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December 6, 2016

Ms. Regina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

H. Curtis Spalding, Regional Administrator
Environmental Protection Agency
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Re: Notice of Intent to Sue under Ocean Dumping Act (33 U.S.C. §1415(g))

Dear Administrator McCarthy and Regional Administrator Spalding:

The State of New York respectfully provides notice pursuant to 33 U.S.C. §1415(g) that it intends to initiate legal action against the United States Environmental Protection Agency (EPA) sixty (60) days hereafter to challenge EPA's adoption of a final rule designating a permanent disposal site in eastern Long Island Sound called the Eastern Long Island Sound Disposal Site (ELDS). In designating ELDS, EPA violated the site designation criteria of the Title I of the Marine Protection, Research, and Sanctuaries Act (MPRSA), referred to as the "Ocean Dumping Act" (ODA).¹ The final rule was published on December 6, 2016 in the Federal Register.² EPA's rule designating ELDS will result in significant harm to the environmental health of Long Island Sound.

By letter dated August 4, 2016, Governor Andrew M. Cuomo notified you of New York's intention to sue if EPA proceeded to designate an eastern Long Island Sound disposal site. New York has, for decades, opposed the unabated dumping of dredged materials in Long Island Sound, which practice contributes to heavy metal and organic pollution in the benthic zone, and threatens the loss of recreationally and commercially important aquatic and benthic resources. In seeking to protect the marine environment and the region's economy that depends on a

¹ 33 U.S.C. § 1401, et seq. Site designation criteria are set forth in 33 U.S.C. § 1412(a) and the ODA implementing regulations at 40 C.F.R. Parts 227 and 228.

² See 81 FR 87820.



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healthy Long Island Sound, the Governor warned that the State will not accede to any plan that includes the dumping of polluted sediments into eastern Long Island Sound.

Authority to Sue

33 U.S.C. § 1415(g)(1) authorizes civil suits for violations of the Ocean Dumping Act. It provides:

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.”³

The notice of the violation and intent to sue must be given to the EPA Administrator at least 60 days before commencement of the action.

Open Water Disposal Site Description

EPA has chosen ELDS as its preferred alternative, which is comprised of two areas referred to as “Site NL-Wa” and “Site NL-Wb” but excludes the boulders and the bedrock portions of those areas.⁴ The site boundaries of ELDS in the Final Rule have been modified from those in the Proposed Rule and do not include the New London Disposal Site (NLDS), an interim disposal site used by the U.S. Army Corps of Engineers (Corps). ELDS will have a capacity of 20 million cubic yards.

Violations

In designating ELDS, EPA failed to adhere to the ODA site designation requirements. The ODA regulations prescribe general and specific criteria at 40 C.F.R. §§ 228.4, 228.5 and 228.6 to guide the selection and designation of disposal sites. The State will show that EPA’s failure to follow these site designation requirements violated the Ocean Dumping Act.

³ “Person” is defined to “mean[] any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.” 33 U.S.C. § 1402(e).

⁴ Final SEIS p. 3-33 provides a description of the sites:

- **Site NL-Wa:** Site NL-Wa also has an area of 1 nmi² (3.4 km²). Water depths range from approximately 45 feet (14 m) in the north to 100 feet (30 m) in the south. The site consists of mostly sandy areas, but also an area of boulders and rocks in the northern part of the site (WHG, 2014). This boulder area may be a lag deposit of a glacial moraine. The water depth in parts of the boulder area is shallower than 59 feet (18 m).

- **Site NL-Wb:** Site NL-Wb has an area of 0.5 nmi² (1.7 km²). The site consists of an extension of the sandy areas of Site NL-Wa. Bartlett Reef is located approximately 0.5 nmi (0.9 km) to the west of the western boundary of the site. The southwestern corner of Site NL-Wb contains an area of bedrock and boulders (WHG, 2014); this area is an extension of a larger area with a similar substrate further to the south. The bedrock appears as parallel ridges of dipping layered rock that can be correlated to bedrock on shore (Poppe et al., 2011). The bedrock area within Site NL-Wb also contains some sand waves (WHG, 2014). Overall, water depths at the entire site range from approximately 59 feet (18 m) in the north to 95 feet (28 m) in the south.”

EPA did not provide a revised analysis for the environmental impacts associated with a 36% increased concentration in the deposition of 20 million cy of dredged material at ELDS, which EPA unilaterally decreased in area by 35% following completion of the Final Supplemental Environmental Impact Statement.

Among the ODA regulations that EPA violated in making this designation are the following:

1. The EPA Administrator will consider the “[e]xistence and effects of current and previous discharges and dumping in the area (including cumulative effects)”. 40 C.F.R. § 228.6(a)(7); see 33 U.S.C. §§ 1412(a)(E) and (F).

Long Island Sound has been a sediment dumping ground for more than 60 years. However, EPA’s analysis of past, current, and future direct and indirect cumulative impacts of such dumping on the health and ecology of Long Island Sound was inadequate and insufficient. EPA has not provided any analysis of the adverse environmental impacts, including cumulative impacts, of multiple disposals in the Sound, the potential for simultaneous dumping of dredged material at more than one designated disposal site, and the dumping of dredged material from watersheds documented as legacy pollution sites from past industrial activities.

2. The EPA Administrator will consider the “[d]ispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction and velocity, if any.” 40 C.F.R. § 228.6(a)(6); see 33 U.S.C. §§ 1412 (a)(C), (D), and (E).

ELDS is located in an area of the Sound with high velocity currents and winds. EPA failed to provide a site specific analysis of why this reconfigured site can reliably serve as a containment area for dredged sediments or that the dredged material, once placed, will stay at that site and won’t be horizontally transported to the west. EPA did not provide a site-specific analysis of the impacts associated with dispersal and horizontal transport during disposal operations especially in view of the valuable recreational fishing grounds nearby at Bartlett Reef.

3. “The dumping of materials into the ocean will be permitted only at sites or in areas selected to minimize the interference of disposal activities with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation.” 40 C.F.R. § 228.5(a); see 33 U.S.C. §§ 1412 (a)(D) and (H).

NL-Wa and NL-Wb have significant concentrations of marine life that provide opportunities for recreational and commercial fishing. As noted, nearby Bartlett Reef is also a popular fishing spot for striped bass anglers. EPA’s explanation for why locating ELDS at this location will not result in harm to fish populations, charter operations or the recreational fishing community was inadequate.

4. The EPA Administrator will consider the “[l]ocation in relation to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases.” 40 C.F.R. § 228.6(a)(2); see 33 U.S.C. §§ (a)(C) and (D).

The area where ELDS is to be located provides benthic habitat features including diverse bottom topography and hard bottom. These features support high quality habitats in the marine environment. EPA’s analysis of how locating a disposal site at this location will not cause harm to breeding, spawning, nursery, feeding or passage areas of aquatic life at all stages was inadequate.

5. The EPA Administrator will consider the “[t]ypes and quantities of wastes proposed to be disposed of, and proposed methods of release, including methods of packing the waste, if any.” 40 C.F.R. §§ 227.16, 228.6(a)(4); see 33 U.S.C. §§ 1412(a)(A) and (F)..

EPA failed to indicate how the types and quantities of dredged material -especially those from the work done in the Thames River- will be contained at the site. EPA has indicated that the Corp’s regular practice of capping contaminated sediments is impermissible, but has not indicated how such sediments will be contained. No studies on the currents at NL-Wa and NL-Wb were conducted and it is unclear whether such sediments will be transported to Bartlett Reef and farther west during disposal and after deposition. The SEIS for ELDS did not evaluate the effects of dumping the sediment volumes and concentrations that were identified in the DMMP at this particular location; therefore, the EPA’s analysis of effects was deficient.

6. “The sizes of ocean disposal sites will be limited in order to localize for identification and control any immediate adverse impacts and permit the implementation of effective monitoring and surveillance programs to prevent adverse long-range impacts. The size, configuration, and location of any disposal site will be determined as a part of the disposal site evaluation or designation study.” 40 C.F.R. § 228.5(d). See 33 U.S.C. § 1412(D).

While EPA has redrawn the boundaries of ELDS to accommodate 20 million cubic yards of dredged material, it has failed to identify the dredged material by type, quantity and toxicity that would be disposed of at ELDS. As noted above, while EPA has reduced the size of ELDS, it has significantly increased the concentration of dredged material that will be placed at the site.

7. “EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used.” 40 C.F.R. § 228.5(e), See 33 U.S.C. § 1412(a)(I).

The ODA provides that “[i]n designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.”⁵ The rationale of designating dump sites beyond the Continental Shelf is to keep the disposal of such materials far from the biologically productive areas along the shore. In proposing to designate dump sites within a semi-enclosed waterway like Long Island Sound rather than the open ocean, EPA contravenes the ODA’s language.

The ODA regulations authorize designation of open water disposal sites “where historical disposal has occurred.” (61 FR 54118-54119). Neither NL-Wa nor NL-Wb are historical disposal sites. EPA noted that these sites are located adjacent to another disposal site (NLDS) but Sites NL-Wa and NL-Wb have not been used for sediment disposal, are significantly cleaner than the nearby NLDS and contain significant concentrations of marine life and benthic resources.

Conclusion

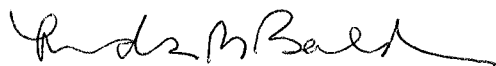
Accordingly, New York intends to sue EPA for failure to comply with its statutory and regulatory duty under the ODA. This notice letter shall not in any respect limit the rights of the State to initiate a cause of action under other federal laws, including the Coastal Zone Management Act,

⁵ 33 U.S.C. §1412 (a)(I).

the Administrative Procedure Act and the National Environmental Policy Act. Rights to bring such an action are explicitly reserved.

Should you have any questions about this letter, please contact Linda Baldwin, at Linda.Baldwin@dos.ny.gov or 212-417-5803.

Submitted by,



Linda M. Baldwin
General Counsel
NYS Department of State



Thomas Berkman
General Counsel
NYS Department of Environmental Conservation

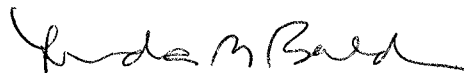
Cc (by email): Col. Christopher J. Barron, USACE
David Kaiser, NOAA
Kathleen Moser, NY DEC
Mark Stein, USEPA
Brian Thompson, CT DEEP

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served this 6th day of December, 2016, on the following:

Ms. Regina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

H. Curtis Spalding, Regional Administrator
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1 Congress Street, Suite 1100
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Linda Baldwin
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