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3510-NK-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 211103-0224]

RIN 0648-BI01

Monterey Bay National Marine Sanctuary Regulations

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule and notification of availability of a final management plan and final environmental assessment.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) issues final regulations, a final management plan, and a final environmental assessment (EA) for Monterey Bay National Marine Sanctuary (MBNMS or sanctuary). The final rule includes modifications to three provisions of the MBNMS regulations, the modification of an appendix to the MBNMS regulations that describes sanctuary zone boundaries, and the addition of one new definition to the MBNMS regulations. A final EA and finding of no significant impact (FONSI) have been prepared for this action.

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

ADDRESSES: To obtain a copy of the final management plan, environmental assessment, and FONSI, contact the Management Plan Review Coordinator at Monterey Bay National Marine Sanctuary, Address: 99 Pacific Street, Building 455A Monterey, CA 93940; phone number (831) 647-4201; or via email at

mbnmsmanagementplan@noaa.gov. Copies can also be downloaded from the Monterey Bay National Marine Sanctuary website at *https://montereybay.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Lisa Wooninck, Monterey Bay National Marine Sanctuary Acting Superintendent, at *lisa.wooninck@noaa.gov* or (831) 647-4201.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

NOAA's Office of National Marine Sanctuaries (ONMS) serves as the trustee for a network of underwater parks encompassing more than 600,000 square miles of marine and Great Lakes waters from Washington State to the Florida Keys, and from Lake Huron to American Samoa. The network includes a system of 15 national marine sanctuaries and two marine national monuments.

B. Monterey Bay National Marine Sanctuary

NOAA established Monterey Bay National Marine Sanctuary in 1992 for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical, and aesthetic resources and qualities of the area, including the submarine Monterey Canyon and, subsequently, Davidson Seamount. The sanctuary is located offshore of California's central coast, encompassing a shoreline length of approximately 276 miles between Rocky Point (Marin County) and Cambria (San Luis Obispo County). With the inclusion of the Davidson Seamount Management Zone (DSMZ) in 2008, the sanctuary now spans approximately 6,094 square miles (4,602 square nautical miles (nmi^2)) of ocean and coastal waters, and the submerged lands thereunder, extending an average distance of 30 miles (26 nautical miles (nmi)) from shore. Supporting some of the world's most diverse and productive marine ecosystems,

the sanctuary is home to numerous mammals, seabirds, fishes, invertebrates, sea turtles and plants.

C. Need for Action

The primary purpose of the action is to fulfill section 304(e) of the National Marine Sanctuaries Act (16 U.S.C. 1431 et seq.) (NMSA). Section 304(e) (16 U.S.C 1434(e)) requires periodic review of sanctuary management plans to ensure that site-specific management techniques and strategies effectively address changing environmental conditions and threats to protected resources and qualities of the sanctuaries, and that they fulfill the purposes and policies of the NMSA. The management plan review process also includes an assessment of existing sanctuary regulations to determine if any regulatory changes are needed to support management plan objectives.

Accordingly, ONMS conducted a review of the MBNMS management plan and regulations, which resulted in the development of a new management plan for the sanctuary and changes to the sanctuary's regulations.

With this final rule, NOAA modifies three provisions of the MBNMS regulations, modifies appendix E to the MBNMS regulations, and adds one new definition to the MBNMS regulations. These changes support more efficient and effective program management and enhanced stewardship of the sanctuary's natural resources. The need for each regulatory action is described in greater detail in Section III below.

D. Process

The process for this action included four major stages: (1) information collection and characterization via development and issuance of a sanctuary condition report that describes the status and trends of driving forces and pressures on the ecosystem and natural and archaeological resource conditions in MBNMS, as well as public scoping to further identify issues associated with revising the management plan

(scoping was completed on October 30, 2015); (2) preparation and release of a proposed rule (85 FR 40143, July 6, 2020), draft revised management plan, and draft EA in accordance with the National Environmental Policy Act (NEPA); (3) public review and comment on the proposed rule, draft management plan, and draft EA; and (4) preparation and release of a final rule, final management plan, final EA, and FONSI. With the publication of this final rule, NOAA completes the fourth phase of the process. All written comments NOAA received are available at *https://www.regulations.gov/docket/NOAA-NOS-2020-0094*. NOAA's responses to public comments are included in Appendix A of the final EA, and the comments pertaining to this rulemaking are included in Section IV of this document.

Together with this final rule, NOAA is releasing the final management plan, as well as a final EA and FONSI. The management plan describes strategies and action plans for conservation and management of the sanctuary. The EA contains more detailed information on the considerations of the final management plan and regulatory amendments, including an assessment of alternatives, analysis of environmental impacts, and references. The management plan, EA, and FONSI can be found on the website listed in the ADDRESSES section above.

II. Changes from Proposed to Final Regulations

After considering the public comments received between July 6 and September 4, 2020, and engaging in interagency consultations and internal deliberations, NOAA revised the proposed beneficial use definition in 15 CFR 922.131 to modify the standard applicable to dredged material eligible for beneficial use in the sanctuary and to clarify that beneficial use includes habitat protection and restoration purposes (changes described in detail below). NOAA made corresponding changes to the final EA and management plan. Additionally, NOAA made technical changes to the descriptions and coordinates of the Motorized Personal Watercraft (MPWC) Zones and access routes

within the sanctuary in appendix E to subpart M of part 922. All other regulatory modifications NOAA outlined in the proposed rule remain the same in the final rule.

In the proposed rule, NOAA proposed a definition of "beneficial use of dredged material" to mean the use of dredged material removed from any of the four public harbors immediately adjacent to the shoreward boundary of the sanctuary (Pillar Point, Santa Cruz, Moss Landing, and Monterey) that has been determined by the Director to be clean (as defined by 15 CFR 922.131) and suitable (as consistent with regulatory agency reviews and approvals applicable to the proposed beneficial use) as a resource for habitat restoration purposes only. NOAA also proposed the clarification that the beneficial use of dredged material is not disposal of dredged material. With this final rule, NOAA finalizes the definition of "beneficial use of dredged material" to mean the use of dredged material removed from any of the four public harbors adjacent to the sanctuary (Pillar Point, Santa Cruz, Moss Landing, and Monterey) that has been determined by the Director to be suitable as a resource for habitat protection or restoration purposes only. NOAA also finalizes the clarification that the beneficial use of dredged material is not disposal of dredged material.

NOAA made changes to the definition in response to two primary concerns raised during the public comment period. First, several commenters expressed concern that the prescribed use of dredged material for habitat restoration was too restrictive and precluded the use of such material for more proactive shoreline protection projects, such as: protecting habitat for wildlife; softscape erosion control alternatives; shoreline stabilization; and adaptive management to address impacts from sea level rise. NOAA acknowledges that the term "restoration" alone does not adequately encompass proactive measures to protect habitat that may prevent the need for restoration by helping to prevent future habitat degradation. For example, placing sediment on an eroding beach can help protect it from further erosion, and it can contribute to the coastal sediment

transport system, which provides sediment to other nearby coastal beaches. Nourishing beaches also helps protect coastal dunes, which provide habitat for threatened and endangered species, such as western snowy plovers. NOAA also recognizes that there may be ancillary benefits from these projects, such as the protection of coastal infrastructure. The purpose of the beneficial use regulatory provisions is to protect and restore sanctuary habitats, such as beaches, through the beneficial use of dredged material. Therefore, NOAA replaces the term "restoration" with "protection or restoration" to allow the beneficial use of suitable dredged material removed from any of the four local harbors to cover protecting and restoring MBNMS habitats.

Second, commenters expressed concern that the standard NOAA proposed in the definition of "beneficial use of dredged material" for sediment to be "clean" would be a prohibitively strict threshold because, based on other definitions in the MBNMS regulations, it would mean that the sediment used for habitat protection or restoration projects could contain no detectable levels of any of the substances listed pursuant to section 42 U.S.C. 9601(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at 40 CFR 302.4.[1] Commenters were concerned that if this standard were applied, it would be more restrictive than those used by other Federal agencies that utilize dredged materials for similar projects, such as the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA). Commenters also expressed concern that it would be very difficult to find sediment that could meet the proposed standard, which would effectively prevent the

[1] *See* 15 CFR 922.131 (MBNMS regulation defining "clean" as "not containing detectable levels of harmful matter" and defining "harmful matter" as any substance, or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities, including but not limited to: Fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C. 9601(14) of the Comprehensive Environmental Response, Compensation, and Liability Act at 40 CFR 302.4).

placement of any dredged sediment and make implementation of the regulation impracticable.

After reviewing public comments, conferring with other agencies, and conducting internal deliberations, NOAA determined that the proposed use of "clean" as a standard created challenges, given that word's meaning elsewhere in MBNMS definitions. Upon consideration, NOAA concurs with the concerns outlined above that were raised during the public comment period. Moreover, NOAA has determined that the purpose of protection of sanctuary resources and qualities can be maintained via a revised sediment standard and through the implementation of permit and/or authorization review criteria. Therefore, with this final rule, NOAA revises the standard so that the ONMS Director must determine that the dredged material is "suitable" as a resource for habitat protection or restoration purposes only.

NOAA also removed the parenthetical language in the proposed rule following "suitable" (i.e., "as consistent with the regulatory agency reviews and approvals applicable to the proposed beneficial use") to clarify that the ONMS Director's "suitable" determination is not limited to only considering regulatory agency reviews and approvals, although these reviews and approvals will continue to be required. The revised standard fulfills the same purposes and policies of the originally proposed "clean" and "suitable" standard by ensuring that dredged sediment for proposed habitat protection or restoration projects is subject to rigorous evaluation and furthers the statutory and regulatory purpose of protection of sanctuary resources. The beneficial use of dredged material within MBNMS for habitat protection or restoration purposes still has to meet NOAA's own permitting and/or authorization criteria and undergo environmental review, as well as other rigorous testing and screening criteria established by other Federal and state regulatory agencies, as applicable.

Additionally, NOAA has made technical changes to the descriptions of the harbors in the definition of "beneficial use of dredged material," as well as to the descriptions and coordinates of the Motorized Personal Watercraft (MPWC) Zones and access routes within the sanctuary in appendix E to subpart M of part 922. These technical changes include: revising the phrase "removed from any of the four public harbors immediately adjacent to the shoreward boundary of the sanctuary (Pillar Point, Santa Cruz, Moss Landing, and Monterey)" to "removed from any of the four public harbors adjacent to the sanctuary (Pillar Point, Santa Cruz, Moss Landing, and Monterey)"; adding the missing phrase "[Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983]" to the beginning of appendix E to clarify which projection NOAA uses to calculate the zone coordinates; adding the last point coordinates to each of the five zones to complete the polygon, along with descriptive text explaining how to draw the polygons from point to point; and correcting the magnetic bearings listed for each zone to make them more accurate. These technical changes in the final rule do not result in differences in the list of eligible harbor sources or locations of the polygons from the proposed rule.

NOAA determined that the changes made from proposed to final rule did not result in any changes in the conclusions of the final EA with regard to the significance of the impacts.

III. Summary of Final Regulations

A. Beneficial use of suitable dredged material

The MBNMS terms of designation and regulations prohibit permitting the disposal of dredged material within the sanctuary other than at sites authorized by the EPA prior to the effective date of designation.[2] NOAA is adding a new definition for

[2] Article V of the Monterey Bay National Marine Sanctuary Terms of Designation, 73 FR 70488 (Nov. 20, 2008); 15 CFR 922.132(f).

"beneficial use of dredged material" to 15 CFR 922.131 and amending 15 CFR 922.132(f) to clarify that "beneficial use" of dredged material as defined in 15 CFR 922.131 is not "disposal" of dredged material as described at 15 CFR 922.132(a)(2)(i)(F) and 15 CFR 922.132(f). Together, these regulatory changes clarify that the MBNMS terms of designation and regulations do not preclude NOAA from approving the beneficial use of dredged material within sanctuary boundaries that has been removed from any of the four public harbors adjacent to the sanctuary and that has been determined by the Director to be suitable for habitat protection or restoration purposes. In this section, NOAA discusses the requirements to approve beneficial use projects; provides additional historical context for this regulatory clarification in light of the original terms of designation and management approaches; summarizes additional options for sediment placement for habitat protection and restoration purposes that are currently available and remain unchanged by this rulemaking; and provides a brief overview of the regulatory context of dredge, fill, and disposal projects that helped inform this rulemaking.

1. Review and permitting of beneficial use projects

This section provides additional context on the review criteria and other requirements that must be met for beneficial use projects to be approved.

Any project that proposes the beneficial use of dredged material would require a NOAA sanctuary permit and/or authorization, as well as appropriate review under NEPA, the Clean Water Act, and other applicable statutes. The ONMS Director has broad authority in applying permit review criteria to ensure the proposed project is conducted in a manner that is compatible with the primary objective of protecting sanctuary resources and qualities; to consider other permit review factors deemed appropriate; and to include any permit terms or conditions deemed appropriate.[3] The

[3] 15 CFR 922.133.

ONMS Director also has broad authority in applying authorization reviews of any valid lease, permit, license, or approval to include any terms or conditions deemed reasonably necessary to protect sanctuary resources and qualities.[4] The Director would also assess the suitability of the sediment using water quality and sediment quality criteria that are established and updated by the sanctuary to ensure that it matches the physical properties of native sediments at any planned receiving site (e.g., grain size, sediment type) and meets sanctuary water quality objectives.

A proposed project involving the use of dredged material would only be eligible for approval by NOAA if the project demonstrates a sanctuary habitat protection or restoration purpose under the new definition of "beneficial use of dredged material" at 15 CFR 922.131. For the purposes of the "beneficial use of dredged material" definition in this final rule, "habitat restoration" means placing sediment for the purpose of re-establishing natural habitats that have been negatively impacted by erosion processes, including but not limited to wetlands, sandy beaches, and coastal dune habitats. For the purposes of the "beneficial use of dredged material" definition in this final rule, "habitat protection" means placing sediment at sites in the sanctuary to protect against habitat degradation and reduce the need for future habitat restoration. As an example of how habitat protection may proactively reduce the need for future habitat restoration, a well-designed project could help minimize coastal erosion by providing a buffer of protection during seasonally dynamic storm cycles that could otherwise remove or replace large volumes of sand. Furthermore, when a coastal beach habitat is restored or protected, the adjacent upland resources such as shoreline infrastructure may also be protected.

In addition to a sanctuary permit and/or authorization and an appropriate environmental review, the beneficial use of dredged material at sites within the sanctuary

[4] 15 CFR 922.49(a)(4) and 922.132(e).

may also require review and permitting by other Federal and State regulatory authorities with jurisdiction over the proposed beneficial use project.

2. Sources of sediment eligible for use in beneficial use projects

This section explains the historical context of the prohibition in the MBNMS terms of designation and regulations on permitting disposal of harbor dredged materials. This section also explains the sources of sediment that are eligible for use in permitted beneficial use projects in the sanctuary: suitable sediment from local harbors immediately adjacent to the sanctuary; suitable sediment from upland and onshore sources; and suitable sediment from non-harbor offshore sources within the sanctuary.

a. Historical context of the MBNMS terms of designation and regulations

A key provision of the terms of designation and regulations governing MBNMS stipulates that in no event may sanctuary managers permit, authorize, or approve the disposal of dredged material within the sanctuary other than at federally approved dredge disposal sites established prior to sanctuary designation.[5] Absent clarification in MBNMS regulations that "disposal of dredged material" is a different activity than "beneficial use of dredged material" for habitat protection or restoration, NOAA has not authorized discharges of harbor-dredged material directly into the sanctuary under its discretionary authority described at 15 CFR 922.48, 922.49, 922.132(e), and 922.133 other than at pre-approved disposal sites.

However, in the last MBNMS Management Plan (November 2008), NOAA stated, "[i]f investigations indicate that employment of additional beach nourishment sites using clean dredged harbor material would be possible and appropriate, MBNMS may examine whether revision of MBNMS regulations and Designation

[5] Article V of the MBNMS Terms of Designation, 73 FR 70488 (Nov. 20, 2008); 15 CFR 922.132(f).

Document may be warranted; or if a beneficial program might occur via MBNMS permit or authorization in concert with other agencies."[6]

NOAA has determined that the protection and restoration purposes of local harbor-driven beach nourishment projects -- projects that have, to date, largely relied on onshore placement of suitable material -- can be further promoted by allowing placement of suitable dredged material directly into the sanctuary below the mean high water (MHW) line for habitat protection or restoration purposes. One example site that could benefit from placement of sediment below MHW line, subject to a project proposal and applicable permit and environmental review criteria, is the potential placement of suitable dredged material from Pillar Point Harbor into the shallow subtidal zone of the sanctuary at El Granada/Surfer's Beach (discussed in more detail below). The beneficial use of suitable dredged material for habitat protection or restoration purposes in the sanctuary would provide an additional effective and sustainable option to address sites in the sanctuary where shoreline habitat and resources have been heavily impacted by erosion or no longer exist due to the presence of shoreline structures, coastal armoring, sea level rise, and increased storm activity.

For the reasons explained here and throughout this final rule, NOAA has determined that employment of additional habitat protection or restoration projects using suitable dredged material from any of the four adjacent harbors would be possible and appropriate. Accordingly, this final rule clarifies that beneficial use projects may occur through MBNMS permits and/or authorizations if all applicable criteria are met.

b. Sediment from local harbors immediately adjacent to the sanctuary

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[6] Final Management Plan, pg. 96. available at: *https://montereybay.noaa.gov/intro/mp/welcome.html*.

The four harbors immediately adjacent to the sanctuary, and no other harbors, are considered eligible sources of material for protecting or restoring habitats for several reasons.[7]

First, the four harbors and the sanctuary are in the same local sediment transport cell, which means that the sediments that settle in the four harbor channels generally come from the same sources as those that settle in the sanctuary. Second, if the four harbors adjacent to the sanctuary did not exist, sand and other sediment would not settle in the harbors and would thus remain in the coastal transport cell. Therefore, the regulatory clarifications regarding the permitted use of suitable dredged material from the four named harbors for beneficial use projects achieve the intent of helping restore the normal transport of sediment along the coast within the sanctuary.

Third, the original terms of designation and regulations for MBNMS regarding dredge disposal contemplated the need to accommodate dredging from the four local harbors via disposal of such dredged material at authorized, offshore disposal sites, but they never envisioned the sanctuary as a site to absorb dredge materials from harbors distant to the sanctuary. In fact, NOAA's final EIS for the 1992 MBNMS designation discussed how designating the new sanctuary would prevent the creation of new disposal sites within MBNMS's boundaries for dredged material extracted from the harbors within San Francisco Bay, due to the sanctuary's regulatory prohibition on designation and use of any new ocean dredged material disposal sites within the sanctuary.[8]

Therefore, the clarification in this final rule that disposal of dredged material does not include the beneficial use of dredged material is meant to only address

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[7] The boundaries of these harbor jurisdictions are described in 15 CFR 922.130(a) and 15 CFR part 922, subpart M, appendix A. *See* 15 CFR 922.130(a). Maps of these harbor jurisdictions with harbor exclusion coordinates noted are located here: *https://nmsmontereybay.blob.core.windows.net/montereybay-prod/media/materials/maps/harbor1_lg.jpg.*

[8] Monterey Bay National Marine Sanctuary Final Environmental Impact Statement and Management Plan Vol 1. 1992. Pgs. IV-31 to IV-35. available at: *https://montereybay.noaa.gov/intro/mp/archive/original_eis/partIV_sI.html*.

material dredged from any of the four harbors immediately adjacent to MBNMS. For these reasons, the new definition for "beneficial use of dredged material" applies to material removed from these four local harbors and not to material removed from other harbors.

c. Upland and onshore sediment sources

As explained above, the original prohibition on the disposal of dredged material in the MBNMS terms of designation and regulations addressed a concern with disposal of harbor-dredged material.[9] Onshore or upland sources of sediment, provided they are not sourced from dredging a harbor other than the four adjacent to MBNMS, are treated differently because they are not harbor-dredged material. NOAA received public comments on the proposed rule that expressed confusion as to the effect of the rulemaking on NOAA's ability to permit placement of upland material for beneficial use projects. This rulemaking does not change NOAA's current authority and long-standing approach with respect to permitting placement of upland or onshore sediments within the sanctuary. The placement of suitable material within the sanctuary that originates from onshore sources (e.g., sediment from coastal bluffs/dunes, coastal lagoon sediment traps, coastal highway construction projects, river maintenance) for habitat protection or restoration projects may continue to be allowed through appropriate permits and/or authorizations and environmental review. NOAA has issued permits in the past for placement of these types of materials within the sanctuary, such as south of Año Nuevo and along the Big Sur coast from coastal highway maintenance and repair projects.

d. Offshore sediment sources within the sanctuary

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[9] *See also* Monterey Bay National Marine Sanctuary Final Environmental Impact Statement and Management Plan Vol 1. 1992, pg. II-79, for additional discussion of dredging and dredge disposal activities in the context of harbor activities. Available at: *https://montereybay.noaa.gov/intro/mp/archive/original_eis/partII_sIII.html#d.*

NOAA also received public comments that expressed confusion about whether beneficial use projects in the sanctuary may rely upon sediment from offshore sources. Similar to proposed beneficial use projects using upland material, NOAA may permit the placement of suitable sediment from offshore sources within the sanctuary for habitat protection and restoration purposes, as long as the sediment is not dredged from a harbor other than one of the four local harbors referenced above. This rulemaking does not alter NOAA's ability to permit such projects and does not preclude a potential permit applicant from requesting to source and dredge material from within MBNMS (e.g., an offshore sand cell) and deposit it nearshore for habitat protection or restoration.

Review of such a proposed project currently, and after this rulemaking, would need to evaluate the environmental impacts of the removal of the offshore material and the impacts of its deposit elsewhere in the sanctuary. In order to approve such a project, NOAA would need to make the necessary findings within the MBNMS permit or authorization review criteria and other applicable regulations. Review and approval by other agencies may also be required.

3. Other sediment placement options

This section provides a brief summary of two available options for sediment placement for beneficial use purposes in which the sediment is placed outside, rather than within, the sanctuary.

a. Onshore sediment placement shoreward of the sanctuary's mean high water boundary

Placement of sediment above the mean high water (MHW) line (i.e., outside the MBNMS shoreward boundary) immediately adjacent to the sanctuary would not constitute prohibited disposal of dredged material within the sanctuary. To date, NOAA has accommodated requests for such placement of dredged sediment above the MHW line from three of the four adjacent harbors for beach nourishment purposes.

Several examples of such projects are as follows. In 2007, NOAA concurred with other agencies to allow Moss Landing Harbor to place suitable beach nourishment material from harbor dredging on the beach above MHW immediately south of the harbor breakwater, in an area not within the sanctuary. Further, beach replenishment projects currently occur at Del Monte Beach in Monterey and Twin Lakes Beach in Santa Cruz. The City of Monterey has an MBNMS authorization for the annual placement of dredged material from Monterey Harbor onto two EPA-approved locations above MHW at Del Monte Beach. The material meets USACE, EPA, and California Regional Water Quality Control Board water and sediment quality standards and consists primarily of an acceptable grain size that is compatible with the receiving beach. Sediment deposited at these two beach locations in Monterey is eventually washed by natural wave action into lower tidal areas (i.e., below MHW and thus inside the sanctuary) and laterally along the shoreline, effectively maintaining or creating improved coastal habitat and recreational resources within the sanctuary. A similar but larger on-shore beach restoration protocol has been established at Twin Lakes Beach in Santa Cruz for suitable sediment dredged from the entrance channel to Santa Cruz Harbor.

Based upon the past successful use of suitable dredged material for beach nourishment at Santa Cruz, Moss Landing, and Monterey, in 2015 NOAA wrote to Pillar Point Harbor to convey how onshore placement of its suitable dredge material would not constitute discharge within the bounds of the sanctuary and could allow the harbor district to implement a beach nourishment project it had long sought for El Granada/Surfer's Beach next to that harbor. Due to the interruption of natural sand transport patterns, the beach has eroded to such a degree that ocean waters now extend to the toe of the riprap armoring that safeguards Highway 1. El Granada/Surfer's Beach is now often submerged at MHW, and a fraction of the former beach appears only at the lowest tide levels. An on-shore beach restoration project could restore the natural coastal

beach habitat, as well as provide recreational benefits to beach goers and protect the highway infrastructure. Pillar Point Harbor has received grant funds and continues to study such an on-shore beach restoration project.

The habitat restoration projects described here have proven successful in maintaining the integrity of high public use beaches that would otherwise suffer from accelerated erosion due to human interruptions of natural sediment transport patterns in the area. Placement of dredged material on these beaches has helped protect coastal beaches and dunes, stabilize their geologic profiles, and protect these habitats for wildlife. Although NOAA has determined that the protection and restoration purposes of local harbor-driven beach nourishment projects can be further promoted by allowing placement of suitable harbor-dredged material directly into the sanctuary, the option of a project using onshore placement of suitable material remains available.

b. Sediment placement in areas outside the sanctuary

This rulemaking does not affect the current prohibitions on deposition in the sanctuary of any material dredged from harbors other than the four adjacent to the sanctuary, such as the complex of harbors in San Francisco Bay or the San Francisco main ship channel, except for use of federally-approved disposal sites SF-12 and SF-14 off Moss Landing. Nonetheless, Federal and State agencies and harbor managers could discharge suitable material from these sources for beach nourishment offshore of or onshore the approximately 12 miles of coastal habitat and beaches off San Francisco, Daly City, and Pacifica that is outside of the boundaries of Monterey Bay National Marine Sanctuary, subject to other applicable review and permitting requirements. Such a beach nourishment project along this stretch of coast would be closer to the dredged source, which would both increase project feasibility and restore the material to the closest location within the littoral coastal transport cell. A beach nourishment project in

this area would not be governed by sanctuary regulations unless there was a potential for that material to enter and injure sanctuary resources.

4. Statutory and regulatory context of dredge, fill, and disposal projects

This action, which clarifies NOAA's authority to approve the use of dredged material from the four adjacent public harbor jurisdictions that has been determined by the Director to be suitable as a resource for habitat protection or restoration purposes within the sanctuary, is consistent with the regulatory framework for dredge, fill, and disposal projects as outlined by the Clean Water Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), and applicable USACE and EPA regulations. The existing regulatory framework differentiates between the disposal, or discarding, of dredged material and the beneficial use of dredged material, which refers to the purposeful application of material. For example, the "disposal into ocean waters" of dredged material is regulated under provisions of the Ocean Dumping Act, whereas discharge of dredged material for fill, including beach nourishment, is regulated under Section 404 of the Clean Water Act.[10] In addition to the ONMS Director's approval, any proposed beneficial use of dredged material project in MBNMS would be subject to applicable permit and regulatory reviews of other Federal and State authorities with jurisdiction over the proposed project.

Finally, this action is also consistent with current State and Federal coastal management practices that favor softscape approaches to restoring and protecting beaches and shorelines over hardscape methods (e.g., riprap, groins and seawalls).[11] The USACE Engineering and Design Manual on Dredging and Dredged Material (July 2015) states, "Interest in using dredged material as a manageable, beneficial resource, as an alternative

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[10] 33 CFR 336.0.

[11] *See* California Coastal Commission's Sea Level Rise Policy Guidance, available at: *https://documents.coastal.ca.gov/assets/slr/guidance/2018/0_Full_2018AdoptedSLRGuidanceUpdate.pdf*.

to conventional placement practices, has increased."[12] The USACE/EPA Beneficial Use Planning Manual states, "the promotion of beneficial uses continues to require a shift from the common perspective of dredged material as a waste product to one in which this material is viewed as a valuable resource that can provide multiple benefits to society."[13] The planning manual further notes that in general, "clean, coarse-grained sediments (sands) are suitable for a wide variety of beneficial uses."[14] Finally, the USACE/EPA Manual on The Role of the Federal Standard in the Beneficial Reuse of Dredged Material indicates, "a beneficial use option may be selected for a project even if it is not the Federal Standard for that project."[15]

NOAA has determined the placement in the sanctuary of local dredged material (removed from any of the four public harbors adjacent to the sanctuary) that has been determined by the Director to be suitable for habitat protection or restoration purposes is appropriate and consistent with the existing regulatory framework for dredge, fill, and disposal projects.

5. Conclusion

For the reasons explained here, NOAA is adopting this regulatory change to clarify NOAA's authority to approve the beneficial use of suitable dredged material for habitat protection or restoration purposes within MBNMS. Such use would not constitute "disposal of dredged material" within the meaning of the MBNMS terms of designation and regulations. This regulatory change does not pose additional regulatory burdens to

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[12] EM 1110-2-5025 at page 5-1 (July 31, 2015), available at: https://www.publications.usace.army.mil/portals/76/publications/engineermanuals/em_1110-2-5025.pdf.
[13] Identifying, Planning, and Financing Beneficial Use Projects Using Dredged Material at 11 (October 2007, available at: *https://www.epa.gov/sites/production/files/2015-08/documents/identifying_planning_and_financing_beneficial_use_projects.pdf*.
[14] The USACE/EPA Beneficial Use Planning Manual was not applying NOAA's proposed definition of "clean" referring to CERCLA. Rather, the Planning Manual considered suitability factors under the Clean Water Act Section 404(b)(1) guidelines, and data on grain size, levels of contamination, salinity, water content, organic content, acidity, levels of nutrients, and engineering properties. *Id*. at 10-11.
[15] EPA842-B-07-002 (October 2007) at 3, available at: *https://www.epa.gov/sites/production/files/2015-08/documents/role_of_the_federal_standard_in_the_beneficial_use_of_dredged_material.pdf.*

the public, but rather, increases the availability of projects that may be permitted to help address coastal erosion and beach nourishment in the sanctuary.

B. Modification of Seasonal/Conditional Requirement for Motorized Personal Watercraft (MPWC) Access to MPWC Zone 5 at Mavericks

Consistent with the text that appeared in the proposed rule, NOAA amends MBNMS regulations to reduce the sea state condition required for MPWC access to MPWC zone 5 at Mavericks, offshore of Half Moon Bay. NOAA is changing the current high surf warning (HSW) requirement to a less stringent high surf advisory (HSA) requirement. The MPWC zone 5 was created in 2009 primarily to allow MPWC to support big-wave surfing at Mavericks during winter months when wildlife activity is significantly reduced in this area. Currently, MPWC may access zone 5 at Mavericks only when HSW conditions (predicted breaking waves at the shoreline of 20 feet or greater) are in effect, as announced by the National Weather Service for San Mateo County during the months of December, January, and February. However, due to unique bathymetric features at Mavericks, waves can exceed 20 feet well before HSW conditions are announced county-wide. Allowing MPWC access to Mavericks during HSA conditions (predicted breaking waves at the shoreline of 15 feet or greater) allows MPWC presence at the break three to five additional days per year to provide safety assistance to surfers operating in a highly energized surf zone.

Surfers have developed new techniques for accessing larger waves, enabling surfers to now routinely surf extremely large waves at Mavericks during winter HSA conditions when MPWC access to the zone is currently prohibited. In February 2017, an MBNMS Advisory Council subcommittee recommended lowering the current conditional threshold for MPWC access to Mavericks from a HSW to a HSA condition during the months of December, January, and February to allow expanded use of MPWC for safety assistance to surfers recreating in extreme sea conditions. The MBNMS

Advisory Council voted unanimously to support the subcommittee recommendation on February 17, 2017. NOAA agrees with the MBNMS Advisory Council recommendation and believes it would benefit public safety, while posing no significant added threat of disturbance to protected wildlife due to minimal wildlife activity in the area during extreme high-surf conditions in winter months.

C. Reconfiguration of Year-Round MPWC Zone Boundaries

Consistent with the text that appeared in the proposed rule, NOAA amends the MBNMS regulations to modify boundaries of four, year-round MPWC zones in a manner that maintains NOAA's original intent to provide recreational opportunities for MPWC within the sanctuary, while safeguarding sensitive sanctuary resources and habitats from unique threats of disturbance by these watercraft. NOAA is not modifying the boundaries of the seasonal/conditional zone 5 at Mavericks.

Specifically, these modifications reduce the number of deployed boundary buoys and associated navigational hazards, aesthetic impacts, and mooring failures that create public safety issues, marine debris, seafloor impacts, and excessive maintenance efforts. The zones were established in 1992 to provide recreational use areas for MPWC while safeguarding marine wildlife and habitats. MPWC have the unique capability to sharply maneuver at high speeds in the ocean environment and freely access remote and sensitive marine habitat areas, unlike any other type of motorized vessel (57 FR 43310, September 18, 1992).

The four MPWC zones were established near each of the four harbors in the sanctuary where MPWC operators typically launch. The boundaries were delineated without consideration of practical matters such as the integrity or sustainability of buoy stations. For example, buoys deployed off rocky points have experienced repeated mooring failures due to heavy wave diffraction/reflection, abrasive and mobile rocky substrate affecting mooring tackle, and a lack of soft sediments into which an anchor may

be securely set. Buoys deployed in deep water have repeatedly failed due to suspected interactions with vessels and commercial fishing gear. Mooring failures cause deposition of chain and anchors on the seafloor and pose a hazard to mariners and the public from drifting buoys. Even when buoys hold station, they could present navigation obstacles. As stated above, reducing the number of boundary buoys by utilizing existing marks and geographical features (e.g., United States Coast Guard (USCG) navigation buoys and landmarks) can markedly reduce navigational hazards and mooring failures that create public safety issues, marine debris, seafloor impacts, and excessive maintenance efforts.

Anecdotal observations of MPWC zone use over time by harbor officials, marine enforcement officers, ocean users, sanctuary staff, and volunteers indicate that the zones are rarely used by MPWC operators. Therefore, reconfiguring the zones will minimally impact a small number of users.

Relocation of marker buoys to shallower mooring depths will improve station-keeping, inspection, and maintenance of buoy moorings. Reconfiguring the four zones reduces the overall number of deployed MPWC boundary buoys from fifteen to nine, which is a 40% net reduction in the number of MPWC boundary buoy mooring sites; eliminates six existing buoy mooring stations entirely; replaces four existing mooring stations with four new shallower mooring stations; and leaves five previous mooring stations unchanged. These modifications will result in the permanent removal of anchors and chain from the seafloor at ten sites and the installation of anchors and chain at four new sites. As previously stated, the four new mooring stations will be in shallower water and deliberately sited in mud/sand substrate to avoid rocky reef habitat — a purposeful reduction of negative environmental impacts. Zone reconfigurations result in a 59% reduction of total areal coverage of the four year-round zones, resulting in an equal reduction of surface area subject to direct MPWC interactions with specially protected

marine wildlife, such as migratory birds, whales, dolphins, porpoise, turtles, sea lions, and sea otters.

The reconfigured MPWC zones still provide considerable area adjacent to all four harbors for general use of MPWC, fulfilling the original goal for the zones when MBNMS was established in 1992. The four reconfigured year-round access zones offer 0.96 square miles (0.72 nmi^2) of riding area south of Pillar Point Harbor, 2.63 square miles (1.99 nmi^2) off Santa Cruz Harbor, 2.29 square miles (1.73 nmi^2) off Moss Landing Harbor, and 3.10 square miles (2.34 nmi^2) off Monterey Harbor. Maps depicting MPWC zone boundary changes can be found in the final EA.

Reconfiguring the four zones to be smaller and closer to shore provides improved MPWC access and operator safety, and also aids zone monitoring, enforcement, and planned systematic surveys of zone use described in the new MBNMS management plan. The zone reconfigurations shorten the length of the MPWC access corridors to the Santa Cruz and Monterey zones by 66% and 23% respectively, allowing MPWC operators easier and quicker access to both riding zones. The shorter access corridors lower the potential for negative interactions with marine traffic and wildlife as MPWC transit to or from harbors. Rotation of the access corridor at the Monterey zone, away from the predominant marine traffic pattern at the harbor entrance, also reduces the potential for negative interaction with other vessels there. The reconfigured zone boundaries at Santa Cruz shift that zone closer to shore, which provides MPWC operators easier and faster access to the riding area, as well as improved safety should an MPWC operator need emergency assistance. In the past, MPWC users requested that the access corridor be shortened and the zone at Santa Cruz be shifted closer to shore.

The five existing MPWC zones remain at their current general geographical location. Consistent with the proposed rule, NOAA is making the following changes to the four year-round MPWC zones:

1. Modify the year-round MPWC zone at Half Moon Bay by using existing USCG red bell buoy 2 and existing USCG green gong buoy 1S as boundary points instead of current MBNMS buoys PP2 and PP3. By re-shaping the current zone from a parallelogram to a concave pentagon, the zone's general position south of Pillar Point Harbor is maintained, increasing the zone area by 10% (from 0.87 sq mi (0.66 nmi^2) to 0.96 sq mi (0.73 nmi^2)). Permanent removal of the two MBNMS buoys at this zone reduces navigational obstructions, risk of mooring failure, and buoy and tackle loss.

2. Modify the year-round MPWC zone at Santa Cruz by using existing USCG red/white whistle buoy SC as a boundary point, instead of the current MBNMS buoy SC7. By re-shaping the current zone from a rectangle to a parallelogram, the zone position rotates 45° clockwise to the NE, reducing the zone area by 59% (from 6.36 sq mi (4.80 nmi^2) to 2.63 sq mi (1.98 nmi^2)). The transit route to the zone from the entrance of the Santa Cruz Small Craft Harbor is reduced from 1.35 miles (1.17 nmi) to 0.5 miles (0.43 nmi). One MBNMS buoy will be permanently removed from the waterway, one buoy will remain on station, and two buoys will be redeployed to shallower depths. The redistributed buoys will be positioned within better visible range of one another, in softer seafloor sediments, and away from rocky points, thus reducing navigational obstructions, risk of mooring failure, and buoy and tackle loss.

3. Modify the year-round MPWC zone at Moss Landing by eliminating current MBNMS buoys ML4 and ML5. By re-shaping the current zone from an irregular hexagon to a trapezoid, the eastern portion of the zone remains in its current position; the zone area is reduced by 72% (from 8.10 sq mi (6.12 nmi^2) to 2.29 sq mi (1.73 nmi^2)). Permanent removal of two MBNMS buoys at this zone reduces navigational obstructions, risk of deep-water mooring failures, and buoy and tackle loss.

4. Modify the year-round MPWC zone at Monterey by using existing USCG red bell buoy 4 as a boundary point instead of MBNMS buoy MY3. By re-shaping the

current zone from a trapezoid to a parallelogram, the zone position rotates 90° clockwise to the NE, and the zone area is reduced by 51% (from 6.36 sq mi (4.8 nmi^2) to 3.10 sq mi (2.34 nmi^2)). One MBNMS buoy will be permanently removed from the waterway, one buoy remains on station, and two buoys will be redeployed to shallower depths. The redistributed buoys will be positioned within better visible range of one another, in softer seafloor sediments, and away from rocky points and popular commercial squid fishing grounds, which reduces navigational obstructions, risk of deep-water mooring failure, risk of disruption to commercial fisheries, and buoy and tackle loss.

The length of the prescribed zone transit route from Monterey Harbor decreases from 1.00 mile (0.87nm) to 0.77 miles (0.67 nm). In addition, the transit corridor rotates 52 degrees farther east from the harbor entrance, away from the predominant marine traffic pattern to and from the harbor.

Reducing the number of necessary MPWC boundary buoys also reduces impacts to benthic habitats, risk of wildlife entanglements, and risk of maritime collisions. Relocating buoys will make them more resistant to storm damage and buoy anchor and chain failure, thereby reducing risks to mariners from drifting buoys and marine debris from unnecessary deposition of chain and anchors on the seafloor. Utilizing mooring locations over soft seafloor sediments can reduce scarring and damage to hard-substrate benthic habitat and organisms from mooring chains.

In summary, revising locations of MPWC zone boundaries represents essential adaptive management as envisioned in the NMSA and the required management plan review process. The adjustments maintain 9 square miles (7.82 nmi^2) of the sanctuary for operating MPWC off all four harbors in areas with decreased likelihood of wildlife disturbance, which were goals for the original creation of the zones in 1992. Coupled with the increased operating days at the seasonal/conditional MPWC zone at Mavericks, NOAA’s original intent to facilitate MPWC recreational opportunities is

maintained. Maps depicting the proposed MPWC zone boundary changes can be found in the final EA.

D. Exempted Department of Defense Activities within Davidson Seamount Management Zone

Consistent with the text that appeared in the proposed rule, NOAA amends MBNMS regulations by modifying 15 CFR 922.132(c)(1) to correct an error. The current regulatory text at 15 CFR 922.132(c)(1) states, in part, that a list of exempted Department of Defense (DOD) activities at the Davidson Seamount Management Zone (DSMZ) is published in the 2008 Final Environmental Impact Statement (FEIS) that accompanied the 2008 MBNMS Management Plan. However, due to an administrative error, the list of exempted activities was not included in the 2008 FEIS. A December 18, 2006, letter from the U.S. Air Force (USAF) 30th Space Wing identified a list of USAF activities at the DSMZ that existed at the time of the DSMZ designation that are subject to DOD exemption. The MBNMS Superintendent confirmed in a January 5, 2009, letter to the USAF 30th Space Wing that NOAA acknowledged the list of exempted activities as valid from the effective date of inclusion of the DSMZ within MBNMS (March 9, 2009) and that NOAA would correct the administrative record and regulations to properly document the exempted DOD activities within the DSMZ. Accordingly, NOAA amends 15 CFR 922.132(c)(1) by replacing "2008 Final Environmental Impact Statement" with "2021 Final Environmental Assessment for the MBNMS Management Plan Review" and has added an appendix to the 2021 final EA to serve as the published list of exempted DOD activities within the DSMZ. NOAA herein affirms that the exemptions requested by the USAF in 2006 and confirmed by NOAA in 2009 have been valid since the effective date of the DSMZ's addition to MBNMS (March 9, 2009).

IV. Response to Comments

NOAA received 159 comments on the proposed rule, draft management plan, and draft environmental assessment (EA) during the July 6 through September 4, 2020, public review period. NOAA hosted three virtual public meetings with 117 total participants. NOAA received written comments from members of the public submitted at *www.regulations.gov*, written comments from MBNMS's Research Activity Panel, and oral and written comments provided during virtual public meetings and two sanctuary advisory council meetings. Due to the volume of comments received, the section below summarizes and addresses those comments related to the proposed rulemaking. Please refer to Appendix A in the final EA (https://montereybay.noaa.gov/intro/mp/welcome.html) to see summaries of and responses to all substantive issues raised in all comments for the proposed rule, draft management plan, and draft EA.

All substantive issues raised in relation to the proposed rulemaking are summarized and addressed in this section. NOAA summarized the comments according to the content of the statement or question put forward in written statements or oral testimony regarding the proposed action and alternatives. Technical or editorial comments on any of the draft documents are incorporated in the final rule, final management plan, and final EA, and are not described in further detail here.

Beneficial Use of Dredged Material Regulation

1. Comment: NOAA should support the regulation clarifying the language in the terms of designation and MBNMS regulations prohibiting permitting the disposal of dredged material within the sanctuary (other than at sites authorized by the U.S. EPA prior to the effective date of designation) which does not preclude NOAA from authorizing the beneficial use of clean dredged material within sanctuary boundaries when suitable for habitat restoration purposes.

Response: NOAA agrees and is moving forward with the beneficial use regulation with some clarifications and modifications.

"Clean" definition

2. Comment: NOAA should clarify its definition of "clean" material and clarify the standards used to assess material appropriate for beneficial use projects.

Response: In this final rule, NOAA acknowledges that the proposed use of "clean" as a standard for beneficial use projects created challenges given how that word is defined elsewhere in MBNMS regulations (*see* 15 CFR 922.131). NOAA has determined that the purpose of protection of sanctuary resources and qualities could be maintained via a revised sediment standard and implementation of permit and/or authorization review criteria. NOAA has therefore removed "clean" from the sanctuary definition of "beneficial use of dredged material." Instead, the ONMS Director must determine that the dredged material is "suitable" as a resource for habitat protection or restoration purposes. Please see Section II. "Changes from Proposed to Final Regulations" for further information about the change from the proposed rule to the final rule, as well as a description of the standard for 'suitable'.

Beneficial use standards

3. Comment: NOAA should use EPA's standards for determining suitability of dredged material for placement within MBNMS for beneficial use.

Response: NOAA will apply ONMS review criteria for permits and/or authorizations. In addition to an ONMS permit or authorization, a project would also be reviewed and permitted, as appropriate, by other Federal and State regulatory authorities with jurisdiction over the proposed beneficial use project, such as the EPA, as applicable. Please see Section III A. 1. "Review and permitting of beneficial use projects" for more information on how NOAA will evaluate beneficial use projects proposed to be conducted within sanctuary boundaries.

Limited sources of dredged material

4. Comment: NOAA received comments that the proposed beneficial use definition unnecessarily limits the origin of dredged material that can be considered for beneficial use to the four harbors adjacent to the sanctuary.

Response: NOAA provides several reasons in Section III. A. 2. b., "Sediment from local harbors immediately adjacent to the sanctuary," why the four harbors immediately adjacent to the sanctuary, and no other harbors, are considered eligible sources of material for protecting or restoring habitats. First, the four harbors and the sanctuary are in the same local sediment transport cell, which means that the sediments that settle in the four harbor channels generally come from the same sources as those that settle in the sanctuary. Second, if the four harbors adjacent to the sanctuary did not exist, sand and other sediment would not settle in the harbors and would thus remain in the coastal transport cell. Therefore, the regulatory clarifications regarding the permitted use of suitable dredged material from the four named harbors for beneficial use projects achieve the intent of helping restore the normal transport of sediment along the coast within the sanctuary. Third, NOAA describes historical reasons why the original designation of MBNMS did not envision the sanctuary as a site to absorb dredge materials from harbors distant to MBNMS.

In addition to the four harbors, NOAA describes several other sources of material that could be approved for beneficial use projects within the sanctuary. Please see Section III. 2. "Sources of Sediment eligible for use in beneficial use projects" for more information on other eligible sources of material.

Habitat protection and restoration

5. Comment: NOAA received comments that the proposed rule restricts the use of dredged material to "habitat restoration," which could preclude using the dredge material to protect infrastructure threatened by coastal erosion, sea level rise, and coastal storms.

Response: In response to these comments, NOAA has modified the definition of the "beneficial use of dredged material" to clarify that beneficial use of dredged material includes habitat protection and habitat restoration purposes. As explained in Section II. "Changes from Proposed to Final Regulation" and Section III. A. 1. "Review and Permitting of Beneficial Use Projects", proactive "protection" of natural habitats serves a beneficial purpose and, by helping to prevent future degradation of habitat, may preclude or reduce the need for habitat restoration. An ancillary benefit from restoring and protecting beach habitat could include coastal infrastructure protection.

6. Comment: NOAA should describe habitat restoration purposes to meet the criteria for beneficial use.

Response: NOAA includes managing sediment for the purpose of habitat restoration in the two Coastal Regional Sediment Management Plans (CRSMP) that pertain to MBNMS. For example, the CRSMP for the Santa Cruz Littoral Cell mentions that sediment management projects could provide several direct benefits to the region including "mitigating shoreline erosion and coastal storm damage; allowing for biological habitat restoration and protection; increasing natural sediment supply to the coast; and providing public safety, access and recreational benefits through beach restoration."[16] Further, implementation of the two CRSMPs are included in the Coastal Erosion and Sediment Management Action Plan, Strategy CESM-1. NOAA also provides additional information in Section III. A. 1. "Review and Permitting of Beneficial Use Projects" regarding the meaning of "habitat restoration" for purposes of this final rule.

Authorizations

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[16] Coastal Regional Sediment Management Plan for the Santa Cruz Littoral Cell, Pillar Point to Moss Landing. September 2015. Pg. 217. Available at: https://montereybay.noaa.gov/resourcepro/resmanissues/crsmp-sc.html.

7. Comment: NOAA should clarify the process for ONMS to issue authorizations to USACE for permits to allow disposal of dredged material in the sanctuary by Santa Cruz Port District (SCPD).

Response: Within MBNMS, NOAA ONMS authorizes permits issued for disposal of dredged material at approved disposal sites. An authorization or permit is necessary for this prohibited activity to be conducted within the sanctuary (15 CFR 922.48, 922.49, 922.132, and 922.133). NOAA may authorize the USACE dredge disposal permit issued to SCPD and/or the California Coastal Commission (CCC) Coastal Development Permit (CDP) based on NOAA's authorization review process, including in this instance, consideration of alignment of regulated activities and mitigations to protect sanctuary resources. In summary, NOAA will continue to work closely with EPA, USACE, CCC, and other State and Federal resource agencies when assessing dredge disposal activities, and may authorize valid permits, leases, licenses, approvals or other authorizations (15 CFR 922.132(e)) pertaining to dredge disposal in approved dredge disposal sites (15 CFR 922.132(a)(2)(i)(F)).

Impact on current harbor dredge authorization and permitting processes

8. Comment: NOAA received comments asking if NOAA's regulatory action regarding beneficial use of dredged material will affect how ONMS authorizes current harbor dredge disposal activities.

Response: NOAA has issued sanctuary authorizations to Santa Cruz, Moss Landing, and Monterey harbors for depositing harbor dredge at approved disposal sites in the past. NOAA's regulatory action regarding beneficial use of dredged material will not alter the sanctuary authorization or permitting process for depositing harbor dredge material at the approved disposal sites (15 CFR 922.132(a)(2)(i)(F)). If any of the four harbors identified in the "beneficial use" definition (the three listed here or Pillar Point) propose a project

for which the material dredged from their harbor would be used for beneficial use to protect or restore habitat, NOAA would follow the process steps outlined in this rule.

Beach Nourishment

9. Comment: NOAA should reserve the right to alter the timing and frequency of beach nourishment treatments should data and analysis indicate negative ecological impacts from excessive sediment loading or seasonal conflicts with reproductive cycles of flora and fauna.

Response: NOAA concurs. In accordance with 15 CFR 922.49(a)(4) and 15 CFR 922.132(e), authorization applicants must comply with any terms and conditions the issuing NOAA official deems reasonably necessary to protect sanctuary resources and qualities. This may include terms and conditions pertaining to the timing and frequency of dredged material placement.

10. Comment: NOAA should consider authorizing use of contaminated dredge materials for beneficial use if pre-treated to reduce toxicity levels.

Response: NOAA believes it is important for MBNMS to only rely upon dredged material that has been deemed suitable by the ONMS Director for habitat protection or restoration projects. As explained in Section III. A. 1. "Review and Permitting of Beneficial Use Projects", the determination of suitability includes consideration of compatibility standards for water and physical quality of any sediment placed within the sanctuary to ensure protection of native habitats and ecology. If dredged material can be successfully pre-treated to reduce toxicity to suitable levels, it may be considered for beneficial use projects.

11. Comment: NOAA should consider negative effects of beach nourishment, such as introduction of invasive species and interruption of important temporal ecological processes at receiving sites.

Response: NOAA concurs and has implemented regulations that prohibit the introduction of introduced species to the ecosystem of the sanctuary (15 CFR 922.131 and 922.132(a)(12)). Ecological impacts to receiving sites will be assessed through project-specific environmental reviews, including assessments of the source sediment to ensure the absence of introduced species. Further, NOAA will consult with appropriate resource management agencies for any proposed beach nourishment project in the sanctuary using beneficial use of dredge material.

Artificial Reefs, islands, and other purposes

12. Comment: NOAA should authorize use of dredged material for artificial reefs, islands, and other purposes beyond habitat restoration.

Response: NOAA disagrees. Using dredged material to develop artificial reefs and islands within MBNMS is beyond the scope of this action and the intent of the original sanctuary designation. NOAA is implementing this action to protect and restore natural habitats and ecological communities and processes within sanctuaries as much as possible - not to create artificial habitats and communities for interests or development purposes that may be incompatible with the sanctuary's primary mandate of resource protection. Furthermore, the State is the lead authority for artificial reefs in California state waters and does not have a process in place for permitting artificial reefs at this time.

13. Comment: NOAA should use crushed glass for clean fill material for artificial reefs.

Response: NOAA disagrees. There are strict prohibitions regarding ocean dumping and discharges into the sanctuary and this suggestion runs counter to these prohibitions. See, as well, the response to the above comment regarding artificial reefs.

List of Department of Defense Exempted Activities

14. Comment: NOAA should rectify the omission of the list of exempted Department of Defense Activities at the Davidson Seamount Management Zone in the 2008 FEIS.

Response: NOAA is including an appendix in the 2021 final EA to serve as the published list of exempted DOD activities within the DSMZ, which is referenced and confirmed by the January 5, 2009, letter to the U.S. Air Force 30th Space Wing from the MBNMS Superintendent.

Cruise ships and discharges

15. Comment: NOAA should ban cruise ships in the sanctuary as well as any discharges of fuel and waste from them.

Response: The NMSA facilitates multiple uses within sanctuaries, including commercial and recreational uses, compatible with the primary objective of resource protection. NOAA believes the current MBNMS regulations prohibiting discharges from within or into MBNMS of any material or other matter from a cruise ship (e.g., fuel and waste), except clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clean bilge water, or anchor wash (15 CFR 922.132(a)(2)(ii)), are adequate at this time to protect sanctuary resources while also allowing use of the resources from a cruise ship. If data become available in the future that show that these regulations are not adequate, NOAA can amend regulations affecting cruise ships in the future.

Opposition to MPWCs, Closure of Pillar Point Zone

16. **Comment:** NOAA received a variety of comments regarding MPWCs, including recommendations to prohibit MPWC operation throughout MBNMS; close the year-round MPWC operating zone at Pillar Point due to low use by MPWC; prohibit MPWC operations in nearshore areas; and implement NOAA's planned assessment of MPWC zone use.

Response: NOAA is not closing any of the five existing zones where MPWC are allowed to operate within the sanctuary. However, Strategy RP-15 in the final management plan includes assessing MPWC use levels and impacts within the MPWC zones, as well as an

evaluation of the relevance of the zones in meeting their originally intended purposes. The MPWC zones were originally sited seaward of nearshore resources such as kelp forests and rocky reefs to minimize negative impacts to coastal wildlife and habitats. Thus, MPWC are already excluded from nearshore areas of the sanctuary, except as permitted by NOAA or approved for public safety agency training and search and rescue operations.

Sanctuary Ecologically Significant Areas (SESAs)

17. Comment: NOAA should not make Sanctuary Ecologically Significant Areas (SESAs) into regulated marine protected areas.

Response: NOAA is not planning to implement additional regulated zones in the sanctuary. SESAs are areas that encompass remarkable, representative, and/or sensitive marine habitats, communities and ecological processes. SESAs are focal areas for facilitating research with partners in order to better understand natural and human-caused variation, as well as resource protection.

V. Classification

A. National Environmental Policy Act

In accordance with NEPA, on August 27, 2015, NOAA published a notice of intent to prepare an Environmental Impact Statement (EIS) in order to identify and analyze potential impacts associated with a review of the 2008 management plan for MBNMS (80 FR 51973). NOAA's analysis of the draft management plan and proposed regulatory changes indicated no significant impacts are expected. Accordingly, NOAA determined the preparation of an EIS would not be necessary, and instead prepared a draft EA, which was made available for public review on July 6, 2020 (85 FR 40143). In that notice, NOAA also withdrew the portion of the Federal Register Notice published on August 27, 2015, that provided notice of intent to prepare an EIS.

In the draft EA, NOAA evaluated the potential impacts on the human environment of the proposed action and alternatives in compliance with NEPA, as amended (42 U.S.C. 4321 et seq.), and its implementing regulations (40 CFR parts 1500 through 1508). NOAA prepared the EA and FONSI for this action using the 1978 Council on Environmental Quality (CEQ) regulations because this environmental review began before September 14, 2020, which was the effective date of the amendments to the CEQ regulations implementing NEPA (85 FR 43304, July 16, 2020). The draft EA considered all reasonable alternatives to the proposed Federal action that met the purpose and need for the action. These alternatives included a no action alternative and a range of reasonable alternatives for managing MBNMS according to the objectives of the NMSA.

The draft EA found that no significant impacts to resources and the human environment are expected to result from this proposed action. Following public comment on the proposed rule and draft EA and consultation under applicable natural and cultural resource statutes (described below), NOAA prepared a final EA and FONSI.

In preparing the final EA, NOAA evaluated and considered all public and agency comments received on the draft EA and notice of proposed rulemaking, which resulted in changes to the proposed regulations and draft management plan. NOAA determined that these changes to the regulations and draft management plan did not result in any changes to the determinations of the draft EA with regard to the significance of the impacts. Therefore, NOAA prepared a FONSI that concluded that implementing Alternative C (i.e., adopt a new management plan and modify MBNMS regulations) would not have a significant impact on the quality of the human environment. Copies of the final EA and FONSI are available at the website listed in the ADDRESSES section of this final rule.

B. Executive Order 12866: Regulatory Planning and Review

This rule has been determined to be not significant for purposes of Executive Order 12866.

C. Executive Order 13132: Federalism

NOAA has concluded this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended and codified at 5 U.S.C. 601 et seq., requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) 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.

Under section 605(b) of the RFA, if the head of an agency (or his or her designee) certifies that a rule will not have a significant impact on a substantial number of small entities, the agency is not required to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that the original proposed rule would not have a significant impact on a substantial number of small entities. The rationale for that certification was set forth in the preamble of the proposed rule (85 FR 40143, July 6, 2020).

None of the changes NOAA has made to the regulations from the proposed rule to the final rule alter the determination that this rule will not have a significant impact on small businesses. The impact levels assessed in the original analysis remain valid (*see* table summarizing impact levels, 85 FR 40143, 40150). NOAA also did not receive any comments on the certification or conclusions. Therefore, the

determination that this rule will not have a significant economic impact on a substantial number of small entities remains unchanged. As a result, a final regulatory flexibility analysis was not required and none was prepared.

E. Paperwork Reduction Act

This final rule does not create any new information collection requirement, nor does it revise the information collection requirement that was approved by the Office of Management and Budget (OMB Control Number 0648–0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. (PRA). Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

F. National Historic Preservation Act

In fulfilling its responsibility under the National Historic Preservation Act (NHPA) (54 U.S.C. 300101 et seq.) and NEPA, NOAA identified historic properties and assessed the potential effects of the undertaking (implementation of the revised regulations and adoption of the new management plan) on such properties. NOAA determined that this undertaking would result in no adverse effects to historic properties because it is a planning and administrative effort not likely to have physically direct or indirect effects to historic properties. NOAA notified the California State Historic Preservation Officer of this determination upon publication of the proposed rule and draft management plan. The State Historic Preservation Officer reviewed NOAA's determination and notified NOAA by letter on January 15, 2021, that they have no comments for this action. NOAA has no further obligations under NHPA Section 106 at this time. If specific projects do arise out of management plan implementation, NOAA will conduct Section 106 consultation at that time, as needed.

G. Endangered Species Act

The Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531, et seq.), provides for the conservation of endangered and threatened species of fish, wildlife, and plants. Federal agencies have an affirmative mandate to conserve ESA-listed species. Section 7(a)(2) of the ESA requires Federal agencies, in consultation with the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of designated critical habitat. NOAA's ONMS completed informal consultation under Section 7 of the ESA with NOAA's Office of Protected Resources and the U.S. Fish and Wildlife Service for potential impacts of this action on ESA-listed species and designated critical habitat. The consulting agencies concurred with NOAA ONMS's determination that the action may affect, but is not likely to adversely affect, listed species and/or designated critical habitat. Additional details and correspondence related to informal consultation under ESA are included in the Final EA.

H. Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) of 1972 (16 U.S.C. 1361 et seq.), as amended, prohibits the "take"[17] of marine mammals in U.S. waters. Section 101(a)(5)(A-D) of the MMPA provides a mechanism for allowing, upon request, the "incidental," but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing or directed research on marine mammals) within a specified geographic region. ONMS determined that the action would not cause the take of any marine mammal protected under the

[17] The MMPA defines take as: "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C 1362. Harassment means any act of pursuit, torment, or annoyance which, 1) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or 2) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B Harassment).

MMPA and therefore potential impacts to marine mammals did not rise to a level that required consultation under MMPA.

I. Coastal Zone Management Act

The principal objectives of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 et seq., are to encourage and assist states in developing coastal management programs, to coordinate state activities, and to preserve, protect, develop and, where possible, restore or enhance the resources of the Nation's coastal zone. Section 307(c) of the CZMA requires Federal activity affecting the land or water uses or natural resources of a state's coastal zone to be consistent with that state's approved coastal management program to the maximum extent practicable. 16 U.S.C. 1456(c). In July 2020, NOAA initiated Federal consistency review with the California Coastal Commission. The California Coastal Commission provided comments to NOAA on the proposed rule. On August 12, 2021, NOAA provided the California Coastal Commission with a revised description of the proposed action and a summary of changes made in response to public comment and consultations. On September 2, 2021, the California Coastal Commission issued a letter of concurrence to NOAA.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Fishing gear, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Wildlife.

Nicole R. LeBoeuf,

Assistant Administrator,

National Ocean Service,

National Oceanic and Atmospheric Administration.

For the reasons set forth above, NOAA is amending part 922, title 15 of the Code of Federal Regulations as follows:

PART 922 – NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

1. The authority citation for part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 et seq.

Subpart M — Monterey Bay National Marine Sanctuary

2. Amend § 922.131 by adding the definition for "Beneficial use of dredged material" in alphabetical order to read as follows:

§ 922.131 Definitions.

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Beneficial use of dredged material means the use of dredged material removed from any of the four public harbors adjacent to the sanctuary (Pillar Point, Santa Cruz, Moss Landing, and Monterey) that has been determined by the Director to be suitable as a resource for habitat protection or restoration purposes only. Beneficial use of dredged material is not disposal of dredged material.

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3. Amend § 922.132 by:

a. Revising paragraphs (a)(7) and (c)(1).

b. In paragraph (f), adding a sentence before the last sentence in the paragraph.

The revisions and addition read as follows:

§ 922.132 Prohibited or otherwise regulated activities.

(a)***

(7) Operating motorized personal watercraft within the Sanctuary except within the four designated zones and access routes within the Sanctuary described in appendix E to this

subpart. Zone Five (at Pillar Point) exists only when a High Surf Advisory has been issued by the National Weather Service and is in effect for San Mateo County, and only during December, January, and February.

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(c)(1) All Department of Defense activities must be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. The prohibitions in paragraphs (a)(2) through (12) of this section do not apply to existing military activities carried out by the Department of Defense, as specifically identified in the Final Environmental Impact Statement and Management Plan for the Proposed Monterey Bay National Marine Sanctuary (NOAA, 1992). For purposes of the Davidson Seamount Management Zone, these activities are listed in the 2021 Final Environmental Assessment for Monterey Bay National Marine Sanctuary Management Plan Review. New activities may be exempted from the prohibitions in paragraphs (a)(2) through (12) of this section by the Director after consultation between the Director and the Department of Defense.

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(f)*** For the purposes of this subpart, the disposal of dredged material does not include the beneficial use of dredged material as defined by § 922.131. ***

4. Revise appendix E to subpart M to read as follows:

Appendix E to Subpart M of Part 922 — Motorized Personal Watercraft Zones and Access Routes within the Sanctuary

[Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983]

The five zones and access routes are:

(1) The 0.96 mi^2 area off Pillar Point Harbor from harbor launch ramps, through the harbor entrance to the northern boundary of Zone One. The boundary for Zone 1 begins

at Point 1 in the coordinate table listed below and continues to each subsequent point in numerical order ending at Point 6.

Point ID No.	**Latitude**	**Longitude**
1 (flashing white 5-second breakwater entrance light and horn at the seaward end of the outer west breakwater – mounted on 50-ft high white cylindrical structure)	37.49402	−122.48471
2 (triangular red dayboard with a red reflective border and flashing red 6-second light at the seaward end of the outer east breakwater – mounted on 30-ft high skeleton tower)	37.49534	−122.48568
3 (bend in middle of outer east breakwater, 660 yards west of the harbor entrance)	37.49707	−122.47941
4 (Southeast Reef - southern end green gong buoy “1S” with flashing green 6-second light)	37.46469	−122.46971
5 (red entrance buoy “2” with flashing red 4-second light)	37.47284	-122.48411
6 (flashing white 5-second breakwater entrance light and horn at the seaward end of the outer west breakwater – mounted on 50-ft high white cylindrical structure)	37.49402	−122.48471

(2) The 2.63 mi² area off of Santa Cruz Small Craft Harbor from harbor launch ramps, through the harbor entrance, and then along a 100-yard wide access route to the south-southwest along a bearing of approximately 196° true (183° magnetic) toward the red and white whistle buoy at 36.93899 N, 122.009612 W, until crossing between the two yellow can buoys marking, respectively, the northeast and northwest corners of the zone. The

boundary for Zone 2 begins at Point 1 in the coordinate table listed below and continues to each subsequent point in numerical order ending at Point 5.

Point ID No.	**Latitude**	**Longitude**
1 (red/white striped whistle buoy “SC” with flashing white Morse code “A” light)	36.93899	−122.00961
2 (yellow can buoy)	36.95500	−122.00967
3 (yellow can buoy)	36.94167	−121.96667
4 (yellow can buoy)	36.92564	−121.96668
5 (red/white striped whistle buoy “SC” with flashing white Morse code “A” light)	36.93899	−122.00961

(3) The 2.29 mi^2 area off of Moss Landing Harbor from harbor launch ramps, through harbor entrance, and then along a 100-yard wide access route southwest along a bearing of approximately 230° true (217° magnetic) to the red and white bell buoy at 36.79893 N, 121.80157 W. The boundary for Zone 3 begins at Point 1 in the coordinate table listed below and continues to each subsequent point in numerical order ending at Point 5.

Point ID No.	**Latitude**	**Longitude**
1 (red/white striped bell buoy “MLA” with flashing white Morse code “A” light)	36.79893	−121.80157
2 (yellow can buoy)	36.77833	−121.81667
3 (yellow can buoy)	36.83333	−121.82167

4 (yellow can buoy)	36.81500	−121.80333
5 (red/white striped bell buoy “MLA” with flashing white Morse code “A” light)	36.79893	−121.80157

(4) The 3.10 mi² area off of Monterey Harbor from harbor launch ramps to a point midway between the seaward end of the U.S. Coast Guard Pier and the seaward end of Wharf 2, and then along a 100-yard wide access route to the northeast along a bearing of approximately 67° true (54° magnetic) to the yellow can buoy marking the southeast corner of the zone. The boundary for Zone 4 begins at Point 1 in the coordinate table listed below and continues to each subsequent point in numerical order ending at Point 6.

Point ID No.	**Latitude**	**Longitude**
1 (yellow can buoy)	36.61146	−121.87696
2 (red bell buoy “4” with flashing red 4-second light)	36.62459	−121.89594
3 (yellow can buoy)	36.65168	−121.87416
4 (yellow can buoy)	36.63833	−121.85500
6 (yellow can buoy)	36.61146	−121.87696

(5) The 0.13 mi² area near Pillar Point from the Pillar Point Harbor entrance along a 100-yard wide access route to the south along a bearing of approximately 174° true (161° magnetic) to the green bell buoy (identified as “Buoy 3”) at 37.48154 N, 122.48156 W and then along a 100-yard wide access route northwest along a bearing of approximately 284° true (271° magnetic) to the green gong buoy (identified as “Buoy 1”) at 37.48625 N, 122.50603 W, the southwest boundary of Zone Five. Zone Five exists only when a High

Surf Advisory has been issued by the National Weather Service and is in effect for San Mateo County and only during December, January, and February. The boundary for Zone 5 begins at Point 1 in the coordinate table listed below and continues to each subsequent point in numerical order ending at Point 5.

Point ID No.	**Latitude**	**Longitude**
1 (green gong buoy “1” with flashing green 2.5-second light)	37.48625	−122.50603
2 (intersection of sight lines due north of green gong buoy “1” and due west of Sail Rock)	37.49305	−122.50603
3 (Sail Rock)	37.49305	−122.50105
4 (intersection of sight lines due east of green gong buoy “1” and due south of Sail Rock)	37.48625	−122.50105
5 (green gong buoy “1” with flashing green 2.5-second light)	37.48625	−122.50603

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