



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 228**

**[EPA-R04-OW-2016-0354; FRL - 10012-27-Region 4]**

**Ocean Dumping: Modification of an Ocean Dredged Material Disposal Site Offshore of  
Mobile, Alabama**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is issuing a rule that modifies the existing EPA-designated ocean dredged material disposal site (ODMDS) offshore of Mobile, Alabama (referred to hereafter as the existing Mobile ODMDS), pursuant to the Marine Protection, Research and Sanctuaries Act of 1972, as amended (MPRSA). The primary purpose for the site modification is to enlarge the site to serve the long-term need for a location to dispose of suitable material dredged from the Mobile Harbor Federal navigation channel, and for the disposal of suitable dredged material for persons who receive a MPRSA permit for such disposal from other sites within Mobile Bay/Port of Mobile. The modified site will be subject to monitoring and management to ensure continued protection of human health and the marine environment.

**DATES:** This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R04-OW-2016-0354. All documents in the docket are listed on the <http://www.regulations.gov>

website. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Wade Lehmann, U.S. Environmental Protection Agency, Region 4, Water Division, Oceans and Estuarine Management Section, 61 Forsyth Street, Atlanta, Georgia 30303; phone number (404) 562-8082; e-mail: [Lehmann.Wade@epa.gov](mailto:Lehmann.Wade@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Potentially Affected Persons**

Persons potentially affected by this action include those who seek or might seek permits or approval to dispose of dredged material into ocean waters pursuant to the MPRSA, 33 U.S.C. §1401 to §1445. The EPA’s action would be relevant to persons, including organizations and government bodies, seeking to dispose of dredged material in ocean waters offshore of Mobile, Alabama. Currently, the U.S. Army Corps of Engineers (USACE) would be most affected by this action. Potentially affected categories and persons include:

<b>Category</b>	<b>Examples of potentially regulated persons</b>
Federal government ...	USACE Civil Works projects, and other Federal agencies
Industry and general public ...	Port authorities, marinas and harbors, shipyards and marine repair facilities, berth owners
State, local and tribal governments ...	Governments owning and/or responsible for ports, harbors, and/or berths, Government agencies requiring disposal of dredged material associated with public works projects

This table is not intended to be exhaustive, but rather provides a guide for readers regarding persons likely to be affected by this action. For any questions regarding the applicability of this

action to a particular person, please refer to the contact person listed in the preceding “FOR FURTHER INFORMATION CONTACT” section.

## **II. Background**

### **a. History of disposal sites offshore of Mobile, Alabama**

The Mobile ODMDS is located between two and six miles south of Dauphin Island in the Gulf of Mexico and is 4.75 square nautical miles (nmi<sup>2</sup>) in size. The Mobile ODMDS received interim site designation status in 1977 and final designation in 1988.

The USACE Mobile District and the EPA Region 4 have identified a need to either designate a new ODMDS or modify the existing Mobile ODMDS. The need for modifying the ocean disposal capacity is based on future capacity requirements, historical dredging volumes, estimates of dredging volumes for future proposed projects, and limited capacity of upland confined disposal facilities (CDFs) in the area.

The EPA is modifying the existing Mobile ODMDS rather than designate a new site off the coast of Mobile for ocean disposal of dredged material. The modification of the existing Mobile ODMDS for dredged material does not mean that the USACE or the EPA has approved the use of the Mobile ODMDS for open water disposal of dredged material from any specific project. Before any person can ocean dump dredged material at the Mobile ODMDS, the EPA and the USACE must evaluate the project according to the ocean dumping regulatory criteria (40 CFR, part 227) and the USACE must authorize the disposal. The EPA independently evaluates proposed dumping and has the right to restrict and/or disapprove of the actual disposal of dredged material if the EPA determines that environmental requirements under the MPRSA have not been met. This action is supported by an Environmental Assessment, which was established in accordance with the National Environmental Policy Act.

**b. Location and configuration of the Modified Mobile ODMDS**

The modified ODMDS is in approximately 34 to 57 feet of water and is located between 2.0 and 6.0 nautical miles south of Dauphin Island, Alabama. The modified ODMDS would expand the existing Mobile ODMDS from a size of approximately 4.75 nmi<sup>2</sup> to approximately 23.8 nmi<sup>2</sup> in size. The location of the modified ODMDS is bounded by the coordinates listed below. The coordinates for the site are in North American Datum 83 (NAD 83):

**Modified Mobile ODMDS**

- A) 30° 13.0' N, 88° 08.8' W
- B) 30° 09.6' N, 88° 04.8' W
- C) 30° 08.5' N, 88° 05.8' W
- D) 30° 08.5' N, 88° 12.8' W
- E) 30° 12.4' N, 88° 12.8' W

The modification of the existing ODMDS will allow the EPA to adaptively manage the site to maximize its capacity, minimize the potential for mounding and associated safety concerns, and minimize the potential for any long-term adverse effects to the marine environment.

**c. Management and Monitoring of the Site**

The modified ODMDS is expected to receive dredged material from the federally authorized navigation project at Mobile Harbor, Alabama, and dredged material from other applicants who have obtained a MPRSA permit for the ocean disposal of dredged material. All persons using the site will be required to follow the Site Management and Monitoring Plan (SMMP) for the ODMDS that is specifically developed for the modified ODMDS. The SMMP includes management and monitoring measures to ensure that dredged materials disposed at the modified ODMDS are suitable for disposal in the ocean and that adverse impacts of disposal, if any, are

addressed to the maximum extent practicable. This includes provisions to avoid and minimize potential impacts to artificial reefs and cultural resources. The SMMP for the modified ODMDS also addresses management of the site to ensure adverse mounding does not occur and ensures that disposal events minimize interference with other uses of ocean waters near the modified ODMDS. Future transportation to the ODMDS and disposal of dredged material at the ODMDS will be governed by the currently approved version of the SMMP.

**d. MPRSA Criteria**

In evaluating the modified ODMDS, the EPA assessed the site according to the criteria set forth in the MPRSA, with emphasis on the general and specific regulatory criteria of 40 CFR part 228, to determine whether the site designation satisfies those criteria. The EPA's *Final Environmental Assessment for Modification of the Ocean Dredged Material Disposal Site Mobile, Alabama, May 2020 (FEA)*, provides an extensive evaluation of the criteria and other related factors for the modification of the existing ODMDS.

***General Criteria (40 CFR 228.5)***

*(1) Sites must be selected to minimize interference with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation (40 CFR 228.5(a)).*

The location of the modified ODMDS was screened in 1982 by the USACE as part of their evaluation of the area for selection of a location for ocean dumping of dredged material under Section 103 of the MPRSA, as there was no EPA-designated ODMDS at the time. That evaluation included considerations of potential interference with other activities in the marine environment including avoiding areas of existing critical fisheries or shellfisheries, regions of heavy commercial or recreational navigation, and potential historic properties. These

evaluations were re-considered from 2002 through to the present time, as the modified ODMDS continued to be assessed.

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

The modified ODMDS will only be used for disposal of suitable dredged material as determined by Section 103 of the MPRSA. Based on the USACE and the EPA's sediment testing and evaluation of dredged material, disposal is not expected to have any long-term impact on water quality. The modified ODMDS is located sufficiently far from shore (two to six miles) and fisheries resources to allow temporary water quality disturbances caused by ocean disposal of dredged material to be reduced to ambient conditions before reaching any environmentally sensitive areas.

*(3) This criterion has been removed from the regulations and no longer applies.*

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

The location, size, and configuration of the modified ODMDS will provide long-term capacity, while also allowing effective site management, site monitoring, and limiting environmental impacts to the surrounding area to the greatest extent practicable.

Based on 25 years of projected new work and maintenance dredging, and permitted dredged material disposal needs, it is estimated that the modified ODMDS should be approximately 24 nmi<sup>2</sup> in size to meet the anticipated long-term disposal needs of the area. This would provide the modified ODMDS with an estimated capacity of approximately 260 million cubic yards, which is sufficient to manage risk, account for future unknown disposal operations from private entities, and provide a margin of navigation safety.

By adding approximately 19 nmi<sup>2</sup> to the existing Mobile ODMDS, the total area of the modified Mobile ODMDS is 23.8 nmi<sup>2</sup>. An ODMDS of this size and capacity will provide a long-term ocean disposal option for the Mobile Bay area.

When determining the size of the proposed site, the ability to implement effective monitoring and surveillance programs was considered to ensure that the environment of the site could be protected, and that navigational safety would not be compromised by the mounding of dredged material, which could result in adverse wave conditions. A SMMP has been developed and will be implemented to determine if disposal at the site is significantly affecting adjacent areas and to detect the presence of adverse effects. At a minimum, the monitoring program will consist of bathymetric surveys, sediment grain size analysis, chemical analysis of constituents of concern in the sediments, and a health assessment of the benthic community.

*(5) EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites where historical disposal has occurred (40 CFR 228.5(e)).*

Locating the disposal site near the continental shelf is not feasible and would be cost prohibitive. Transporting material to and performing long-term monitoring of a site located off the continental shelf is not economically or operationally feasible.

***Specific Criteria (40 CFR 228.6)***

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

The modified ODMDS is in the Gulf of Mexico, between two and six miles offshore of Dauphin Island, Alabama. Water depths range from -34 to -57 feet (10.4 to 17.4 meters) with an overall average depth of -45 feet (13.7 meters). Sediments consist of sands to clays, with various mixtures of sand, silts, and clays. Most areas in the modified ODMDS have a higher percentage of silt/clay than sand. There tends to be more fine material in the northern portion of the site, and more fine sand on the southern portion of the modified ODMDS. There is a shallower mound (approximately -18 feet MLLW) located in the southeastern portion of the site, where material was historically placed for disposal. There are numerous oil and gas wells located throughout the proposed expansion area. Disposal shall not occur closer than 1,300 feet to any oil or gas rig that may be present within the site boundaries. The FEA contains a map of the ODMDS modification.

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

The modified ODMDS has been selected to avoid the presence of any exclusive breeding, spawning, nursery, feeding, or passage areas for adult or juvenile phases of living resources.

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

The center of the modified ODMDS is several miles from any beaches or amenity areas. No significant impacts to beaches or amenity areas associated with the existing Mobile ODMDS have been detected.

*(4) Types and Quantities of Wastes Proposed to be Disposed of, and Proposed Methods of Release, including Methods of Packing the Waste, if any (40 CFR 228.6(a)(4)).*



Only dredged material that meets the EPA Ocean Dumping Criteria in 40 CFR 220-228 and has been deemed suitable can be disposed of in the ODMDS. Dredged materials dumped in this area will primarily be silts and clays with some sands that originate from Mobile Bay including the Federal Channel and areas of the Port. Average yearly disposal of dredged material into the modified ODMDS is expected to be approximately 2.9 million cubic yards of maintenance and new work dredged material. Hopper dredge, barge, and scow combinations are the usual vehicles of transport for the dredged material, resulting in release of dredged material closer to the bottom of the site which reduces resultant turbidity. None of the dredged material is packaged in any manner.

Under section 103 of the MPRSA, the USACE is the federal agency that decides whether to issue a permit authorizing the ocean disposal of dredged materials. In the case of federal navigation projects involving ocean disposal of dredged materials, transportation to and disposal in ocean waters for disposal by the USACE is subject to the MPRSA, but not to a USACE permit. The USACE relies on the EPA's ocean dumping criteria when evaluating permit requests for (and implementing federal projects involving) the transportation of dredged material for the purpose of dumping it into ocean waters. MPRSA permits and federal projects involving ocean dumping of dredged material are subject to the EPA's review and concurrence. The EPA may concur with or without conditions or decline to concur on the permit or federal project, i.e. non-concur. If the EPA concurs with conditions, the final permit or federal project authorization must include those conditions. If the EPA declines to concur (non-concurs) on an ocean dumping permit for dredged material, the USACE cannot issue the permit or authorize the transportation to and disposal of dredged material in the ocean associated with the federal project.

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

The EPA expects monitoring and surveillance at the modified ODMDS to be feasible and readily performed from ocean or regional class research vessels. The entire area of the modified ODMDS has been surveyed and sampled in 2009 and 2017. The EPA will monitor the site for physical, biological, and chemical attributes as well as for potential impacts. Bathymetric surveys will be conducted routinely, and benthic infauna and epibenthic organisms will be monitored, as described in the SMMP for the site.

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

Current velocities are greatest at the water's surface due to wind and wave action. Intermediate and bottom layer currents are driven by thermohaline and tidal circulations. Currents measured at gauge stations surrounding the ODMDS are predominantly to the west or southwest on the order of 10-30 centimeters per second.

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

Previous disposal of dredged material in the existing Mobile ODMDS has resulted in temporary increases in suspended sediment concentrations during disposal operations, localized mounding within the site, burial of benthic organisms within the site, slight changes in the abundance and composition of benthic assemblages, and changes in the sediment composition from sandy sediments to finer-grained silts. Short-term, long-term, and cumulative effects of dredged material disposal in the modified ODMDS would be similar to those for the previously designated Mobile ODMDS.

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

There will be minor, short-term interferences with commercial and recreational boat traffic during the transport of dredged material to the modified ODMDS. There are several oil and gas extraction platforms in the existing and modified Mobile ODMDS. The site has not been identified as an area of special scientific importance. There are no aquaculture areas near the site. There may be recreational fishing in the area. The likelihood of direct interference with these activities is low, provided there is close communication and coordination among users of the ocean resources. There is one artificial reef site located approximately a quarter mile south of the modified ODMDS. The SMMP for the modified ODMDS contains provisions for corrective measures if impacts to the artificial reef related to dredged material disposal are identified.

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

Water quality of the existing site is typical of the Gulf of Mexico. Water and sediment quality analyses conducted in the vicinity of the modified ODMDS and experience with past disposals in the previously designated Mobile ODMDS have not identified any adverse water quality impacts from ocean disposal of dredged material. The site supports benthic and epibenthic fauna characteristic of the shallow Gulf of Mexico and are widespread off the Gulf coast.

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

Nuisance species, considered as any undesirable organism not previously existing at a location, have not been observed at, or in the vicinity of, the modified ODMDS. Disposal of dredged material, as well as monitoring, has been ongoing for the past 40 to 50 years. Nuisance species have not been found. The dredged material to be disposed of at the ODMDS is expected to be from similar locations to those dredged previously, therefore it is expected that any benthic organisms transported to the site would be relatively similar in nature to those already there.

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

A maritime investigation of this site was conducted in 1982 to identify areas of high and low probability of submerged resources. Past efforts showed the presence of magnetic anomalies that may be indicative of potential resources. Until further analysis is conducted, these anomalies should be avoided in the modified Mobile ODMDS.

The SMMP for the ODMDS contains measures to ensure that resources identified in up-to-date maritime investigations are avoided and are not adversely affected by dredged material disposal.

**III. Environmental Statutory Review - National Environmental Policy Act of 1969, as amended (NEPA); Magnuson-Stevens Fisheries Conservation and Management Act (MSA); Marine Mammal Protection Act (MMPA); Coastal Zone Management Act (CZMA); Endangered Species Act, as amended (ESA); National Historic Preservation Act, as amended (NHPA)**

**a. National Environmental Policy Act**

Section 102 of the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 to 4370, 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 the courts have exempted the EPA's actions under the MPRSA from the procedural requirements of NEPA through the functional equivalence doctrine. The EPA has, by policy, determined that the preparation of NEPA documents for certain EPA regulatory actions, including actions under the MPRSA, is appropriate. 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.

A Draft Environmental Assessment (DEA) for the modification of the Mobile ODMDS was released for public review and comment for a 35-day period on September 26, 2018. The EPA re-noticed the DEA for public review and comment for a 34-day period on October 17, 2019. In addition, the EPA issued a preliminary Finding of No Significant Impact for public review and comment for a 30-day period on June 2, 2020.

The DEA presented the analysis and alternatives considered for the permanent designation of a modified ODMDS offshore Mobile, Alabama, for the purpose of providing an environmentally acceptable option for the ocean disposal of dredged material. The alternatives included: (1) no action/continued use of the previously designated ODMDS; (2) modification of the previously designated Mobile ODMDS to encompass a larger area capable of meeting the capacity needs during the next 25 years; (3) modification of the previously designated Mobile ODMDS to encompass a much larger area capable of meeting the capacity needs during the next 50 years; and (4) designation of a new site. The second alternative was presented as the selected alternative in the EA.

The EPA received comments on the DEA regarding issues that included: (1) potential movement of disposed material impacting nearby artificial reefs; (2) consideration of impacts to the giant manta ray, a newly listed threatened species; (3) the age of the existing cultural resource surveys; and (4) a request for additional opportunity for public review and comment. A detailed responsiveness summary is included in the appendices in the FEA. In addition, a summary of the EPA's consideration of comments received regarding the proposal to modify the Mobile ODMDS is included below.

Following the consideration of comments received, the EPA has issued a Finding of No Significant Impact and the FEA. These documents are included in the docket for this action and may be accessed from <http://www.regulations.gov>.

**b. Magnuson-Stevens Fishery Conservation and Management Act**

The FEA includes a description of the history during the past 18 years of consultation with the National Marine Fisheries Service (NMFS) regarding the assessment of essential fish habitat (EFH), pursuant to Section 305(b), 16 U.S.C. 1855(b)(2), of the MSA with respect to the Mobile ODMDS. On July 24, 2018, the USACE issued a Draft Integrated General Reevaluation Report with Supplemental Environmental Impact Statement on the Mobile Harbor Navigation Project, which included an assessment of EFH regarding the disposal of dredged material to the Mobile ODMDS. On September 7, 2018, NMFS issued a letter to the USACE that stated its agreement with the USACE's determination that the project will not adversely affect EFH. The EPA notified NMFS by letter dated September 25, 2018, of the proposed action to modify the Mobile ODMDS and provided the EPA's assessment that this action would not likely adversely affect EFH. On May 13, 2020, NMFS notified the EPA by email that the required EFH consultation under the MSA has been successfully concluded.

**c. Coastal Zone Management Act**

Pursuant to an Office of Water policy memorandum dated October 23, 1989, the EPA has evaluated the proposed site designations for consistency with the State of Alabama's approved coastal zone management program. On September 25, 2018, the EPA notified the Alabama Department of Environmental Management of the proposed modification of the Mobile ODMDS and provided them with the EPA's assessment that the proposed action was consistent with Alabama's coastal zone management program to the maximum extent practicable. On April 10, 2020, ADEM notified the EPA by email that the Alabama Coastal Area Management Program does not object to the proposal to expand the ODMDS on the basis that all placed material is required to meet the EPA's environmental criteria and it keeps the mineral resource within the system.

**d. Endangered Species Act**

The ESA, as amended, 16 U.S.C. 1531 to 1544, requires Federal agencies to consult with NMFS and the U.S. Fish and Wildlife Service (USFWS) to ensure that any action authorized, funded, or carried out by the Federal agency is not likely to jeopardize the continued existence of any federally listed endangered or threatened species or result in the destruction or adverse modification of any critical habitat. The EPA notified NMFS and USFWS respectively by letters dated September 25, 2018, of the proposed action to modify the Mobile ODMDS and provided the EPA's assessment that this action would not likely adversely affect federally listed species or their critical habitat.

In a letter dated October 8, 2018, the USFWS concurred with the EPA's determination that the proposed action is not likely to adversely affect federally listed species under the jurisdiction of the USFWS. The USFWS further stated that no further endangered species consultation will

be required unless: the proposed action is subsequently modified in a manner that causes an effect on listed species or their critical habitat; new information reveals that the proposed action may affect listed species or their critical habitat in a manner or to an extent not previously considered, or a new species is listed or critical habitat is designated under the ESA that may be affected by the proposed action. As of the date of this action, there are no new federally listed species under jurisdiction of the USFWS in the project area. There are also no new information or changes to the project that may affect species or their critical habitat in a manner or extent not previously considered.

Following the issuance of the EPA's letter dated September 25, 2018, the EPA learned of additional federally listed species under the jurisdiction of NMFS including the giant manta ray (*Manta birostris*) and the Bryde's whale (*Balaenoptera edeni brydei*). In addition, NMFS is in the process of developing a Gulf of Mexico Regional Biological Opinion, which is expected to address all federally listed species that may be affected by the modification of the Mobile ODMDS. Based on the EPA's May 8, 2020 communication with NMFS, the EPA is deferring completion of consultation with respect to the modification of the Mobile ODMDS pursuant to ESA Section 7(d).

**e. National Historic Preservation Act**

The USACE and the EPA initiated consultation with the State of Alabama's Historic Preservation Officer (SHPO) on September 25, 2018, to address the NHPA, 16 U.S.C. 470 to 470a-2, which requires Federal agencies to consider the effect of their actions on districts, sites, buildings, structures, or objects, included in, or eligible for inclusion in the National Register of Historic Places. In a letter dated October 13, 2018, the Alabama Historical Commission (AHC) recommended more up to date maritime surveys in the proposed action area.



During the public comment period for the draft rule to modify the Mobile ODMDS, the EPA received an email from the Choctaw Nation of Oklahoma (CNO) dated July 30, 2019 that notified the EPA that the proposed modification of the Mobile ODMDS lies within the CNO's area of historic interest and that unidentified cultural resources may be located in this area. The CNO also issued an email to the EPA dated November 18, 2019 that requested that they be a consulting party on the modification to the ODMDS pursuant to the NHPA. Following discussions with the AHC and the CNO, the EPA issued letters to the AHC and CNO dated January 24, 2020 that presented language that set forth management provisions to be included in the SMMP to ensure protection of historic and cultural archaeological resources and address the interests expressed by the AHC and the CNO. The EPA specifically proposed language in the SMMP that references a Programmatic Agreement between the USACE and the AHC regarding the Mobile Harbor General Reevaluation Study (Programmatic Agreement), which was signed on July 26, 2019, and sets forth surveys and other activities that would need to be conducted prior to the disposal of dredged material to unused portions of the expanded Mobile ODMDS. On February 25, 2020, the AHC responded by letter and informed the EPA of its agreement with the proposed language. During subsequent communications with the EPA through email and teleconference on February 24, and March 23, 2020, the CNO stated that they had no objections to the proposed language and had no further comments on the EPA's proposed modification of the Mobile ODMDS.

#### **IV. Responses to Comments Received on the Proposed Rule**

On June 25, 2019, the EPA published a proposed rule (docket number EPA-R04-OW-2016-0356) to modify the site for public review and comment for a 45-day period. During that time, the EPA received comments from government agencies including the CNO, the National

Oceanic and Atmospheric Administration (NOAA), and the U.S. Department of Interior (DOI). The EPA also received comments from two members of the public during this time. The specific comments received on the proposed rule and the EPA's responses to such comments are included in the Responsiveness Summary of Appendix C of the FEA, which may be accessed at <http://www.regulations.gov>. Below is a summary of the EPA's consideration of the comments received regarding the proposed rule.

The comments from the CNO and the EPA's consideration of such comments are described above in Section III.e.

NOAA issued a comment from its Marine Chart Division requesting clarity regarding the boundaries of the modified ODMDS and the boundaries that are currently defined on marine charts. The boundaries of the modified ODMDS were established to ensure protection of human health and the marine environment pursuant to the requirements of MPRSA. The boundaries are set forth by the coordinates of this regulation and are also presented in tables ES-3 and ES-4 of the FEA.

The DOI recommended that the modified ODMDS be re-surveyed prior to the deposition of dredged material using more modern equipment than what was available nearly 40 years ago. The SMMP for the Mobile ODMDS includes language that references a Programmatic Agreement that specifies work, including modern surveys, to be conducted prior to the disposal of dredged material for unused portions of the ODMDS.

The comments received from members of the public included concerns about the adequacy of the opportunity to provide comments on the DEA. The EPA subsequently reopened the public comment period for the DEA for a 34-day period on October 17, 2019. The public comments also referenced the DEA and expressed concerns about the description of the respective roles of

the EPA and the USACE regarding the modification of the Mobile ODMDS. The FEA includes updated language from the language included in the DEA to ensure clarity regarding the responsibilities of the EPA under the MPRSA, including coordination with the USACE, with respect to the modification of the Mobile ODMDS. The public also provided recommended revisions to some of the language in the DEA, which are addressed in the FEA as described in more detail in the responsiveness summary in Appendix C of the FEA.

A member of the public requested that the rule be clarified to define the changes that would be expected to occur within the modified ODMDS that demonstrate that the capacity has been exhausted. The member of the public further requested that the rule explain how the USACE would be prevented from exceeding this capacity. The exhaustion of the capacity of the ODMDS will ultimately be evaluated based on monitoring data obtained from the ODMDS. The requirements for monitoring and management of the ODMDS, including the monitoring of changes in bathymetry, are set forth in the SMMP. The EPA and the USACE will utilize the monitoring data collected as the basis for understanding the changes in available capacity over time for the Mobile ODMDS. In addition, no material can be disposed of in the ODMDS without the EPA's review and concurrence in accordance with MPRSA Section 103. The EPA will consider all available data and information, including monitoring data from the site, prior to taking management action pursuant to MPRSA for the Mobile ODMDS.

A member of the public stated that the rule and the DEA should be revised to reflect a modification to the Mobile ODMDS that would accommodate the disposal needs during the next 50 years, instead of 25 years. A Memorandum of Understanding between the USACE South Atlantic Division and EPA Region 4 specifically identifies a period of 10 to 25 years for considering the long-term use for designation or modification of an ODMDS. Basing the size of

an ODMDS on a longer planning period, such as 50 years, would significantly increase the necessary resources to manage and monitor the ODMDS. The decision to utilize a 25-year time frame for disposal was made by the USACE and the EPA in consideration of the agreed-upon provisions of the 2017 MOU. If it is found that material is accumulating in the site to a degree at which there are concerns (biological, chemical, physical), modeling will be undertaken to reassess the capacity as specified in the SMMP.

A member of the public expressed that the rule fails to address some key provisions to protect the water from contamination and illegal dumping. In accordance with the MPRSA and the criteria set forth by its implementing regulations, as described in Section II above, contaminated material cannot not be disposed in the Mobile ODMDS. Any unauthorized dumping of material to the Mobile ODMDS is not allowed by the rule that is being issued today and is subject to enforcement for illegal dumping.

#### **V. Statutory and Executive Order Reviews**

This rule modifies the Mobile ODMDS pursuant to Section 102 of the MPRSA. This action complies with applicable executive orders and statutory provisions as follows:

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

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 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. Burden is defined at 5 CFR 1320.3(b). This

site designation, does not require persons to obtain, maintain, retain, report, or publicly disclose information to or for a Federal agency.

**c. Regulatory Flexibility**

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. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) a small business defined by the Small Business Administration's size regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule, the EPA certifies that this action will not have a significant economic impact on a substantial number of small entities.

**d. Unfunded Mandates Reform Act**

This 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 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 the EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicited comments on this action from State and local officials.

**f. Executive Order 13175: Consultation and Coordination with Indian Tribal**

**Governments**

As described in Section III.e. above, the CNO notified the EPA that the proposed modification of the Mobile ODMDS lies within the CNO's area of historic interest and requested to be a consulting party on the modification to the ODMDS pursuant to the NHPA. The EPA conducted a teleconference with the CNO on January 13, 2020 and discussed the CNO's interests regarding the EPA's proposed action. The EPA issued a letter to the CNO on January 24, 2020, that presented language that set forth management provisions to be included in the SMMP to ensure protection of historic and cultural archaeological resources and address the interests expressed by the CNO. During subsequent communications with the EPA through email and teleconference, the CNO stated that they had no objections to the proposed language and had no further comments on the EPA's proposed modification of the Mobile ODMDS.

**g. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks**

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. The action concerns the modification of the existing Mobile ODMDS and only has the effect of providing a designated location for ocean disposal of dredged material pursuant to Section 102 (c) of the MPRSA.

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

This action is not subject to Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use" (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 (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs the EPA to provide Congress, through Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action includes

environmental monitoring and measurement as described in the SMMP. The EPA will not require the use of specific, prescribed analytic methods for monitoring and managing the modified ODMDS. The Agency 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 rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The EPA has assessed the overall protectiveness of modifying the existing Mobile ODMDS 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.



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

Environmental protection, Water pollution control.

Authority: This action is issued under the authority of Section 102 of the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. 1401, 1411, 1412.

Dated: July 17, 2020.

Mary Walker

Regional Administrator, Region 4.

For the reasons set out in the preamble, the EPA amends chapter I, title 40 of the Code of Federal Register as follows:

**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. Section 228.15 is amended by revising paragraphs (h)(14)(i) through (iii) and (vi) to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(14) \* \* \*

(i) *Location:* Corner Coordinates (NAD 1983) 30° 13.0' N, 88° 08.8' W; 30° 09.6' N, 88° 04.8' W; 30° 08.5' N, 88° 05.8' W; 30° 08.5' N, 88° 12.8' W; 30° 12.4' N, 88° 12.8' W

(ii) *Size:* Approximately 23.8 square nautical miles in size.

(iii) *Depth:* Ranges from 34 to 57 feet (10.4 to 17.4 meters).

\* \* \* \* \*

(vi) *Restrictions:* (A) Disposal shall be limited to dredged material from the Mobile, Alabama area;

(B) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 220-228;

(C) Transportation and Disposal shall be managed by the restrictions and requirements contained in the Site Management and Monitoring Plan (SMMP).;

(D) Monitoring of the site also shall be governed by the currently approved SMMP.

\* \* \* \* \*

[FR Doc. 2020-15963 Filed: 8/3/2020 8:45 am; Publication Date: 8/4/2020]