electric Boat relies on deep-water access for delivery of construction materials and submarine modules to the shipyard, transit of submarines for maintenance and modernization, and for final ship delivery to the Navy. As a result, the existence of a sufficient and cost-effective dredging disposal option is vital to Electric Boat's mission.
>
> The proposed Eastern Long Island Sound Disposal Site (ELDS) is close to Electric Boat's facilities and is economically critical to the region. Navigation-dependent activity in the Long Island Sound contributes about $9.4 billion annually to the region. This figure includes Electric Boat's shipbuilding work in Connecticut and Rhode Island, which is expected to grow significantly in the next 10 years.

AR-A 097, p.1.

c. Air Pollution Impacts

There is another significant impact from a failure to dredge ports and harbors; increased air pollution. The Connecticut Harbor Management Association has studied this and concluded that the adverse impacts to the state's economic, social, and environmental interests would be direct and substantial. As noted in a Summary of Findings provided by the Association and included in the record on March 21, 2005: "[w]ithout maintenance dredging . . . there will be dramatic increases in truck traffic on State highways to transport fuel oil, gasoline, and other bulk products currently brought to

Connecticut port facilities. . . ." AR-082, p. 3295, A-3-181. Connecticut is, and always has been a non-attainment zone for air pollutants under the Clean Air Act, and a key part of its Comprehensive Energy Strategy is to *decrease* the air pollution and carbon impacts from truck traffic along state highways. See, AR-A 088, pp. 2-2 through 2-7. In the CHMA document referenced above, the Association pointed out that:

> **Environmental benefits of waterborne transportation are substantial.** Waterborne transportation utilizing Federal navigation projects results in substantial environmental and other benefits associated with reduced truck traffic on the State's highways, including reduced congestion and vehicle emissions and lower highway maintenance costs. When the Port of New Haven, for example, received over 1.8 billion gallons of petroleum products via waterborne transportation in a recent year, this was reported as the equivalent of 278,000 highway truck deliveries. On a smaller scale, a waterfront terminal in Norwalk Harbor in 1999 received 25 barge deliveries totaling 13,000,000 gallons of fuel oil; each barge handled 520,000 gallons per trip. Approximately 2,000 tanker truck deliveries utilizing I-95 would have been required to deliver the same amount of product considering that a tanker truck can hold about 6,500 gallons of fuel oil. That Norwalk terminal, however, suspended barge deliveries of fuel oil in 2003 due to lack of maintenance dredging of the Federal channel; since then, all of its fuel oil deliveries have been by truck. Clearly, a switch from waterborne to highway transportation can cause significantly adverse environmental and other impacts; conversely, enhancement of existing port and navigation facilities and increased waterborne transportation can reduce existing truck traffic on I-95, thereby providing substantial quality of life benefits.

AR-082, pp. 3277-78, A-3-183 – A-3-184.(Emphasis in original.) The highway transportation corridor along I-95 is already stressed and overcrowded. Waterborne transportation of bulk goods is invariably safer and less polluting than truck transport. The loss of access to ports and harbors due to lack of dredging will have both environmental and economic consequences that will be severe. The documentation of these environmental consequences in the existing record offer compelling evidence supporting the EPA's conclusion that there is a demonstrated public need both for harbor dredging and, specifically, the ELDS.

d. New York State Agencies Have Acknowledged the Need For Dredging

Interestingly, the New York Plaintiffs have themselves fully acknowledged the need for periodic dredging to preserve safe navigation and berthing of vessels. In the July 18, 2016 NY DOS/NY DEC Comments on the April 2016 Proposed Rule and DSEIS, the New York state agencies wrote that "[a]s a state with considerable water dependent uses and navigation infrastructure, New York recognizes the need for, and is fully supportive of, dredging for maintaining these types of activities." AR-023, pp. 18-19.

The New York Plaintiffs, however, now claim that there is no need for the ELDS because the central and western sites are sufficient. Plaintiffs' arguments miss the point. The capacity of the WLDS and CLDS are not the only determining factor in deciding the need for the ELDS. The record, however, is clear that:

> Disposal capacity at the WLDS and CLDS does not obviate the need for the ELDS. USACE projected in the DMMP that dredging in Long Island Sound would generate approximately 52.9 [million cubic yards (mcy)] of material over the 30-year planning horizon, with approximately 30.3 mcy from the western and central regions and 22.6 mcy from the eastern region. Of the 52.9 mcy, approximately 3.3 mcy of material are projected to be unsuitable for open-water disposal. *See* 81 Fed. Reg. 24750, 24750 (Apr. 27, 2016); *see also* FSEIS, App. J - Responses to Comments, Comment/Response #5 and #9. This leaves approximately 49.6 mcy of material that could potentially need to be placed at an open-water disposal site. Of this 49.6 mcy of material projected to be suitable for open-water disposal, 15.2 mcy are projected to be sand that could potentially be used for beneficial uses, such as beach nourishment, while 34.4 mcy is projected to be fine-grained material. While EPA expects that beneficial uses, or some other upland management option, will be found for some amount of the sand, and possibly even for some amount of the fine-grained material, there is no guarantee, and it is impossible to be sure precisely how much will be managed in this way.

AR-023, pp. 19-20.

Ultimately, EPA calculated that:

> the CLDS and WLDS are each estimated to have a disposal capacity of about 20 mcy. This 40 mcy of capacity is not enough to take the entire 49.6 mcy of material that *could* require open-water disposal. Moreover, the CSDS and NLDS sites will close by operation of law on December 23, 2016. With regard to disposal capacity that may be at the

> RISDS, that site was designated in 2005 to serve the dredging needs of the Rhode Island and southeastern Massachusetts region. Planning for the RISDS did not include accommodating material from eastern Long Island Sound.

AR-023, p. 20.

Consequently, contrary to the Plaintiffs' assertions, there is a definite need for a disposal site in the eastern Long Island Sound addition to the WLDS and CLDS.

e. The EPA and USACE Did Not Miscalculate Dredged Materials Volumes

Plaintiffs claim that EPA and USACE have different total volume estimates for the anticipated dredged materials disposal capacities and that EPA's reliance on the lower volume available at the CLDS demonstrates that EPA's designation is arbitrary and capricious. New York Mem., pp. 35-37. To the contrary, EPA and USACE did not miscalculate the potential quantity of dredged materials or the capacity of potential sites, but properly estimated potential future needs and evaluated the available sites accordingly.

As an initial matter, Defendant-Intervenor State of Connecticut relies on and adopts the argument raised by Defendant EPA in its brief addressing the issue of the alleged difference in total volumes between the USACE and EPA. Defendant-Intervenor Connecticut, however, would like to note that even a brief review of the record shows that EPA and USACE devoted considerable effort to estimating the potential volumes of material that might need disposal. For example the USACE's Final Dredged Material Management Plan and Appendices, December, 2015, is over 6000 pages of text and data. AR-082. *See also*, AR-034. Appendix B Dredging Needs. EPA reviewed the reports and data from USACE and, initially, EPA proposed an ELDS with a capacity of 27 million cubic yards (mcy) based on the dredging needs assessment from the DMMP. *See* 81 FR 24750. EPA received comments from New York stating that there was no need for a disposal site to be designated in the eastern region of Long Island Sound. In its Final Rule EPA responded:

> As part of its consideration of, and response to, these comments, EPA requested the USACE prepare a more refined estimate of the dredged material disposal capacity needed for sediments projected to be dredged from the eastern region of the Sound. The USACE undertook this analysis and projected that a disposal capacity of approximately 20 mcy (based on water volume below a depth of 59 feet [18 meters] and slope calculations, with a buffer zone) would likely be sufficient. This estimate reflects a variety of factors, some of which involve an unavoidable degree of uncertainty. These factors include the following: specific dredging projects currently projected within the region (including possible "improvement projects" to further deepen channels or berthing areas); how much of each type of material (*e.g.*, sand, suitable and unsuitable fine-grained material) is estimated to be generated by each project; how much of this material is estimated to require open-water disposal; the possibility of increased dredging needs caused by larger-than-normal storms; and a "bulking factor" of approximately 10 percent. More specifically, the revised projected disposal capacity need of approximately 20 mcy is based on the need to accommodate approximately 12.5 mcy of suitable fine-grained sediment; 2.8 mcy from potential improvement (deepening) dredging projects; 1.8 mcy of shoal material resulting from extreme storm events; 1.1 mcy of sand (recognizing that beach nourishment may not be a practicable alternative for all 9.1 mcy of the projected sand); and 160,000 cy for the excavation of Confined Aquatic Disposal cells (for material unsuitable for open-water disposal); for a total of 18,364,500 cy; and a bulking factor of approximately 10 percent of the total, which brings the total to about 20 mcy. The "bulking factor" assumes that dredged material placed at a disposal site is relatively unconsolidated and, thus, will require more capacity when it is placed at a disposal site than it occupied when in it was in a consolidated state on the seafloor prior to dredging. EPA discussed this disposal capacity needs analysis with the USACE before, during, and after its development, and EPA has also independently assessed it. Based on all of this, EPA regards the disposal capacity needs analysis to be reasonable, especially in light of the unavoidable uncertainty associated with some of its elements.

AR-001A, pp. 13-14. Thus, it is very clear that EPA did not ignore New York's comments but considered and responded to them.

In addition, it is very important to understand the context in which EPA made its final decision; specifically that the volumes are estimates and calculated over an extended period and therefore are only going to be approximate and not precise to a mathematical certainty. As indicated in EPA's April 2016 Proposed Rule:

> EPA determined, based on the evaluation of projected dredging needs *over a 30-year planning horizon* and alternatives to open-water disposal conducted for the USACE's DMMP, that there are dredging and dredged material disposal/handling needs that exceed the available disposal/handling capacity in the eastern region of Long Island Sound . . ..

(Emphasis added.) 81 Fed. Reg. 24749, AR-005. See also, AR-082, p. ES-7. More specifically, with regard to the estimated dredging needs:

> …dredging in eastern Long Island Sound is projected to generate approximately 22.6 million cubic yards (mcy) of dredged material over the next 30 years, including 17.9 mcy from Connecticut ports and harbors and 4.7 mcy from ports and harbors in New York. Of the total amount of 22.6 mcy, approximately 13.5 mcy are projected to be fine-grained sediment that meets MPRSA and CWA standards for aquatic disposal (i.e., "suitable" material), and 9.1 mcy are projected to be coarse-grained sand that also meets MPRSA and CWA standards for aquatic disposal (i.e., also "suitable" material).

81 Fed. Reg. 24750, AR-005.

As noted above, it is the duty of the EPA, as the lead technical agency drafting the final disposal rule, to collect, collate, and review a final estimate of the potential volume of dredged material involved. EPA has never hidden or downplayed the fact that it, and the USACE, were preparing *estimates* of potential total volumes and disposal site capacities. *See*, AR-023, p.20. ("This revised estimate reflects a variety of factors, some of which involve an unavoidable degree of uncertainty.") EPA has been very clear:

> it must be understood that estimates of the amounts of material of different types needing to be managed in the future are unavoidably imperfect. The actual amount of material that will require management could be higher (or lower) over the 30-year planning horizon. This is especially evident when unpredictable events, such as large storms and possible improvement dredging projects, are considered. Therefore, EPA deems it reasonable and prudent to designate sites to ensure adequate disposal capacity is available for all the projected material, recognizing that all the capacity may not be needed in the future.

AR-023, p. 21.

It cannot be denied that EPA and USACE had the responsibility of sifting through the data and applying their technical experience to determine what the total future potential need for disposal space would be. Ultimately, resolution of New York Plaintiffs' claim involves primarily issues of fact, and "analysis of the relevant documents requires a high level of technical expertise," *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989)(quotations and citations omitted), and "defer[ence]

to the informed discretion of the responsible federal agencies" is required. *Id.*; *National Audubon Society, Inc. v. United States Fish and Wildlife Service,* 55 F.Supp.3d 316 (2014). Further, there is a legally established presumption of regularity for such agency actions and the record readily establishes both agencies' methodical approach to the ultimate question before it of whether this designated site was needed and where it was needed. *Coal. on W. Valley Nuclear Wastes v. Bodman,* 625 F.Supp.2d 109, 116 (W.D.N.Y.2007), *aff'd sub nom. Coal. on W. Valley Nuclear Wastes v. Chu,* 592 F.3d 306 (2d Cir.2009).

Clearly, EPA did not "entirely fail to consider an important aspect of the problem," in the words of the *Karpova* court but, to the contrary, completed a comprehensive and exhaustive evaluation of the potential quantities of dredging spoil and the distances support vessels would have to travel to dispose of the material. Further, the New York Plaintiffs had not merely "meaningful," but ample opportunity, over nine years, to comment on the record and they did comment repeatedly.[5]

It is not enough for New York and the other intervenors to challenge EPA's designation of the ELDS because they would have made a different decision or preferred a different choice of site. EPA made a reasoned decision on the extensive record before it as to the potential volumes of dredging spoil to be expected over a 30 year planning horizon and the potential capacities of the relevant disposal sites. New York, having been heard and its views considered, now offers its views on what are reasonable dredging volumes and disposal capacities and concludes that the ELDS is not needed. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resource Council,* 490 U.S. 360, 378 (1989). New York may

[5] Including NY DOS's comments, EPA received a total of 119 individual sets of comments on the Proposed Rule from federal and state agencies, municipalities, elected officials, and members of the public.

have liked a different number, but that is not legally relevant. If the administrative agency has provided a complete record demonstrating that it has reviewed and analyzed the relevant data and reached a decision revealing a rational connection between the facts found and the choice made, then the reviewing court has no jurisdiction to amend or alter that conclusion.

Finally, there is a fundamental fallacy in the Plaintiffs' statement that the western and central sites could accommodate all future dredged materials. AS EPA bluntly put it:

> As noted in the DSEIS, the CLDS and WLDS are each estimated to have a disposal capacity of about 20 mcy. This 40 mcy of capacity is not enough to take the full 49.6 mcy of material that could require open-water disposal.

AR-001A, p. 20. There simply is not sufficient available disposal volume in the central and western sites to accommodate the needs from the eastern Long Island Sound.

In addition, even if there were sufficient volume to accept all of the Sound's potential dredging needs, eliminating an eastern disposal site would increase overall environmental impacts. The very point of having sites in different parts of the Sound in to minimize overall impact to just one site and to limit the significant expense and adverse impacts to air pollution and navigation from the additional tow barge trips down the length of the Sound. As the EPA noted:

> Using [other disposal sites] would greatly increase the transport distance for, and duration of open-water disposal for dredging projects from the eastern Long Island Sound region . . . . . the greater transport distances would be environmentally detrimental, in that they would entail greater energy use, increased air emissions, and increased risk of spills and short dumps. Regarding air emissions, increased hauling distances might require using larges scows with more powerful towing vessels, which would use more fuel and cause more air pollution. Longer haul distances also may increase the amount of time necessary to complete a dredging project, resulting in an extended period of disruption to the areas being dredged.

AR-001A, pp. 7-8; AR-003, pp. ES-18, ES-19; AR-007, p. 3-6. It is clearly appropriate for EPA to consider the distances that support vessels would have to travel to dispose of dredged material because towing barges are diesel powered and the number of trips, over the distances involved, times 30 years, is

an obvious and material increase in air emissions in a region of the country that has been designated non-attainment under the Clean Air Act. As EPA has noted:

> All five counties in the [zone of siting feasibility] are part of moderate nonattainment areas for the 1997 ozone standard. Non-attainment zones are areas where the National Ambient Air Quality Standards have not been met. Ozone nonattainment zones are classified, in increasing degrees of severity, as follows: marginal, moderate, serious, severe, and extreme. New Haven, Middlesex and New London Counties (Connecticut) and Suffolk County (New York) are also marginal nonattainment areas for the stricter 2008 ozone standard**.**

AR-007, ES-17.

Furthermore, New York, in its Memorandum of Law, complains of potential impacts to navigation. New York Mem., pp. 50-52. A much greater impact to navigation, however, would be caused by requiring each dredging project in the eastern Sound to travel the entire length of the Sound to dispose of the same volume of material. This ultimately is a key fact that will be repeated. The volume to be disposed of is the same regardless of the number of sites. The loss of the ELDS would have a negative effect with more vessels traveling longer distances with greater adverse impacts to air pollution and navigation merely because some parties would prefer to have the material sent elsewhere. EPA recognized this and found:

> Beyond the question of disposal capacity, when EPA took into account overall environmental effects, environmental and safety risks, logistical difficulties, and the expense of using such distant sites, EPA concluded that the CLDS, WLDS, and RISDS would not reasonably serve the needs of the eastern Long Island Sound region. A key consideration in EPA's determination that a designated site is needed in eastern Long Island Sound is that going outside the region would involve far longer transit distances from dredging centers in the eastern Sound. For example, the approximate distances from New London Harbor to the CLDS is 34.7 nmi, to the RISDS is 44.5 nmi, and to the WLDS is 59.7 nmi. These longer trips would result in greater energy use, increased air emissions, increased risk of spills, and greater cost (FSEIS, Section 2.1). In addition to increased fuel use and air emissions associated with longer travel distances, lengthier trips might require larger scows with more powerful towing vessels, which would further increase fuel consumption and air emissions. Longer haul distances would also increase the amount of time needed to complete a dredging project, resulting in an extended period of disruption to the areas being dredged and other logistical difficulties associated with needing to complete dredging projects within the limited "environmental

> windows" that are set to restrict when dredging may be carried out in and around Long Island Sound to protect marine life during dredging

AR-023, p.21.

> Finally, longer haul distances also would increase the cost both to taxpayers and private entities of completing dredging projects. Using the CLDS, WLDS, or RISDS would greatly increase the transport distance for, and duration of, open-water disposal for dredging projects from the eastern Long Island Sound region. This, in turn, would greatly increase the cost of such projects. It could also render certain dredging projects too expensive to conduct. For example, maintenance dredging of the U.S. Navy Submarine Base berths planned for 2016-2020 is expected to generate about 75,000 cy of suitable material; the estimated cost of disposal at the ELDS is $31/cy for a total cost of $2,325,000, while disposal at the CLDS is estimated at $64/cy for a total of $4,800,000. An improvement (deepening) project to accommodate a larger class of submarine planned for 2017- 2025 is expected to generate about 350,000 cy; the estimated cost of disposal at the ELDS is $26/cy for a total cost of $9,100,000, while disposal at the CLDS is estimated at $57/cy for a total of $19,950,000 (USACE, 2016b). Thus, the longer haul distance more than doubles the cost to the public to dredge the same project. As stated above, EPA is *not* designating the ELDS solely in order to make dredging less expensive, but it would be irrational to ignore that reducing the cost of necessary dredging is another of the many benefits of designating the ELDS, a site which EPA has determined to be environmentally sound, instead of relying on more distant sites.

AR-023, p.21.

In the face of the planned and proposed projects listed above and the listed quantities of dredged materials anticipated therefrom, it is clear that the Final Determination is neither arbitrary nor capricious.

2. EPA Properly Evaluated The Potential Impacts To Navigation

Plaintiffs' Second Claim is that the EPA minimized the potential interference with navigation that would be caused by designation of the ELDS. Specifically, New York's memorandum in support of its motion states "that EPA's analysis of commercial vessel traffic failed to consider the heavy Cross Sound Ferry traffic on a route that goes directly through the [ELDS]". New York Mem., pp. 50-56. New York's assertion is factually untrue and fails to consider the navigation impacts from a failure to designate the ELDS.

It is undeniably true that the Sound is an important commercial and recreational transportation corridor and that there are upwards of 200,000 boaters that use it. The record in this case clearly shows that EPA was and is fully cognizant of the importance of commercial navigation in the Long Island Sound and correctly concluded that the ELDS is the proper selection to minimize impacts to commercial traffic. AR-003, pp. 261, 269, 351; AR-A 520 (metadata for GIS data); AR-A 492; AR-A 371 (2012 Waterborne Commerce Report). For example, the administrative record includes comprehensive reports on maritime commerce, number of vessel berthings and tonnage. *See, e.g.*, AR-A 365, AR-A 366, AR-A 367, AR-A 371, AR-A 31-0. Based on this and the USACE reports, EPA addressed commercial fisheries and commercial navigation, marine transportation corridors and anchorage areas and impacts thereto in the Supplemental Environmental Impact Statement. *See,* AR-007, Section 4-15, pp. 4-137 to 4-153 and Section 5.5.10.

More to the point, the administrative record contains abundant and undisputed testimony from the affected maritime community that use of the ELDS will result in minimal interference with navigation. Interestingly, while Plaintiffs highlight Cross Sound Ferry as evidence of a problem associated with the ELDS, Cross Sound itself strongly and unequivocally supports the designation of the site. *See,* AR-A 105; AR-003, pp. 477-478.

Specifically, Cross Sound, along with Block Island Ferry Services, Thames Shipyard & Repair Company, Thames Dredge and Dock Company, and Thames Towboat Company joined in a letter, dated November 14, 2012, to EPA noting that they employ over 500 people and that the ferry companies "provide essential transportation services to the public and serve as a lifeline to Block Island and Long Island." AR-A 105, p.1. The companies assert that, "over the past decades, we have analyzed the types of disposal alternatives identified in the LIS DMMP and SEIS . . . . [e]ach time, our analysis has clearly determined that all of these alternatives are unfeasible, and the only practical and feasible disposal

method is disposal in Eastern Long Island Sound." *Id.* Cross Sound and the other companies concluded:

> The absence of an ELIS disposal site would have far reaching social, economic, and environmental impacts. . . . The absence of an ELIS disposal site would result in business in eastern Connecticut either having to utilize the central (CLIS), or western (WLIS) disposal sites, or simply not dredge at all. Not dredging cold lead to the failure of a dredging dependent business, which has obvious economic and social consequences. Disposal of dredge spoils in CLIS or WLIS from projects in eastern Connecticut would cause significant economic and environmental impacts. Economically, the cost of transporting (i.e. towing a dump scow with a tug) dredged material to CLIS or WLIS can more than double the total cost of a dredging project in eastern Connecticut. Environmentally, the air emissions generated by transporting (i.e. towing a dump scow with a tug) dredged material to CLIS or WLIS could significantly impact air quality by increasing carbon and NOx levels in the region.

AR-A 105, p.2.

There is another negative impact to navigation that would be cause by the loss of an eastern disposal site – the risk of increase marine collisions and sinkings related to a lack of adequate dredging and the risks of oil spills associated with such.[6] This is no inconsequential issue. See, i.e., AR-005 (81 Fed. Reg. 24749, 24753); AR-007, PP. 69-70, 81-82, 98, 300-301, 306-308, 385; AR-003, p. 45, AR-018, p. 16; AR-023, p. 23; AR-002 (81 Fed. Reg. 87822). Therefore, beyond the fact that New York can point to no evidence of material failure by the EPA to properly evaluate impacts to navigation, the record clearly shows that the *failure* to provide for adequate dredging disposal in the eastern Long Island Sound would directly interfere with navigation, cause increased marine accidents and oil spills, threaten a "lifeline" to Long Island and Block Island and adversely impact air pollution and the regional economy.

[6] An analysis prepared for USACE and the EPA and included in the record in this case showed that: "Port operators in the area are greatly concerned that the changes in channel depths and width resulting from the No Action Alternative could have a substantial impact on casualties and oil spills." AR-40, p. 63.

Finally, as alluded to above, Plaintiffs' plan to require movement of dredged materials from eastern Connecticut down the length of the Sound to the CLDS or WLDS would increase impacts to navigation and air pollution in an area that has been designated as non-attainment under the Clean Air Act. As the EPA letter states:

> necessary dredging could be blocked or delayed, potentially threatening the safety of, and otherwise hampering, recreational, commercial, and military navigation; further, the cross sound ferry company, which carries vehicles and passengers almost directly over the ELDS has filed a letter in the record explaining that there is no impediment to its navigation. In fact none of the shipping companies or the Navy have suggested that there is any navigation hazard from the ELDS.
>
> . . . [d]redged material might need to be hauled longer distances for placement at open-water sites outside the eastern region of the Sound, which would be more costly, use more energy, generate greater air emissions from dredged material transportation, and generally increase the risk of vessel accidents due to the greater distances being travelled. *See* 81 Fed. Reg. 24749 (detailing distances from Saybrook Outer Bars at the mouth of the Connecticut River to the nearest designated dredged material disposal sites in other parts of Long Island Sound);

EPA's April 2016 DSEIS, p. 5-18, AR-007.

There is, therefore, abundant record evidence that the ELDS will not negatively impact navigation and, in fact, the failure to site the ELDS will itself cause adverse impacts to navigation. New York's preferences do not render EPA's conclusions, based on a thorough record and considered evaluation, arbitrary or unlawful.

3. EPA Did Not Arbitrarily Designate An "Unused" Site For The ELDS In Violation Of The MPRSA

The third claim is that EPA's designation of an "unused" site was arbitrary and capricious in violation of the Administrative Procedures Act. As an initial matter, the ELDS is not an entirely new, unused site. After complaints from New York, EPA shifted part of the planned ELDS westward, *in response to New York's comments*. *See,* AR-023, p. 15. As a consequence, the ELDS is adjacent to and

contiguous with part of the original New London Disposal Site. As the EPA has stated, after receiving New York's comments:

> EPA decided to shift the boundaries of the ELDS to the west so that the site would be entirely outside of the submarine transit corridor into the Thames River, the existing [New London Disposal Site ("NLDS")], and New York state waters, as well as farther from Fishers Island. Third, EPA also adjusted the boundaries of the ELDS to exclude two hard-bottom areas that have the potential to provide relatively more valuable marine habitat. These modifications to the site boundaries reduced the area of the ELDS from two square nautical miles (nmi^2) to approximately 1.3 nmi^2, and the capacity of the site from approximately 27 mcy to 20 mcy.

AR-023, p. 15. It is difficult to accept New York's contention that an untouched site is being used when the major reason the ELDS does not include an existing disposal site (the western half of NLDS) is because New York insisted on it.

In a related argument, the State of New York's Complaint includes the claim that EPA's designation of the ELDS will permit disposal of dredged material at the site which will result in "smothering" of "undisturbed" habitat with "contaminants buried in coastal bays, rivers and harbors. . . ." Complaint, paragraphs 162-164. While the Complaint suggests that contaminated material will be disposed of at the ELDS, the record is clear:

> EPA also explained that designation of a disposal site does not actually authorize any dredged material to be placed at the site. Site designation merely makes the site available as a potential management option (*i.e.*, ocean disposal of dredged material) under appropriate circumstances. Any proposal to place dredged material in the waters of Long Island Sound will be subject to a case-specific permitting review. Placement of dredged material at the ELDS, or any designated disposal site, could only be authorized if the materials are deemed suitable for marine disposal — according to the sediment analyses required under EPA regulations — and only if no practicable alternatives to marine disposal are available. These requirements are expressly stated in the regulations.

AR-023, p. 13, *See* 33 U.S.C. § 1413; 40 C.F.R. Part 227.

This point bears repeating. EPA has emphasized that:

> EPA also explained that designation of a disposal site does not actually authorize any dredged material to be placed at the site. Site designation merely makes the site available as a potential management option (*i.e.*, ocean disposal of dredged material) under

> appropriate circumstances. Any proposal to place dredged material in the waters of Long Island Sound will be subject to a case-specific permitting review. Placement of dredged material at the ELDS, or any designated disposal site, could only be authorized if the materials are deemed suitable for marine disposal— according to the sediment analyses required under EPA regulations—and only if no practicable alternatives o marine disposal are available. These requirements are expressly stated in the regulations.

AR-023, p. 13. Thus, no actual disposal can occur until there has been a full, case-specific review for each project including full physical, chemical, and appropriate biological evaluation if any, of the dredged materials for federal projects and large non-federal projects (subject to MPRSA). Furthermore, all non-federal projects are subject to regulatory review and approval by the Connecticut Department of Energy and Environmental Protection and must comply with Connecticut's very environmentally protective Water Quality Standards.

Finally, New York's concerns about the potential disposal of contaminated material at the ELDS, however, are inconsistent with its own position elsewhere in the record. As noted above, the EPA and USACE full evaluation under the DMMP of disposal sites within Long Island Sound included a draft recommendation for a total of three sites and two possible additional sites. AR-023, p. 13. The final three approved sites were the Western, Central and Eastern sites. As the record reflects:

> EPA's proposal called for the same site use restrictions proposed as part of EPA's designation of the CLDS and WLDS to be applied to the ELDS. *See* 81 Fed. Reg. 44229-44230 (July 7, 2016) (40 C.F.R. §§ 228.15(b)(4) and 228.15(b)(5)); 81 Fed. Reg. 24767 (proposed 40 C.F.R. § 228.15(b)(6)). Consistent with the terms of 40 C.F.R. § 228.15(b)(4)(vi), the purpose of these site use restrictions would be to reduce or eliminate the disposal of dredged material in the waters of Long Island Sound.

AR-023, p. 12. Interestingly, New York not only concurred with the first two sites selected, *i.e*, the CLDS and WLDS, but, as EPA noted: "NY DOS concurred that the revised site use restrictions for the CLDS and WLDS represented consistency to the maximum extent practicable with the enforceable policies of the approved New York CMP." AR-023, p. 12. This is particularly interesting because, as EPA has noted:

> EPA's proposal called for the same site use restrictions proposed as part of EPA's designation of the CLDS and WLDS to be applied to the ELDS. *See* 81 Fed. Reg. 44229-44230 (July 7, 2016) (40 C.F.R. §§ 228.15(b)(4) and 228.15(b)(5)); 81 Fed. Reg. 24767 (proposed 40 C.F.R. § 228.15(b)(6)).

AR-023, p. 13. However, the same EPA document points out:

> As stated above, on July 18, 2016, NY DOS confirmed that EPA's site designations, including the revised site use restrictions, satisfied the conditions in NY DOS's Conditioned Concurrence with EPA's determination under the CZMA that the site designations are consistent to the maximum extent practicable with the enforceable policies of the New York CMP.

AR-023, p. 12. Thus, New York had already determined and agreed that the same criteria that control use of the CLDS and WLDS are acceptable under its CZMP and will apply to the ELDS. EPA concluded that:

> DOS was directly involved in the development of these site use restrictions and concurred that they were satisfactory under the New York CMP for the CLDS and WLDS designations. Applying these site use restrictions to the ELDS makes good sense because they apply equally as well to the eastern region of Long Island Sound, and because applying the restrictions to the eastern Sound ensures that the entire Sound will be covered by the same regulatory regime applied by the same federal and state agencies. This will contribute to providing a rational, predictable, and consistent regulatory regime to the public.

AR-023, pp. 15-16. Therefore, while New York has accepted the WLDS and CLDS sites and disputes only the ELDS, the same standards will apply to all three sites. Blocking the ELDS will have no effect on the water quality of the Sound because the same material will simply be disposed of in one of the two remaining sites in the same body of water. All that will occur is that there will be increased air emissions, greater impacts to navigation and unnecessarily higher costs to water-dependent businesses.

4. EPA Did Not Fail To Consider the Different Federal Disposal Criteria

Plaintiffs' fourth claim is that EPA failed to properly consider the difference in impacts from dredged material disposal under the CWA versus the MPRSA. *See*, New York Mem., pp. 69-70. Specifically, New York's memorandum in support of its motion states that for all federal projects and all

private projects that exceed 25,000 cubic yards of dredged materials, disposal of dredged material in the Sound is reviewed under both Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), and Section 103(a) of the Ocean Dumping Act, 33 U.S.C. § 1413(a). However, for private projects with less than 25,000 cubic yards, review is only under Section 404 of the CWA. New York then argues that the CWA standards are not as stringent and that the EPA failed in consider the impacts of these sediments in evaluating the ELDS. *Id*.

New York's recitation of the law is largely correct; with some caveats, whereas the implications they try to draw are not. As the EPA has noted:

> [B]oth [MRSA and CWA] legal regimes apply to dredged material disposal in the Sound. This is because MPRSA § 106(f), 33 U.S.C. § 1416(f), specifically dictates that in addition to other provisions of law, the requirements of the MPRSA apply to dredged material disposal in Long Island Sound for (a) all federal projects, and (b) non- federal projects involving more than 25,000 cubic yards of material.[2] Because of the terms of MPRSA § 106(f), Long Island Sound is the *only* water body lying landward of the baseline for which dredged material disposal is subject to the MPRSA's stringent requirements for sediment testing, sediment quality, disposal site designations, and site management and monitoring.
>
> The MPRSA is the primary federal law governing EPA's designation of the ELDS. MPRSA § 102(c), 33 U.S.C. § 1412(c), directs EPA to designate ocean disposal sites for dredged material. Such designations are subject to, among other things, the requirements of MPRSA § 102(c) and EPA regulations promulgated at 40 C.F.R. §§ 228.4, 228.5 and 228.6.
>
> Dredged material disposal into waters *landward* of the baseline from which the territorial sea is measured ("baseline") is typically regulated under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, while the MPRSA generally only applies to dredged material disposal into waters *seaward* of the baseline—*i.e.*, "ocean waters" under the MPRSA. *See* 33 U.S.C. § 1402(b). Although the waters of Long Island Sound lie *landward* of the baseline, both the CWA and the MPRSA apply to dredged material disposal in the Sound. Section 106(f) of the MPRSA § 106(f), 33 U.S.C. § 1416(f), specifically dictates that in addition to other provisions of law, the requirements of the MPRSA apply to dredged material disposal in Long Island Sound for (a) federal projects, and (b) non-federal projects involving more than 25,000 cubic yards (cy) of material.[2] MPRSA § 106(f) has been interpreted also to apply the MPRSA's disposal site authorization provisions to the waters of Long Island Sound because dredged material disposal under the MPRSA is governed by the provisions of MPRSA section 103(b), which provides for location of disposal sites. Thus, MPRSA § 106(f) makes Long Island

> Sound the *only* water body lying landward of the baseline for which dredged material disposal is subject to the MPRSA's comparatively stringent requirements for sediment testing, sediment quality, disposal site authorizations, and site management and monitoring.

AR-023, p. 29. Thus, the difference in regulatory treatment of dredged materials from greater than 25,000 cy projects and lesser than 25,000 cy projects *is because federal law makes it so*. EPA has not created some arbitrary testing standard, it is simply enforcing the mandatory limits of federal law. In fact, the application of these standards means that disposal in the Long Island Sound is controlled by *more* stringent standards than apply to dredged material disposal anywhere else.

Beyond the fact that EPA uses two different standards because federal law requires it, it is exceedingly clear that the record includes adequate evidence that the suitability of tested dredged materials was carefully considered. Specifically:

> Under MPRSA §§ 103(a) – (e), 33 U.S.C. §§ 1413(a) – (e), each proposed project involving the ocean disposal of dredged material must be separately authorized by the U.S. Army Corps of Engineers (USACE), subject to EPA review and concurrence, as well as various other types of federal and state review (*e.g.*, Endangered Species Act [ESA] consultation; essential fish habitat coordination under the Magnuson-Stevens Fishery Conservation and Management Act [MSFCMA]; federal consistency review, , under the CZMA; and water quality review under Clean Water Act [CWA] § 401, 33 U.S.C. § 1341).
>
> Pursuant to the MPRSA, the various phases of dredged material undergo rigorous analytic testing protocols before the material can be deemed suitable for placement at an approved site. Prior to dredging, samples of the sediment proposed for ocean disposal is subjected to a variety of testing protocols (*e.g.*, chemistry, toxicity, bioaccumulation) and must satisfy specific criteria in EPA's ocean dumping regulations at 40 C.F.R. Part 227. Suitability for open-water disposal is determined based on whether the various phases (liquid, suspended particulate, and solid) of the material satisfy criteria related to its physical characteristics, toxicity, bioaccumulation potential, and water quality effects. *See, e.g.*, 40 C.F.R. §§ 227.5 and 227.6. If the material does not satisfy each of these regulatory criteria, then the material is deemed unsuitable for open-water disposal and cannot be placed into waters subject to the MPRSA.

AR 023, pp. 2-3; See also, AR-A 082, p. 12.

Therefore, contrary to Plaintiffs' repeated concerns that contaminated, and even toxic, materials are going to be dumped in the Sound, only material that is tested and satisfies extensive federally mandated protocols can be considered for disposal. As the Connecticut Harbor Management Association's July 18, 2016, letter explains it:

> Material to be dredged from Connecticut ports and harbors is subject to rigorous testing to determine its suitability for disposal in Long Island Sound. Testing is according to national and regional standards jointly established by the USACE and EPA. . . . Suitable material placed in open water disposal sites in Long Island Sound is also subject to rigorous monitoring by the USACE for the purpose of identifying any significant adverse impacts of coastal resources and environmental quality.
>
> *The CHMA Board is aware of no scientific date or study indicating that open water disposal of dredged material in Long Island Sound as currently practiced, managed, and monitored is causing any significant adverse impacts on coastal resources and environmental quality, including water quality.*

AR-A 146m p. 4. (Emphasis added.)

The above quoted statements are particularly helpful for three reasons. First, contrary to New York's unsubstantiated assertions, no dredged material can be disposed of unless it is deemed suitable for disposal.[7] Unsuitable material is not and cannot be disposed of in the Sound. AR-023, p. 13. It is true that there are some differences in the testing protocols depending on the amount of material in question that in the context of this case means that, uniquely in the country, a *higher* standard of review is applied to some of the dredging materials.

Secondly, as noted by the CHMA and EPA; the relevant testing standards are established by federal law. There is, therefore, no claim that EPA has created some arbitrary distinction. EPA and USACE are following the dictates of established federal law and regulations. If New York has some valid reason to doubt these standards, the proper action would be to request a rulemaking by the relevant federal agency or, if they prefer, seek to have Congress amend the statute.

[7] Connecticut Water Quality Standards RCSA 22a-426-1 – 22a-426-9.

Thirdly and most critically, New York has pointed to no evidence in the record that current standards are somehow deficient. Nowhere have the Plaintiffs provided any record evidence of negative impacts to water quality caused by the disposal of dredge spoil under current management practices. Much of the hyperbole in the Plaintiffs' briefs is based on claims of *historic* dredging activities which are entirely inapposite. No state or private party simply dumps municipal, industrial or dredging wastes in the Sound. Current law and practices are carefully and thoughtfully designed to prevent that mode of disposal. In fact, the two already permitted and approved sites, the CLDS and WLDS, have been used now for some years and "[m]onitoring of the WLIS and CLIS disposal sites has verified that past and present management practices have been successful in minimizing the short- and long-term, and cumulative adverse impacts to water quality and benthic habitat. . . ." AR-032, section 5.7.

In the absence of any evidence that modern disposal practices are harming water quality, the Plaintiffs have resorted to raising "straw man" arguments based on disposal methods that predate both the DMMP and modern best management practices and therefore prove nothing about the ELDS. Supporting this conclusion is the fact that federal and state regulators routinely monitor the disposal sites in Long Island Sound for adverse impacts to water quality and habitat and have found none. As the EPA has stated: "If monitoring or other information indicates unacceptable adverse impacts to the marine environment from use of a site, then that data and information would enable EPA to modify the conditions under which the site may be used or even close the site." AR 023, p. 4; (*See, i.e.,* AR-A 350 as an example of a monitoring report.)

Faced with a voluminous record which recognizes and discusses the different testing regimes - testing regimes established by federal law - and concludes that there is no problem, it is not possible to determine that EPA’s designation of ELDS is arbitrary and capricious. To the contrary, it is obvious that this specific issue was known, considered and decided on a full record. The validity of the

determination is reinforced by the lack of any evidence to the contrary discovered during environmental monitoring conducted by these same agencies.

Finally, it bears repeating that New York is objecting only to the designation of the ELDS. The testing protocols discussed above apply to all sites. It seems inconsistent, at best, to object to testing standards only when they apply to a site opposed primarily by local residents but have no objection to the same standards used elsewhere in the same body of water.

5. Designation Of The ELDS Is Not Inconsistent With The CZMA

Plaintiffs' fifth claim is that EPA's designation of the ELDS is not consistent with New York's CZMP plan and therefore is arbitrary and capricious. More specifically, New York and the Intervenors claim that EPA is obligated to reduce or eliminate disposal of dredged materials in the Sound. New York then relies on its first and third claims, regarding inaccurate volumes of dredged material and designation of an unused site, for the argument that these claims prove that EPA has not met its obligations under New York's CZMP. See, New York Mem., pp. 83-91.

New York's fifth claim is predominantly predicated on its subordinate claims in Counts 1 and 2. As noted above, neither of these counts are persuasive. The total dredged material volume estimates have been extensively documented and, while different numbers have been advanced at different times, none of that is legally meaningful. What is legally meaningful is that EPA was obligated to provide estimates of the volume of dredged materials over the 30 year planning period. It did that. These numbers were then subject to public comment and New York and other stakeholders did in fact comment. EPA, as the lead agency then completed its review and analysis and published its results. This is what the APA requires.

More to the point, there is a serious underlying flaw in New York's argument that designation of the ELDS is inconsistent with its CZMP. EPA has repeatedly said that the designation of the ELDS

does not, of itself, result in any disposal of dredged material. Designation only identifies a site that may be used if appropriate. Before any actual dredged material may be disposed of, it has to be properly tested and approved. Not only is New York aware of this, it has reviewed and approved the testing and approval criteria governing disposal decisions. As previously noted: "NY DOS [has] concurred that the revised site use restrictions for the CLDS and WLDS represented consistency to the maximum extent practicable with the enforceable policies of the approved New York CMP." AR-023, p. 12. Therefore, the designation of the ELDS does not and cannot be inconsistent with New York's CMP because the designation itself does not result in any disposal and thus cannot have an impact on the CMP. The only permitting decisions that can impact the New York CMP are those associated with the testing and related criteria necessary to permit final disposal and New York has already agreed that the site use criteria are acceptable under their CMP.

One final specific point is of particular consequence to the State of Connecticut. The New York Plaintiffs assert that the designation of the ELDS violates the New York CZMP because it fails to ensure protection of commercial marine resources at the site, particularly shellfishing grounds. New York Mem., p. 91.

Connecticut, through its Office of Aquaculture has expended significant taxpayer resources and large amounts of staff time and resources to develop, encourage and protect shellfishing and shellfish resources in Long Island Sound.[8] The importance of commercial and even recreational shellfishing to Connecticut cannot be overstated. Connecticut operates a shellfish bed leasehold system which is carefully monitored. What New York overlooks is that Connecticut DEEP and EPA were aware of this

[8] "Oyster farming constitutes an important industry in Connecticut; oysters are harvested commercially both by individuals and businesses that lease shellfish beds. Oyster farmers use several culture methods to raise oysters on leased parcels of Long Island Sound floor. The farming method requires that the oysters be grown in relatively shallow waters close to shore. Due to successful oyster culture practices, oystering experienced resurgence in the 1980s and 1990s." AR-003, p. 227.

throughout the entire DMMP process and carefully considered shellfish impacts. EPA has noted: "The seafloor in the ELDS is relatively flat and sandy, without the sort of structure that typically supports a large diversity of fish or shellfish. At the same time, EPA has excluded two areas from the ELDS that *do* include the type of hard-bottom, bedrock and boulder conditions that tend to provide relatively better marine habitat." (Emphasis in original.) AR-001A p. 36; *see also*, AR-003, pp. 228, 229, 343-345; AR-007, pp. 226-227, 339, 341. Beyond this, the ELDS is in Connecticut waters and Connecticut does not have any shellfish leasehold beds in or adjacent to the ELDS. The record is clear: "There is no shellfishing in this area, and the closest shellfish aquaculture operation is several miles west of the ELDS and Closer to shore." AR-001A, p. 36. Finally, as repeatedly emphasized before, contaminated or otherwise inappropriate material cannot be disposed of at the ELDS. Therefore the sand and silt that will be disposed of will pose no threat to the shellfish that are not fished there.

IV. CONCLUSION

WHEREFORE, the Defendant-Intervenor Department of Energy and Environmental Protection respectfully requests that the Court deny Plaintiffs' motions for summary judgment and grant Defendant-Intervenor's motion for summary judgment.

Dated: Hartford, Connecticut
May 23, 2019

DEFENDANT- INTERVENOR

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