

## **FISHERS ISLAND CONSERVANCY, INC.**

**P.O. Box 553, Fishers Island, NY 06390  
631-788-5609      fishersislandconservancy.org**

### **Statement of Fishers Island Conservancy in connection with EPA Designation of Dredged Material Disposal Sites in Eastern Long Island Sound**

The Fishers Island Conservancy is a nonprofit organization formed more than 30 years ago to work with Island residents, businesses, nonprofit organizations and governmental authorities for the purpose of preserving, enriching and enhancing the natural resources of Fishers Island and its surrounding waters. In carrying out this mission, the Conservancy has vigorously opposed open-water dumping of dredge spoils in Long Island Sound (designated by Congress as an Estuary of National Significance) and in particular at the New London Dumpsite (NLDS) located less than 1.5 miles from the Island's shores, and has supported the development and adoption of alternatives to open-water dumping.

After questionable extensions for more than 15 years, NLDS is now scheduled to close on December 31, 2016. On April 27, 2016, the EPA, after allegedly scouring the whole Eastern LI Sound area for alternative sites for more than a decade, announced its proposal to reconfigure NLDS, double its size and designate it as a permanent dumpsite under the Ocean Dumping Act (ODA).<sup>1</sup> The Conservancy strongly opposes this designation for the same reasons that it and Fishers Island have opposed dumping at NLDS for 40 years: (1) its waters are too shallow; (2) its tidal currents at the very edge of the Race are too strong; (3) it is located in commercial navigation lanes and the Navy submarine lane; (4) it is too close to important fish and shellfish habitats and commercial and recreational fisheries; (5) it is too close to public beaches on Fishers Island and the Connecticut shore. In short, NLDS fails to meet most of the important statutory criteria for designation as a disposal site under the ODA.

In addition, after review of the EPA's site designation proposal and its supporting Draft Supplemental Environmental Impact Statement (DSEIS) and the related Dredged Material Management Plan for Long Island Sound (DMMP) produced by the Army Corps of Engineers (ACOE) in December 2015 and its supporting Final Environmental Impact Statement (FEIS), the Conservancy has concluded that there is no realistic need for *any* open-water disposal site in Eastern Long Island Sound. The EPA and ACOE should instead carry out the mandate of the Governors of New York and Connecticut when they called for the preparation of the DMMP: minimize and eliminate open-water dumping wherever practicable by developing and requiring alternative disposal methods and technologies. If after more than 20 years still more time is needed to do this, the EPA should designate a site off the Continental Shelf, as mandated by Congress in the ODA, or at the very least a suitable site in deep, open-ocean waters off Rhode Island,

rather than anywhere in the confined, shallow waters of the Long Island and Block Island Sounds.

### Fishers Island and the New London Dumpsite

Fishers Island and the Conservancy have had a long and fraught history with the NLDS:

- In 1976 a legal challenge to the *Trident* submarine dumping brought by NRDC and Fishers Island under the Clean Water Act (CWA) ended in a settlement agreement that obligated the ACOE to prepare an Environmental Impact Statement evaluating possible disposal sites in Block Island Sound and “nearby ocean waters”. This undertaking was effectively ignored by the ACOE, which produced only a superficial, programmatic EIS that did not seriously examine alternative sites.
- In 1981 the Ocean Dumping Act (originally adopted by Congress in 1972 to implement a treaty on dumping in international waters) was extended by the Ambro Amendment to cover Long Island Sound. NY Representative Ambro’s simple, common sense proposition was that no one should be free to dump in the shallow, confined waters of LI Sound any dredge spoils that could not legally be dumped in open ocean waters under the ODA. Unfortunately, the ODA, as extended by the Ambro Amendment, was systematically ignored by the ACOE and the EPA for two decades, during which time no disposal sites were ever designated for LI Sound by the EPA under ODA Sec. 102(c) or, so far as we have ever seen, properly “selected” by ACOE in compliance with ODA Sec. 103(b).<sup>2</sup>
- In 1995 the Conservancy challenged the dumping at NLDS of 1.4 million cubic yards (cys) of contaminated spoils from the *Seawolf* submarine project. The Court refused to enjoin the dumping and allowed ACOE to complete it under the flag of national security emergency. When the dumping was over, the Court agreed that it violated the ODA, but refused to order ACOE to clean it up on the quite plausible ground that this would only cause more harm.<sup>3</sup> The Conservancy, however, gained a sort of Pyrrhic defeat (lost the battle but won the war) in the settlement of the suit, which obligated the ACOE and EPA (after more than 20 scofflaw years) to comply with the law of the Sound, the ODA. Pressed by the Conservancy’s suit, the EPA initiated proceedings for the designation of ODA sites throughout LI Sound.<sup>4</sup>
- In 2005, the EPA conditionally designated sites in Central and Western LI Sound and suspended the designation proceedings with respect to Eastern LI Sound, pending completion by the ACOE of a comprehensive DMMP, mandated by the Governors of New York and Connecticut and the EPA to examine alternatives to open-water dumping “with the goal of reducing or eliminating” open-water dumping in LI Sound “wherever practicable”.
- At the time these designation proceedings were suspended in 2005, much of the science needed to support the designation of sites in Eastern LI Sound had not been completed (some still has not), but the scientific record in the proceedings at that point overwhelmingly supported the position taken by the Conservancy in the

proceedings that NLDS was manifestly unsuited for open-water dumping under the ODA criteria, for all the reasons stated in the second paragraph of our statement above.

### NLDS Remains Manifestly Unsuited for Designation as a Disposal Site under the ODA

So here we are, after nearly 20 years of site designation proceedings, tens of thousands of pages of scientific studies and millions of dollars, the EPA has concluded that the "best suited" place for a permanent alleged "containment" site for dumping the ACOE's projected 23 million cubic yards of 30-year dredging "needs" of Eastern LI Sound is the western half of the old mile-square NLDS, augmented by an additional 1.5 square miles further west. Given our frustrating history with NLDS, no one should be surprised to hear that the Conservancy is strongly opposed to the designation of NLDS as a permanent ODA site for all the same reasons that we have opposed dumping there for 40 years. Nothing has really changed:

1. Its waters are still too shallow. The EPA conceded as much when it decided to close the eastern half of the old NLDS because it has been "filled" with mounds from previous dumping.
2. Its strong tidal currents are still there. NLDS is located at the very edge of the Race, which as its name suggests has some of the strongest tidal currents on the East Coast. The EPA assures us that the bottom currents at NLDS are "calm" even during storms, but this assurance is based on the flimsiest scientific evidence – modeling from very limited data points in a very complex hydrological environment.
3. It is still located in the submarine and commercial navigation lanes. With the closing of the eastern half of the old NLDS, the submarine lane is now on the eastern side of the reconfigured NLDS, rather than right down the middle. (It is perhaps worth noting that neither the EPA nor the ACOE has made any mention of the history of submarine groundings at NLDS.) We are told by the EPA that the commercial navigation lanes have been moved, but it appears from EPA's own charts in its DSEIS that all the eastbound traffic of barges, tankers, dry cargo vessels and ferries coming through the Race into LI Sound are dumped just south of NLDS, with vessels heading for New London passing right over it to get into the Thames ship channel.
4. Important fish habitats and commercial and sport fisheries are still nearby. The Race is a Designated Significant Fish and Wildlife Habitat, replete with striped bass, bluefish and other finfish species and a formerly abundant lobster fishery, until it was obliterated by some 97% in 1999 by lobster shell disease (possibly linked to NLDS dumping) and other stressors. Shellfish beds in Connecticut and the oyster farm on Fishers Island are still only a couple miles away.
5. Public beaches in Connecticut and on Fishers Island are still only a few miles away.

6. The best claim of the old NLDS for compliance with the ODA site designation criteria was its status as an historic dumpsite. This claim was diluted by 75% with the EPA proposal to close half of the mile-square old NLDS, keep the other half as an historic toehold, and then add 1.5 square miles of new ocean bottom to the west. (So much for the ODA preference for historic dumpsites.)

Nothing much has changed with respect to the other issues surrounding NLDS:

- The ACOE has completed the DMMP, but it gives no comfort that ACOE will actually carry out its mandate to seriously consider alternatives in order to “reduce or eliminate” open-water dumping “wherever practicable”. Instead, ACOE makes it quite clear that it sees its mission as business as usual: dredging at “least cost environmentally acceptable” (code for open-water dumping), with no room for weighing environmental costs and benefits. ACOE says, if anyone wants to spend an extra dollar to protect the fragile LI Sound ecosystem, he will have to come up with it.
- The DMMP indicates that the bulk of the material to be dumped at NLDS would be “suitable fines”, presumably fine grained material that has passed the ODA bioassay and bioaccumulation (“Green Book”) tests, as well as the CWA chemical toxicity tests. Fine grains, of course, are the carriers of contaminants, and physically they are precisely the kind of spoils *least suitable* for dumping in a site with strong currents like NLDS. How much of the dumped fine grained spoils actually make it to the bottom before dispersing in the water column? How much of that stays put on the bottom? During past periods of dumping at NLDS there have been sightings of fine grained gray foam at Race Point on Fishers Island. And although we have no evidence specifically linking it to dumping at NLDS, in recent years the docks at West Harbor have silted up rapidly with fine grained material drifting in with the tides, and deposits of purple/black silt (hopefully not contaminated) regularly appear at low tide on beaches as far away as the south shore of the Island.
- The economics and politics of NLDS have certainly not changed-- Connecticut vs New York, with CT contributing nearly all of the industrial waste spoils from its harbors and getting nearly all of the jobs and other economic benefits of dredging, and NY getting stuck with at least half of the (still unmeasured) environmental and economic cost of degradation of the shared estuary, particularly felt in impacts on commercial fisheries, tourism, recreation, sport fishing. Indeed, one of the very few changes since the designation proceedings were suspended in 2005 is the appointment of the University of Connecticut, a Connecticut state institution, compensated by the Connecticut Department of Transportation, as EPA’s “independent” contractor to conduct scientific studies supporting EPA’s recommendations, replacing private consulting firms like SAIC and Battelle.

Our basic conclusion has not changed either: the New London Dumpsite was a bad place to dump admittedly contaminated and toxic spoils in 1976 and 1995. It

remains a bad place to dump allegedly “suitable” fine grained spoils today. One would have to look hard to find a worse place.

### No Need to Designate any Dumpsite for Eastern Long Island Sound

Long Island Sound, including Block Island and Fishers Island Sounds at its east end, is a federally designated Estuary of National Significance. Its waters, particularly in Eastern LI Sound, provide spawning and foraging habitat for an abundant population of more than 120 species of fish and shellfish, supporting vital commercial fisheries and some of the best sport fishing on the East Coast. More than 23 million people live within 50 miles of the Sound and use it for recreation – beaches, boating, sailing, fishing – and for tourism. The annual economic value of the Sound has been estimated at \$8.9 billion. Since 2000 hundreds of millions, perhaps more than a billion, dollars have been invested by federal, state and municipal bodies and environmental organizations to improve the Sound’s water quality (sewage treatment, storm water runoff, “nonpoint” source projects) and restore its habitats. It simply defies common sense to vitiate this investment by dumping dredge spoils in open water.

Congress mandated a preference in the ODA for designating disposal sites off the Continental Shelf. In spite of this mandate, the EPA began its screening process for candidates for alternative sites in Eastern LI Sound by arbitrarily defining its “Zone of Siting Feasibility” (ZSF) to exclude all the adjacent open-ocean waters off Rhode Island – - dismissing the Congressional mandate and other deep, open-ocean waters with a terse statement that hauling spoils more than 25 miles would be too expensive. Compared to what? A free door-step dump at NLDS with an assumed environmental cost of zero? In California, for example, dredge spoils are routinely hauled 50-75 miles to sites off the Continental Shelf.

The EPA also arbitrarily defined its ZSF to exclude all shallow waters along the shores of Connecticut and Long Island, thereby eliminating any consideration of the construction of containment islands of the type successfully built in the Chesapeake Bay to receive the spoils from dredging Baltimore Harbor or nearshore containment facilities constructed elsewhere.

The ACOE’s DMMP projections of the 30-year dredging “needs” of Eastern LI Sound at 23 million cys (and the entire LI Sound at 53 Million cys) were based primarily on a survey of harbor and marina operators conducted by ACOE fifteen years ago in 2001, and thus represent an outdated composite wish-list of these operators. When the expansion of the Panama Canal to accommodate larger containerships for the Asian trade was announced in the 1990’s, New Haven, New London, even Bridgeport and Stamford, announced grandiose plans to dredge their harbors deeper to become ports of entry for this trade. These plans were soon discredited by regional planning studies (including one commissioned by Connecticut’s Governor Malloy himself) that universally concluded that the Connecticut ports simply could not compete with New York/Newark, Providence or Boston, which already have deep water channels, large docking infrastructure and better land transportation connections and are located closer to population centers. It is

not possible to tell how much of this wishful thinking showed up in ACOE's 2001 survey, but we do know that since the 1.4 million cy *Seawolf* dumping in 1995-6 the only significant dumping at NLDS from federal projects or large private projects was 400,000 cys in 2007. There was no dumping at all at NLDS in most of the 20 years since 1996. It is safe to conclude that the ACOE's DMMP "needs" projections are vastly overstated.

In addition to some maintenance dredging of Connecticut harbors to their currently approved depths, the only significant future dredging projects in Eastern LI Sound are likely to take place at the Groton Submarine Base. Nearly every Navy base in the United States except Groton has its own upland disposal facility, capable of handling all its dredging. There is no reason why in our vast defense budget such a facility could not be funded at Groton, thereby eliminating the hidden ecological subsidy of cheap dumping for the Groton Base.

It may not be just coincidental that an outbreak of lobster shell disease occurred in Fishers Island waters at the time of the *Seawolf* dumping, or that during the recent nine-year period of no dumping at NLDS dolphins and even whales, chasing schools of herring, were sighted in Block Island Sound near the Race and in the Thames River. Just last month Atlantic sturgeon, an endangered specie not seen in the Thames for 30 years, were found, along with herring, at the site of proposed dredging and construction of an enlarged pier at Groton Submarine Base.

Apart from the dubious "need", a powerful reason for not designating any ODA site in Eastern LI Sound is that, if it is there, people will use it and not use available non-open-water alternatives or explore and develop innovative disposal methods and technologies. History has shown that one-stop, door-step dumping at NLDS or elsewhere is always easier and cheaper than any alternative. The history of solar and wind power, and even solid waste disposal, has shown that necessity is the mother of economically feasible innovation. Pressure must be put on regulators and dredgers alike to develop and adopt alternative methods and technologies.

These alternatives range from the established use of clean sandy material for beach replenishment and sand with some organic content for restoration and creation of storm-resilient coastal marshes, to construction of containment islands and nearshore containment facilities, to innovative uses of contaminated spoils in construction materials like highway macadam or concrete to seal abandoned coal mines. In recent years New York has used existing alternatives to dispose of nearly all of its LI Sound dredgings and most of its New York Harbor dredgings without resort to open-water dumping and thus demonstrated that alternatives can be used economically. If alternatives like these are not adopted, we will continue the irrational cycle of investing hundreds of millions to improve water quality and restore habitats and then undercut these investments by dumping contaminated spoils.

The EPA should proceed promptly to designate a disposal site in deep, open-ocean waters off Rhode Island, preferably off the Continental Shelf, for use until the

stated goal of eliminating all open-water dumping is achieved and alternatives are developed and mandated for all dredging projects. As a temporary measure while this deep-water site designation is proceeding, any spoils dredged in Eastern LI Sound that cannot be disposed of by currently available non-open-water alternatives should be disposed of at the existing ODA designated site in Rhode Island. And if for any reason (shallow waters, strong currents) that site is unsuitable for a particular project, as a last resort in an emergency situation, CLIS with its calmer, deeper waters off New Haven has excess capacity.

If any further proof is needed that we would be better off with no designated ODA site in Eastern LI Sound, that proof can be found in the fact that the best location for such a site that the EPA was able to come up with after searching for 20 years is the woefully inadequate NLDS itself.

Thomas A. Sargent, President

July 15, 2016

## Notes

1. The language of dredging (if not the sanitary quality of its subject matter) has been cleaned up. We used to talk about “dumping” “spoils” in “dumpsites” designated under the “Ocean Dumping Act”. Today regulators euphemistically speak of “disposing of” “dredged material” in “disposal sites” designated under “MPRSA”. We prefer the old jargon as more descriptive of what we are really dealing with.
2. Where the use of a site designated by the EPA under ODA Sec. 102(c) is not feasible, Sec. 103(b) authorizes ACOE with EPA concurrence to “select” a temporary site for a period of five years, using the same criteria applicable to the designation of sites by the EPA under Sec. 102(c).
3. The *Seawolf* project called for the construction of a fleet of 34 submarines, most to be built in New London and home-ported at Groton Naval Base. Only two *Seawolves* were built before the project was cancelled, both now based on the West Coast. Thus, the lasting legacy of *Seawolf* is 1.4 million cubic yards of admittedly contaminated spoils out there somewhere in the LI Sound. (The EPA conceded in its DSEIS that the *Seawolf* spoils were “considered unsuitable for open-water disposal due to elevated trace metal and PAH concentrations”.) The ACOE assures us that most of the 1.4 million cubic yards of *Seawolf* spoils are safely “capped” on the bottom at NLDS, but admits that it cannot account for 33% of the contaminated portion of those spoils.
4. At this point, all of the following may be just so much polluted water over the dam (or, as it were, through the Race), but it illustrates the attitude of the ACOE in administering the ODA. After the *Seawolf* suit was filed, ACOE kept dumping at NLDS under its purported “selection” of the site in December 1994 under ODA Sec. 103(b) (see Note 2). Assuming that this selection had in fact been properly made in accordance with Sec. 103(b), its five-year term expired in December 1999. Under Sec. 103(b) the use of a selected site may be continued for an additional five years, subject to certain further conditions. The plain language and clear intent of Sec. 103(b) is that the two five-year periods are to be consecutive, expiring at the latest in December 2004 in the case of NLDS. But under a bizarre reading of Sec. 103(b) ACOE contended that it could invoke the five-year continuation period at any time it wished. ACOE purported to do this in December 2006 and kept dumping at NLDS, in violation of the ODA, until December 2011. When it ran out of time, ACOE got a third five-year bite at the apple by sneaking a provision into its Appropriations Bill in the dark of night on December 23, 2011 (with no notice to anyone, no hearing or other discussion and no pretense of complying with the ODA criteria) that extended the “selection” of NLDS for five more years until December 31, 2016. Tellingly, on April 27, 2016, when the EPA announced its proposed designation of NLDS, it stated that a site selected by ACOE under Sec. 103(b) “may be used for two *consecutive* five-year periods beginning with the first disposal activity” (emphasis added) – thereby confirming that all ACOE dumping at NLDS from at least 2005 through 2011 (including 400,000 cys dumped in 2007) was done in violation of the ODA. It is highly doubtful that ACOE’s covert legislative strike in December 2011 retroactively sprinkled any holy water on ACOE’s illegal dumping for those seven years.