

12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCFA, such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(m)(4) of FFDCFA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note).

**VII. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 17, 2009.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.605 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

**§ 180.605 Penoxsulam; tolerances for residues.**

(a) \* \* \*

Commodity	Parts per million
Almond, hulls .....	0.01
* * * * *	
Grape .....	0.01
Nut, tree, group 14 .....	0.01
Pistachio .....	0.01
* * * * *	

\* \* \* \* \*

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**BILLING CODE 6560-50-S**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 228**

**[EPA-R10-OW-2008-0826; FRL-8893-1]**

**Ocean Dumping; Designation of Ocean Dredged Material Disposal Sites Offshore of the Umpqua River, Oregon**

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

**ACTION:** Final rule.

**SUMMARY:** This action finalizes the designation of the Umpqua River ocean dredged material sites pursuant to the Marine Protection, Research and Sanctuaries Act, as amended (MPRSA). The new sites are needed primarily to serve the long-term need for a location to dispose of material dredged from the Umpqua River navigation channel, and to provide a location for the disposal of dredged material for persons who have received a permit for such disposal. The

newly designated sites will be subject to ongoing monitoring and management specified in this rule and in the Site Management and Monitoring Plan, which is also finalized as part of this action. The monitoring and management requirements will help to ensure ongoing protection of the marine environment.

**DATES:** *Effective Date:* This final rule will be effective May 26, 2009.

**ADDRESSES:** For more information on this final rule, Docket ID No. EPA-R10-OW-2008-0826 use one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for accessing the docket and materials related to this final rule.

- *E-mail:*

*Freedman.Jonathan@epa.gov*

- *Mail:* Jonathan Freedman, U.S.

Environmental Protection Agency, Region 10, Office of Ecosystems, Tribal and Public Affairs (ETPA-083), Aquatic Resources Unit, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101.

Publicly available docket materials are available either electronically at <http://www.regulations.gov>, or in hard copy during normal business hours at the U.S. Environmental Protection Agency, Region 10, Library, 10th Floor, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101. For access to the documents at the Region 10 Library, contact the Region 10 Library Reference Desk at (206) 553-1289, between the hours of 9 a.m. to 11:30 a.m., and between the hours of 1 p.m. to 4 p.m., Monday through Friday, excluding legal holidays, for an appointment.

**FOR FURTHER INFORMATION CONTACT:**

Jonathan Freedman, U.S. Environmental Protection Agency, Region 10, Office of Ecosystems, Tribal and Public Affairs (ETPA-083), Aquatic Resources Unit, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, phone number:

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Jessica Winkler, U.S. Environmental Protection Agency, Region 10, Office of Ecosystems, Tribal and Public Affairs (ETPA-083), Aquatic Resources Unit, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, phone number:

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**SUPPLEMENTARY INFORMATION:** On November 25, 2008, EPA published a proposed rule at 73 FR 71575 to designate two new ocean dredged material disposal sites near the mouth of the Umpqua River, Oregon and to withdraw an earlier proposed rule to designate a single site. EPA received one comment on the proposed rule.

**1. Potentially Affected Persons**

Persons potentially affected by this action include those who seek or might seek permits or approval by EPA to dispose of dredged material into ocean

waters pursuant to the Marine Protection, Research, and Sanctuaries Act, as amended (MPRSA), 33 U.S.C. 1401 to 1445. EPA's action would be relevant to persons, including organizations and government bodies

seeking to dispose of dredged material in ocean waters offshore of the Umpqua River, Oregon. Currently, the U.S. Army Corps of Engineers (Corps) would be most affected by this action. Potentially affected categories and persons include:

Category	Examples of potentially regulated persons
Federal Government ..... Industry and General Public ... State, local and tribal governments.	U.S. Army Corps of Engineers Civil Works Projects, and other Federal Agencies. Port Authorities, Marinas and Harbors, Shipyards and Marine Repair Facilities, Berth Owners. Governments owning and/or responsible for ports, harbors, and/or berths, Government agencies requiring disposal of dredged material associated with public works projects.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding persons likely to be affected by this action. For any questions regarding the applicability of this action to a particular person, please refer to the contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**2. Background**

*a. History of Disposal Sites Offshore of the Umpqua River, Oregon*

Two ocean dredged material disposal sites, an Interim Site and an Adjusted Site, were formerly used by the U.S. Army Corps of Engineers (Corps) for the disposal of sediments dredged from the Umpqua River navigation project. An "Interim Site" was included in the list of approved ocean disposal sites for dredged material in the **Federal Register** in 1977 (42 FR 2461), a status superseded by later statutory changes to the MPRSA. A realignment of the approach channel to the Umpqua River estuary re-routed the navigation channel over the Interim Site so that in 1991 an Adjusted Site was selected by the Corps pursuant to Section 103 of the MPRSA. That authority allows the Corps to select a site for disposal when a site has not been designated. Selection of the Adjusted Site was intended to reduce

potential hazards associated with navigational conflicts in the channel and associated with mounding of dredged material at the Interim Site. The selection of the Adjusted Site was also intended to increase long-term disposal site capacity near the mouth of the Umpqua River. EPA concurred on the selection of the Adjusted Site and approved the Corps' request to continue to use the site through the end of the 2008 dredging season. The Adjusted Site is not a suitable candidate for designation by EPA pursuant to section 102 of the MPRSA because use of the Adjusted Site resulted in mounding that severely limited site capacity. In 1996, shoaling and breaking waves associated with mounding at the Adjusted Site were reported. Subsequently a site utilization study was conducted by the Corps in 1998. That study found evidence of mounding sufficient to warrant serious concern regarding impact on the wave environment near the Umpqua River entrance channel. To address that concern the volume of dredged material placed at the Adjusted Site was reduced from an average annual volume of 188,000 cubic yards (cy) prior to 1999 to an average annual volume of 108,000 cy from 1999 to 2007. EPA determined that alternatives to the Adjusted Site would be needed

for long-term disposal capacity near the mouth of the Umpqua River.

*b. Location and Configuration of Umpqua River Ocean Dredged Material Disposal Sites*

This action finalizes the withdrawal of the rule the Agency proposed on October 2, 1991, at 56 FR. 49858, to designate an Umpqua River site, and finalizes the designation of two Umpqua River ocean dredged material sites to the north and south, respectively, of the mouth of the Umpqua River. The coordinates for the two sites are listed below and the figure below shows the location of the two Umpqua River ocean dredged material disposal sites (Umpqua River ODMD Sites or Sites). The configuration of the Sites is expected to allow dredged material disposed in shallower portions of each Site to naturally disperse into the littoral zone without creating mounding conditions that could contribute to adverse impacts to navigation. This will allow EPA to manage the Sites to keep as much material disposed at the Sites as possible in the active littoral drift area to augment shoreline building processes.

The coordinates for the two Umpqua River ODMD Sites are, in North American Datum 83 (NAD 83).

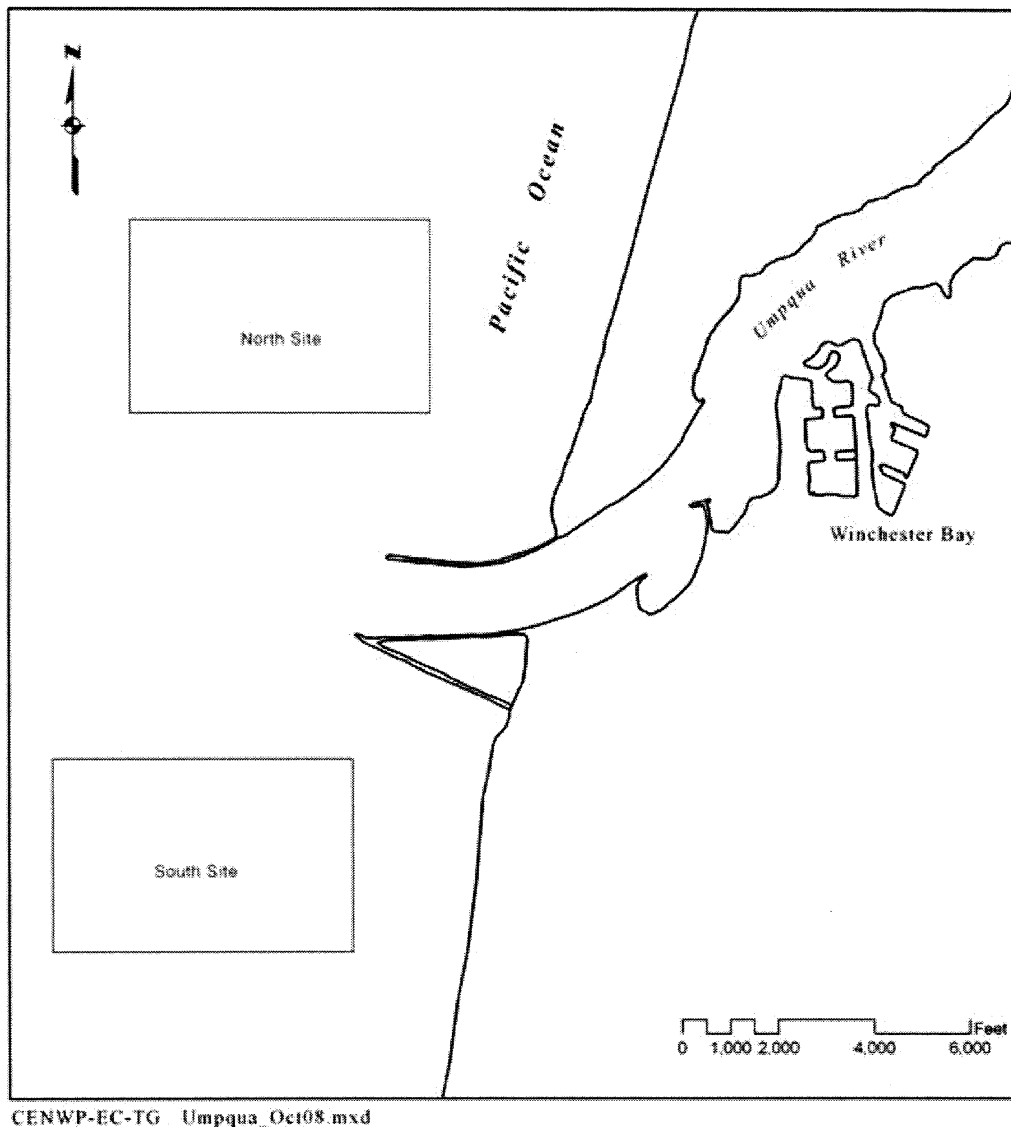
North Umpqua ODMD site	South Umpqua ODMD site
43°41'23.09" N., 124°14'20.28" W. 43°41'25.86" N., 124°12'54.61" W. 43°40'43.62" N., 124°14'17.85" W. 43°40'46.37" N., 124°12'52.74" W.	43°39'32.31" N., 124°14'35.60" W. 43°39'35.23" N., 124°13'11.01" W. 43°38'53.08" N., 124°14'32.94" W. 43°38'55.82" N., 124°13'08.36" W.

The two Sites are situated in approximately 30 to 120 feet of water located to the north and south of the entrance to the Umpqua River on the southern Oregon Coast (see Figure 1). The dimensions of each of the Sites are

6,300 by 4,000 feet. Each disposal Site will contain a drop zone, defined by a 500-foot setback inscribed within all sides of the boundary of each Site, reducing the permissible disposal area to a zone 5,300 feet long by 3,000 feet

wide. The drop zone will ensure that dredged material initially stays within each Site.

**BILLING CODE 6560-50-P**



**Figure 1 is a diagram of the Final North and South Sites**

**BILLING CODE 6560-50-C**

*c. Management and Monitoring of the Sites*

The final Umpqua River ODMD Sites are expected to receive sediments dredged by the Corps to maintain the federally authorized navigation project at the Umpqua River, Oregon and dredged material from other persons who have obtained a permit for the disposal of dredged material at the Sites. The ocean dumping regulations do not require a modification of any existing permits issued before this final action. All persons using the Sites are required to follow the Site Management and Monitoring Plan (SMMP) for the Umpqua River ODMD Sites. The SMMP is available to the public as part of this action. The SMMP includes management and monitoring

requirements to ensure that dredged materials disposed at the Sites are suitable for disposal in the ocean. The final SMMP also addresses management of the Sites to ensure adverse mounding does not occur and to ensure that disposal events are timed to minimize interference with other uses of ocean waters in the vicinity of the Sites.

*d. MPRSA Criteria*

EPA assessed this action against the criteria of the MPRSA, with particular emphasis on the general and specific regulatory criteria of 40 CFR part 228, to determine that the final site designations satisfied those criteria.

**General Criteria (40 CFR 228.5)**

(1) *Sites must be selected to minimize interference with other activities in the*

*marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation (40 CFR 228.5(a)).*

EPA reviewed the potential for the Sites to interfere with navigation, recreation, shellfisheries, aquatic resources, commercial fisheries, protected geologic features, and cultural and/or historically significant areas and found low potential for conflicts. The Sites are located away from the approach to the Umpqua River entrance channel and are unlikely to cause interference with navigation near the mouth of the Umpqua River. Commercial crab and salmon fishing have the potential to take place in the Sites because of overlapping disposal and fishing seasons, but conflicts are not

anticipated based on the past history of fishing and disposal operations in this area. Other recreational users, for example, surfers, boarders, and divers, may use the near-shore area in the vicinity of the Sites. EPA does not expect disposal operations at the Sites to conflict with these recreationists.

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

Based on EPA's review of modeling, monitoring data, analysis of sediment quality, and history of use, no detectable contaminant concentrations or water quality effects, e.g., suspended solids, would be expected to reach any beach, shoreline, or other area outside of the Sites. The drop zones at each of the Sites will help ensure this criterion is satisfied. All dredged material proposed for disposal will be evaluated according to the ocean dumping regulations at 40 CFR 227.13 and guidance developed by EPA and the Corps. In general, dredged material which meets the criteria under 40 CFR 227.13(b) is deemed environmentally acceptable for ocean dumping without further testing.

Dredged material which does not meet the criteria of 40 CFR 227.13(b) must be further tested as required by 40 CFR 227.13(c). Suitable material can be disposed at the Sites. Modeling work performed by the Corps at the Umpqua River demonstrates that water column turbidity, a temporary perturbation during disposal, would be expected to dissipate for an anticipated 97% of the coarser material within a few minutes of disposal. The remaining 3% of the material, which would be classified as fine-grained, would be expected to dissipate within a half hour. Over time, some of the suitable disposed material would be expected to migrate into the littoral system, and potentially to coastal shorelines. Bottom movement of material, based on historic trends near the mouth of the Umpqua River, is expected to show a net movement to the north at the depth of the disposal Sites with rapid dispersion after movement.

(3) *If Site designation studies show that any interim disposal sites do not meet the site selection criteria, use of such sites shall be terminated as soon as any alternate site can be designated (40 CFR 228.5(c)).*

EPA's recent final rule at 73 FR 74983 (December 10, 2008) repealed obsolete

regulations under the MPRSA regarding interim ocean dumping sites and interim ocean dumping criteria. EPA stated in the proposed rule that the use of the Interim Site near the Umpqua River Sites was terminated upon selection of the 103-selected site, the Adjusted Site, by the Corps. However, the category of "interim site" has now been removed from the ocean dumping regulations.

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

EPA sized the final Sites to meet this criterion. The Sites tend to be moderately dispersive in the near-shore area and less dispersive farther from shore. The Sites were designed to be large enough to minimize the potential for adverse mounding and to allow for a minimum twenty-year capacity. Effective monitoring of the Sites is necessary and annual bathymetric surveys are required for each Site. Those surveys are expected to be used to document the fate of the dredged material disposed at the Sites and to provide information for active management of the Sites.

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

The Sites are located near where historic disposal occurred with only minimal impact to the environment. Locations off the continental shelf in the Pacific Ocean as a general rule are inhabited by stable benthic and pelagic ecosystems on steeper gradients that are not well adapted to the type of frequent disturbance events that are typical of dredged material disposal in ocean waters. Monitoring and surveillance of these Sites do not pose the challenges inherent in locations beyond the edge of the continental shelf. Material disposed at a location beyond the continental shelf would not be available to the littoral system. The loss of material would potentially have a negative impact on the mass balance of the system with a resulting negative impact on erosion/accretion patterns along this limited area of coastline near the Umpqua River.

Specific Criteria (40 CFR 228.6)

(1) *Geographical Position, Depth of Water, Bottom Topography and*

*Distance from Coast (40 CFR 228.6(a)(1)).*

The geographical position, including the depth, bottom topography and distance from the coastline in the vicinity of the Sites will not cause adverse effects to the marine environment. Based on EPA's understanding of currents at the Sites and the influence of those currents on the movement of material in the area, there is a high likelihood that much of the material disposed at the Sites will be transported to the littoral sediment circulation system. Limited onshore transport of material disposed of at the Sites is expected because of the nature of the prevailing currents and wave transport in the vicinity of the Sites. Net predicted material transport at the Sites is southward in the summer months and northward during the remainder of the year. These transport mechanisms are expected to move material into the active littoral drift area and to significantly decrease or eliminate mounding as an issue for disposal of dredged material near the mouth of the Umpqua River. This movement is expected to allow for long-term disposal without creation of adverse mounding conditions at either of the Sites.

To help avoid adverse mounding at the Sites, the site management strategy will include placing the majority of dredged material within drop zones at each Site and in shallower portions of the Sites closer to shore where the material can return to the regional littoral sediment system. Disposal runs will be managed to avoid multiple dumps in any location to further minimize mounding. Management may include establishing "cells" along the nearshore portions of each Site and assigning numbers of "dumps" to each cell to minimize material accumulation and avoid excessive or persistent mounding. Disposal will also alternate as necessary between the two Sites to allow for maximum dispersal of material and minimal impact to each Site.

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

The Sites are not located in exclusive breeding, spawning, nursery, feeding or passage areas for adult or juvenile phases of living resources. Near the Sites, a variety of pelagic and demersal fish species, as well as shellfish, are found. Modeling of the water column over the Sites indicates that turbidity from a disposal event is expected to dissipate rapidly and consequently avoidance behavior by any species in the Sites or in the surrounding area at

the time of a disposal event would be short-term.

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

The Sites, although located in close proximity to the Umpqua River navigation channel, are located a sufficient distance offshore to avoid adverse impacts to beaches and other amenity areas. Transportation of dredges or barges to and from the Sites to dispose of dredged material will be coordinated to avoid disturbance of other activities near the Umpqua River entrance channel. Dredged material disposed of at the Sites is expected to disperse into the littoral system, with a possible positive effect over time of reducing erosion of coastal beaches. There are no rocks or pinnacles in the vicinity of either Site. The Oregon Dunes National Recreation Area, a part of the Siuslaw National Forest, is located on the beach adjacent to the South ODMD Site, but does not extend into the water. Use of the South ODMD Site is not expected to interfere with any upland uses.

The ocean area north and south of the south jetty is utilized for wave-dependent near-shore recreation, such as surfing, diving, kayaking, boogie-boarding, skim boarding, and body surfing. While some of these uses may overlap with the Sites, resulting in temporary usage conflict during disposal activities, the SMMP contains provisions to minimize or avoid such conflicts. The Sites are sized and located to provide long-term capacity for the disposal of dredged material without causing any impacts to the wave environment at, or near, the Sites. Site monitoring and adaptive management are components of the final SMMP.

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

Dredged material found suitable for ocean disposal pursuant to the regulatory criteria for dredged material or characterized by chemical and biological testing and found suitable for disposal into ocean waters will be the only material allowed to be disposed of at the Sites. No material defined as "waste" under the MPRSA will be allowed to be disposed of at the Sites. The dredged material to be disposed of at the Sites will be predominantly marine sand, far removed from known sources of contamination. With respect to methods of releasing material at the Sites, material will be released just below the surface and the disposal

vessel will be required to be under power and to slowly transit the disposal location during disposal. This method of release is expected to spread material at the Sites to minimize mounding and to minimize impacts to the benthic community and to species at the Sites at the time of a disposal event.

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

EPA expects monitoring and surveillance at the Sites to be feasible and readily performed from small surface research vessels. The Sites are accessible for bathymetric and side-scan sonar surveys. At a minimum, annual bathymetric surveys will be conducted at each of the Sites to confirm that no unacceptable mounding is taking place within the Sites or in their immediate vicinity. Routine monitoring will concentrate on examining how the distribution of material in the near-shore portions of the Sites is working to minimize mounding of material and how the distribution of material augments littoral processes. Monitoring will also examine the distribution of material in the deeper portions of the Sites to avoid or minimize mounding.

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

Dispersal, horizontal transport and vertical mixing characteristics of the area at and in the vicinity of the Sites indicate that the marine sands and fluvial gravels from the Umpqua River distribute away from the river mouth rapidly. The beaches do not show significant accretion or loss, suggesting the system is in equilibrium and that littoral transport is in balance. The bottom current records suggest a bias in transport to the north. Fine grained material tends to remain in suspension and to experience rapid offshore transport compared to other sediment sizes. Sediment transport of sand-sized or coarser material tends to move directly as bedload, but is occasionally suspended by wave action near the seafloor. The final Sites are not expected to change these characteristics.

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

The two Sites have not been used before for any type of disposal activity. Disposal of dredged material is not expected to result in unacceptable environmental degradation at the Sites or in the vicinity of the Sites. The final SMMP includes requirements, including bathymetric surveys and preventative

steps, for managing the Sites to address potential mounding issues.

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

The Sites are not expected to interfere with shipping, fishing, recreation or other legitimate uses of the ocean. Disposals at the new Sites will be managed according to the final SMMP to minimize interference with other legitimate uses of the ocean through careful timing and staggering of disposals in the Sites. Commercial and recreational fishing and commercial navigation are the primary uses for which such timing will be needed. No plans for mineral extraction offshore of the Umpqua River are planned or proposed for this area. Wave-dependent near shore recreation may possibly overlap with the Sites resulting in temporary usage conflict during disposal activities but the Sites will be managed to minimize such potential conflicts. Use of the Sites is not expected to change the wave conditions for any recreational uses. Two wave energy projects are in the preliminary permitting phases near the Sites. EPA would expect to revise the SMMP if necessary in the event the proposed wave energy projects moved forward and potential conflicts seemed likely. Fish and shellfish culture operations are not under consideration for the area. There are no known areas of scientific importance in the vicinity of the Sites.

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

EPA did not identify any adverse water quality impacts from ocean disposal of dredged material at the Sites based on water and sediment quality analyses conducted in the study area of the Sites and based on experience with past disposals near the mouth of the Umpqua River. Fisheries and benthic data show the ecology of the area to be that of a mobile sand community typical of the Oregon Coast.

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

Nuisance species, considered as any undesirable organism not previously existing at a location, have not been observed at, or in the vicinity of, the Sites. Material expected to be disposed at the Sites will be uncontaminated marine sands similar to the sediment present at the Sites. Some fine-grained material, finer than natural background, may also be disposed. While this finer-

grained material could have the potential to attract nuisance species to the Sites, no such recruitment occurred in the past at either the Interim or the Adjusted Site. The final SMMP includes specific biological monitoring requirements, which will act to identify any nuisance species and allowing EPA to direct special studies and/or operational changes to address the issue if it arises.

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

No significant cultural features have been identified at, or in the vicinity of, the Sites. EPA coordinated with Oregon's State Historic Preservation Officer and with Tribes in the vicinity of the Sites to identify any cultural features but none were identified. No shipwrecks were observed or documented within the Sites or their immediate vicinity.

### 3. Response to Comments

EPA received one indirect comment on the proposed rule. The commenter objected generally to any dumping in the ocean and criticized shipping companies for dumping rather than recycling. EPA's action designates sites for the disposal of dredged material meeting the ocean dumping criteria for environmental acceptability in the ocean environment. No other material is allowed at these Sites. The Sites will not be available to users for any purpose other than the disposal of dredged material meeting the regulatory criteria for suitability.

### 4. Environmental Statutory Review—National Environmental Policy Act (NEPA); Magnuson-Stevens Act (MSA); Marine Mammal Protection Act (MMPA); Coastal Zone Management Act (CZMA); Endangered Species Act (ESA); National Historic Preservation Act (NHPA)

#### (1) NEPA

Section 102 of the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 to 4370f, requires that Federal agencies prepare an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the human environment. NEPA does not apply to EPA designations of ocean disposal sites under the MPRSA because the courts have exempted EPA's actions under the MPRSA from the procedural requirements of NEPA through the functional equivalence doctrine. EPA has, by policy, determined that the preparation of non-EIS NEPA

documents for certain EPA regulatory actions, including actions under the MPRSA, is appropriate. EPA's "Notice of Policy and Procedures for Voluntary Preparation of NEPA Documents," (Voluntary NEPA Policy), 63 FR 58045, (October 29, 1998), sets out both the policy and procedures EPA uses when preparing such environmental review documents. EPA's primary voluntary NEPA document for designating the Sites is the final *Umpqua River, Oregon Ocean Dredged Material Disposal Sites Evaluation Study and Environmental Assessment, April 2009* (EA), jointly prepared by EPA and the Corps. The final EA and its Technical Appendices, which are part of the docket for this action, provide the threshold environmental review for designation of the two Sites. The information from the final EA is used extensively, above, in the discussion of the ocean dumping criteria.

#### (2) MSA and MMPA

In the spring of 2008, EPA initiated consultation with the National Marine Fisheries Service (NMFS) concerning essential fish habitat and protected marine mammals. EPA prepared an essential fish habitat (EFH) assessment pursuant to Section 305(b), 16 U.S.C. 1855(b)(2), of the Magnuson-Stevens Act, as amended (MSA), 16 U.S.C. 1801 to 1891d. NMFS reviewed EPA's EFH assessment and ESA Biological Assessment for purposes of the Marine Mammal Protection Act of 1972, as amended (MMPA), 16 U.S.C. 1361 to 1389.

With respect to marine mammals, NMFS found that all potential adverse effects to ESA-listed marine mammals are discountable or insignificant. Those findings are documented in Appendix B. Marine Mammal Determinations of the Biological Opinion issued by NMFS to EPA on March 20, 2009. With respect to EFH, NMFS found that disposal of dredge material, an indirect effect of EPA's action to designate the two Umpqua River ODMD Sites, will affect suspended sediment levels over background and temporarily decrease food resources within the Sites during disposal events. However, these effects are not expected to functionally change or alter the habitat or habitat value of designated EFH at or in the vicinity of the Sites. NMFS concluded that safe passage of the EFH managed species will not be functionally changed by this action or by subsequent disposal at the Sites. These findings are documented in the Magnuson-Stevens Fishery Conservation and Management Act section of the NMFS Biological Opinion. NMFS included a "conservation

recommendation" to develop a plan for monitoring fish interactions with the disposed dredged material at the Sites. EPA will respond in a separate written response to NMFS' recommendation.

#### (3) CZMA

EPA initiated consultation with the State of Oregon on coastal zone management issues in June of 2008. EPA prepared a consistency determination for the Oregon Ocean and Coastal Management Program (OCMP) to meet the requirements of the Coastal Zone Management Act, as amended, (CZMA), 16 U.S.C. 1451 to 1465, and submitted that determination formally to the Oregon Department of Land Conservation and Development (DLCD) for review on November 12, 2008. DLCD published an initial public notice on the consistency determination on November 14, 2008, and in a notice on December 10, 2008, extended the public comment period to January 2, 2009. DLCD received one comment letter from the Oregon Department of Fish and Wildlife (ODFW) expressing support for the designation of the Umpqua River Sites and supporting ocean disposal of dredged material as the best alternative. ODFW did express concern with potential impacts to habitat near the mouth of the Umpqua River and expressed support for "pinpoint dumping" over "uniform placement" of disposal material at the Sites.

DLCD concurred on EPA's determination of consistency with one condition. The condition calls for the final SMMP to assure that monitoring measures for the Umpqua River Sites are reasonably likely to identify significant unanticipated adverse effects on renewable marine resources, biological diversity of marine life and functional integrity of the marine ecosystem at the Sites, and further asks that the SMMP include adaptive management measures to avoid significant impairment of the Sites and significant decreases in abundance of commercial or recreationally caught species from direct or indirect effects on important or essential habitat at the Sites. The final SMMP for the Umpqua River Sites provides the assurances and adaptive management measures requested by DLCD. DLCD responded to the ODFW concern about impacts to habitat by including the condition, above, in its consistency concurrence. DLCD also noted that "pinpoint dumping" has been replaced with the disposal technique of "uniform placement." DLCD suggested that future site designations include opportunities for EPA and ODFW to coordinate on issues.

**(4) ESA**

EPA initiated informal consultation with NMFS and the U.S. Fish and Wildlife Service on its action to designate the Umpqua River ODMD Sites beginning in the spring of 2008. EPA prepared a Biological Assessment to assess the potential effects of designating the two Umpqua River Sites on aquatic and wildlife species to determine whether or not its action might adversely affect species listed as endangered or threatened and/or adversely modify or destroy their designated critical habitat. EPA found that its action would not be likely to adversely affect aquatic or wildlife species listed pursuant to the Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 to 1544, or the critical habitat of such species. EPA found that site designation does not have a direct impact on any of the identified ESA species but also found that indirect impacts associated with reasonably foreseeable future disposal activities had to be considered. These indirect impacts included a short-term increase in suspended solids and turbidity in the water column when dredged material was disposed at the new Sites and an accumulation of material on the ocean floor when material was disposed at the Sites. EPA concluded that while its action may affect ESA-listed species, the action would not be likely to adversely affect ESA-listed species or critical habitat.

The U.S. Fish and Wildlife Service (USFWS) concurred with EPA's finding that EPA's action to designate the Umpqua River ODMD Sites would not likely adversely affect listed species or critical habitat. Consultation with the USFWS for this action was completed on July 25, 2008.

The National Marine Fisheries Service (NMFS) did not concur with EPA's NLAA finding and subsequently prepared a Biological Opinion (BO), issued March 20, 2009. NMFS concluded that EPA's site designations are not likely to jeopardize the continued existence of Oregon Coast (OC) coho salmon or Southern Distinct Population Segment (DPS) green sturgeon and are not likely to destroy or adversely modify designated or proposed critical habitat. However, NMFS found that the indirect effects of designating the Umpqua River Sites related to the exposure fish could experience from the disposal of dredged material could have consequences for listed fish. Based on NMFS' estimate of ensuing indirect effects of designating the Sites, NMFS estimated that injury and death of as many as 990 yearling OC

coho salmon and a smaller number of small sub-adult southern DPS green sturgeon could occur. For Steller sea lions, blue whales, fin whales, humpback whales, Southern Resident killer whales, as described in Appendix B to the BO, NMFS concurred with EPA's determination of NLAA. For Southern Oregon/Northern California Coasts (SONNC) coho salmon, as described in Appendix A to the BO, NMFS also concurred with EPA's determination of NLAA. NMFS found no effect for four species of marine turtles, sperm whales, and sei whales because NMFS did not anticipate the species would be present in the action area.

NMFS acknowledged in the BO that EPA's action, designation of the Umpqua River Sites, does not authorize and will not itself result in disposal of dredged material. NMFS stated that it does not anticipate any take will be caused by the designation of the Sites and the adoption of the SMMP. Consequently, NMFS did not include an incidental take statement in the BO. Rather, NMFS stated that any further analysis of the effect of disposal of dredged material at the disposal sites and issuance of an incidental take statement with reasonable and prudent measures and non-discretionary terms and conditions to minimize take would be prepared when a disposal permit is requested by the action agency. NMFS did include a discretionary conservation recommendation in the BO seeking a study of fish interactions with disposed material. Such recommendations are purely advisory in nature. EPA appreciates that such a study could contribute to the scientific knowledge base but believes that NMFS, the expert Federal agency on fish behavior, would be better suited than EPA to carry out such a study.

**(5) NHPA**

EPA initiated consultation with the State of Oregon's Historic Preservation Officer (SHPO) to address National Historic Preservation Act, as amended (NHPA), 16 U.S.C. 470 to 470a-2, which requires Federal agencies to take into account the effect of their actions on districts, sites, buildings, structures, or objects, included in, or eligible for inclusion in the National Register. EPA determined that no historic properties were affected, or would be affected, by designation of the Sites. EPA did not find any historic properties within the geographic area of the Sites. This determination was based on an extensive review of the National Register of Historic Districts in Oregon, the Oregon National Register list and an

assessment of cultural resources near the Sites. Side scan sonar of the Sites did not reveal the presence of any shipwrecks or other cultural or historic properties. The SHPO responded to EPA's determination on September 11, 2008, without objection. The SHPO clarified on October 13, 2008, that the designation of the Sites did not require further archeological investigation.

**5. Action**

EPA designates the Umpqua River Sites as EPA-approved dredged material ocean disposal sites in this action. The monitoring and management requirements that will apply to these Sites are described in the final SMMP. EPA received one comment on the proposed rule from a commenter who objected to disposing of harmful material in the ocean. The Sites designated in this action are only available for the disposal of material deemed suitable for ocean disposal. The designation of ocean disposal sites for dredged material does not constitute or imply Corps or EPA approval of open water disposal of dredged material from any specific project. Before disposal of dredged material at either of the Umpqua River Sites may commence by any person, EPA and the Corps must evaluate the proposal according to the ocean dumping regulatory criteria (40 CFR part 227) and authorize disposal. EPA independently evaluates proposed dumping in accordance with those criteria pursuant to 40 CFR part 225. EPA has the right to disapprove of the actual disposal of dredged material if EPA determines that environmental requirements under the MPRSA have not been met.

**6. Statutory and Executive Order Reviews**

This rule designates two ocean dredged material disposal sites pursuant to Section 102 of the MPRSA. This rule complies with applicable executive orders and statutory provisions as follows:

**(1) Executive Order 12866**

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether the regulatory action is "significant," and therefore subject to OMB review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or

safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. EPA determined that this final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

#### (2) Paperwork Reduction Act

This final action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, because this rule does not establish or modify any information or recordkeeping requirements for the regulated community.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing, and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR are listed in 40 CFR Part 9.

#### (3) Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small

governmental jurisdictions. For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business defined by the Small Business Administration's size regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. EPA determined that this final action will not have a significant economic impact on small entities because the final rule will only have the effect of regulating the location of sites to be used for the disposal of dredged material in ocean waters. After considering the economic impacts of this rule, I certify that this action will not have a significant economic impact on a substantial number of small entities.

#### (4) Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1531 to 1538, for State, local, or tribal governments or the private sector. This action imposes no new enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small government entities. Those entities are already subject to existing permitting requirements for the disposal of dredged material in ocean waters.

#### (5) Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government." This rule does not have federalism implications. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or

on the distribution of power and responsibilities among various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

#### (6) Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications, as specified in Executive Order 13175 because the designation of the two ocean dredged material disposal Sites will not have a direct effect on Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule. Although Executive Order 13175 does not apply to this final rule, EPA consulted with tribal officials in the development of this rule, particularly as the rule relates to potential impacts to historic or cultural resources.

#### (7) Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. The action concerns the designation of two ocean dredged material disposal Sites and only has the effect of providing designated locations to use for ocean disposal of dredged material pursuant to Section 102(c) of the MPRSA.

#### (8) Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355) because it is not a "significant regulatory action" as defined under Executive Order 12866.

#### (9) National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent



with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final action includes environmental monitoring and measurement as described in EPA's final SMMP. EPA will not require the use of specific, prescribed analytic methods for monitoring and managing the designated Sites. The Agency plans to allow the use of any method, whether it constitutes a voluntary consensus standard or not, that meets the monitoring and measurement criteria discussed in the final SMMP.

*(10) Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations*

Executive Order 12898 (59 FR 7629) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA has assessed the overall protectiveness of designating the disposal Sites against the criteria established pursuant to the MPRSA to ensure that any adverse impact to the environment will be mitigated to the greatest extent practicable.

*(11) Congressional Review Act*

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other

required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective thirty days from the date of publication in the **Federal Register**.

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

Environmental protection, Water pollution control.

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

Dated: April 9, 2009.

**Michelle L. Pirzadeh,**

*Acting Regional Administrator, Region 10.*

■ For the reasons set out in the preamble, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 228—[AMENDED]**

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by adding paragraph (n)(7) to read as follows:

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

\* \* \* \* \*

(n) \* \* \*

(7) Umpqua River, OR—North and South Dredged Material Disposal Sites.

(i) North Umpqua River Site.

(A) *Location:* 43°41'23.09" N, 124°14'20.28" W; 43°41'25.86" N, 124°12'54.61" W; 43°40'43.62" N, 124°14'17.85" W; 43°40'46.37" N, 124°12'52.74" W.

(B) *Size:* Approximately 1.92 kilometers long and 1.22 kilometers wide, with a drop zone which is defined as a 500-foot setback inscribed within all sides of the site boundary, reducing the permissible disposal area to a zone 5,300 feet long by 3,000 feet wide.

(C) *Depth:* Ranges from approximately 9 to 37 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (1) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Umpqua River navigation channel and adjacent areas;

(2) Disposal shall be managed by the restrictions and requirements contained

in the currently-approved Site Management and Monitoring Plan (SMMP);

(3) Monitoring, as specified in the SMMP, is required.

(ii) South Umpqua River Site.

(A) *Location:* 43°39'32.31" N, 124°14'35.60" W; 43°39'35.23" N, 124°13'11.01" W; 43°38'53.08" N, 124°14'32.94" W; 43°38'55.82" N, 124°13'08.36" W.

(B) *Size:* Approximately 1.92 kilometers long and 1.22 kilometers wide, with a drop zone which is defined as a 500-foot setback inscribed within all sides of the site boundary, reducing the permissible disposal area to a zone 5,300 feet long by 3,000 feet wide.

(C) *Depth:* Ranges from approximately 9 to 37 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (1) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Umpqua River navigation channel and adjacent areas;

(2) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(3) Monitoring, as specified in the SMMP, is required.

\* \* \* \* \*

[FR Doc. E9-9434 Filed 4-23-09; 8:45 am]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 447 and 455**

[CMS-2198-F2]

RIN-0938-AN09

**Medicaid Program; Disproportionate Share Hospital Payments; Correcting Amendment**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule; correcting amendment.

**SUMMARY:** This correcting amendment corrects a technical error in the regulations text in the final rule published in the **Federal Register** on December 19, 2008 (73 FR 77904) entitled, "Disproportionate Share Hospital Payments." In that final rule, we set forth data elements necessary to