

No. 20-3188(L)

20-3189 (CON)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Town of Southold,

Plaintiff-Intervenor-Appellant

(full caption inside)

v.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental
Protection Agency,

Defendant-Appellee,

(full caption inside)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF THE CONNECTICUT AMICI IN SUPPORT OF APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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Maritime Coalition, Cross Sound Ferry
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Lower Connecticut River Valley Council of
Governments, Metropolitan Council of
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Southeastern Connecticut Council of
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TOWN OF SOUTHOLD,

Plaintiff-Intervenor-Appellant

ROSSANA ROSADO, in her official capacity as New York State Secretary of State,
BASIL SEGGOS, in his official capacity as Commissioner of the New York State
Department of Environmental Conservation, STATE OF NEW YORK

Plaintiffs-Appellants

COUNTY OF SUFFOLK

Plaintiff-Intervenor,

V.

ANDREW WHEELER, in his official capacity as Administrator of the United States
Environmental Protection Agency,

Defendant-Appellee,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DENNIS
DEZIEL, as Regional Administrator of United States Environmental Protection Agency
Region 1,

Defendants-Appellees

CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL
PROTECTION,

Defendant-Intervenor-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), The Connecticut Amici, by and through their undersigned counsel, hereby make the following disclosure statement:

The **Connecticut Marine Trades Association** is a Connecticut non-stock corporation. It has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

The **Connecticut Maritime Coalition** is a Connecticut non-stock corporation. It has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

Cross Sound Ferry Services, Inc. is a Connecticut corporation. It has no parent corporation and no public traded corporation owns 10% or more of its stock.

Electric Boat Corporation is a Delaware corporation that is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Corporation has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

The **Connecticut Port Authority, New Haven Port Authority, Lower Connecticut River Valley Council of Governments, Metropolitan Council of Governments, Southeastern Connecticut Council of Governments, South**

Central Regional Council of Governments, and Western Connecticut Council of Governments are governmental agencies.

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PRELIMINARY STATEMENT

The Connecticut amici curiae, which are:

- Connecticut Port Authority
- Connecticut Marine Trades Association
- Connecticut Maritime Coalition
- Cross Sound Ferry Services, Inc.
- Electric Boat Corporation
- Lower Connecticut River Valley Council of Governments
- Metropolitan Council of Governments
- New Haven Port Authority
- Southeastern Connecticut Council of Governments
- South Central Regional Council of Governments
- Western Connecticut Council of Governments

(hereinafter collectively referred to as the “Connecticut Amici”) file this brief, upon the consent of all parties, in support of the Appellees Andrew Wheeler (in his official capacity as Administrator of the United States Environmental Protection Agency), the United States Environmental Protection Agency, and Dennis Deziel (in his official capacity as Acting Regional Administrator of EPA Region 1) (the first three appellees collectively referred to as the “EPA”), and the Connecticut Department of Energy and Environmental Protection (“DEEP”).¹

As reflected in the EPA’s findings after a lengthy administrative process, designation of the Eastern Long Island Sound Disposal Site (“ELDS”) as an open-

¹ The Connecticut Amici state that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the Connecticut amici, their members, or their counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. Civ. P. 29(a)(4)(E).

water dredged material disposal site under the Marine Protection, Research and Sanctuaries Act (“MPRSA”) 33 U.S.C. §§ 1412(c) and 1416(f), is essential to the vitality of economic activity in coastal Connecticut. The EPA properly considered these considerations in applying the statutory and regulatory criteria governing its designation decision. The EPA’s findings on these points are supported by substantial evidence in the record. For the reasons stated in Appellees’ briefs, as supplemented by this brief, the district court’s decision granting summary judgment to Appellees and denying Appellants’ challenges to the designation of the ELDS should be affirmed.

STATEMENT OF IDENTITY AND INTERESTS OF AMICI CURIAE

The eleven Connecticut Amici, which include government agencies and private companies and organizations, have joined in this brief to demonstrate to the Court the importance of upholding the EPA’s designation of the ELDS to the residents and maritime businesses of Connecticut. The Connecticut Amici are either directly involved in maritime commerce or represent Connecticut shoreline municipalities that directly rely on the coastal economy. Due to the importance of dredging and dredge disposal to Connecticut’s maritime economy, many of the Connecticut Amici have been involved in the dredge disposal site designation process with the EPA and Army Corps of Engineers for years. All believe that the designation of the ELDS is of critical importance to Connecticut’s maritime

economy and that EPA's decision is supported by the extensive record compiled during the review and decision-making process.

The **Connecticut Port Authority** ("CPA") is a quasi-public agency that is responsible for the development of the state's ports and maritime economy.

Among other duties, CPA coordinates port development, focusing on private and public investments; pursues state and federal funds for dredging and other infrastructure improvements to maintain the navigability of all ports and harbors; works with state, local, and private entities to maximize the economic potential of Connecticut's ports and harbors; supports and enhances the overall development of maritime commerce and industries; coordinates the state's maritime policy; and serves as the governor's principal maritime policy advisor.

The **Connecticut Marine Trades Association** ("CMTA") is a trade association representing 350 members across Connecticut in the marine and boating industry from marina and boatyard owners and operators to boat brokers and dealers, subcontractors and professional service providers (including companies providing boat financing, insurance, and product distribution and fabrication). CMTA was formed to enhance public awareness of the marine industries and to encourage high standards therein; to follow policies and promote activities that will protect or improve marine ecology and the marine environment; to encourage, promote, and participate in programs concerned with safety, education, and the

marine business, and programs designed to enhance boating, the marine industries, marine ecology or marine life; to work with and provide assistance to governmental authorities with respect to laws and legislation pertaining to recreational boating and the marine industries; to offer guidance, instruction and general assistance to boat owners, particularly newcomers; and to sponsor annual functions to display developments in the marine trades and to educate the public about the marine industries.

The **Connecticut Maritime Coalition** (“CMC”) was organized in 2000. It is a non-profit trade association facilitating the competitiveness of Connecticut’s maritime industries. CMC’s membership is composed of a set of four distinct components: transportation, manufacturing, services, and commercial fishing. The maritime industry generates direct revenues in excess of \$2.6 billion in Connecticut. CMC’s activities are focused on marketing the maritime industry within the state to the public, private, and institutional sectors. The organizational priorities include fostering broad-based public consensus on the importance of the maritime industry to the state’s economy and quality of life and strengthening the interest of the maritime sector.

Cross Sound Ferry Services, Inc. (“Cross Sound”) provides daily, year-round, vehicular, passenger and high-speed passenger service between New London, Connecticut and Orient Point, Long Island, New York. Each year, Cross

Sound transports over 500,000 vehicles, including tractor-trailer trucks, and 1.3 million passengers. Cross Sound's fleet of nine vessels makes over 14,000 one-way crossings annually. The service is recognized as part of the America's Marine Highway by the U.S. Maritime Administration ("MARAD") and the U.S. Department of Transportation. MARAD has determined that Cross Sound provides "features of the ferry service that contribute significant benefits to the region and nation. The service is of regional importance, providing both resiliency and redundancy to the regional transportation system while reducing landside congestion." The service is estimated to save approximately 60 million vehicle miles annually, accounting for more than \$3.5 million in greenhouse gas benefits to the New York and Connecticut regions each year.

The **Electric Boat Corporation** ("Electric Boat") is the nation's premier submarine builder. Established in 1899, Electric Boat delivered the first submarine to the U.S. Navy in 1900, beginning a century-long history of accomplishment. Electric Boat has designed and delivered 15 of the U.S. Navy's 19 classes of nuclear submarines. Now in its second centennial of submarine building, Electric Boat is the design yard and prime contractor for the Virginia-class submarine program and is developing the next-generation of ballistic-missile submarines. Electric Boat has more than 16,500 employees, with major locations in Groton and New London, Connecticut and Quonset Point, Rhode Island. The company's

Groton shipyard is located on the Thames River, four miles south of the Naval Submarine Base in Groton. Because of its long relationship with the Navy, the concentration of past and current submariners and submarine-related design and construction, Groton is often referred to as the “Submarine Capital of the World.”

The Lower Connecticut River Valley Council of Governments

(“RiverCOG”) has 17 member towns: Chester, Clinton, Cromwell, Deep River, Durham, East Haddam, East Hampton, Essex, Haddam, Killingworth, Lyme, Middlefield, Middletown, Old Lyme, Old Saybrook, Portland, and Westbrook. RiverCOG includes four members that border Long Island Sound (“LIS”) and 12 that border the Connecticut River, the largest and longest navigable river in New England.

The **Metropolitan Council of Governments** (“MetroCOG”) represents the Connecticut municipalities of Bridgeport, Easton, Fairfield, Monroe, Stratford and Trumbull. The region encompasses about 145 square miles and has a population of about 307,607. The Port of Bridgeport is one of Connecticut three deepwater ports (New London and New Haven being the other two), and typical commerce in Bridgeport’s waters includes: several vessel repair facilities – one of which is also the U.S. Customs Port of Entry for foreign-flag maritime travelers; barge shipments of stone and sand – over 300,000 tons in 2017 (the equivalent of 12,000 truckloads); several oil tank farms whose product provides home heating oil to

homes in Fairfield County and the surrounding region; waterborne mass transportation that includes a year-round ferry service operating between Connecticut and Long Island; and an upcoming high-speed ferry operation intended to provide commuter service between Connecticut and New York employment centers.

The **New Haven Port Authority** (“NHPA”) is a quasi-governmental body established in February of 2003 pursuant to state and local law. NHPA was established in order to stimulate the shipment of freight and commerce through New Haven’s port, to develop and promote the facilities within the port district and thereby to create jobs and increase the tax base of the City of New Haven, to work with the City in maximizing the usefulness of available public funding by consolidating and coordinating efforts to assist in the waterfront, and to cooperate with the state and federal agencies in connection with the maintenance, development, improvement and use of the facilities within the port district.

The **Southeastern Connecticut Council of Governments** (“SCCOG”) represents 22 towns, cities and boroughs: Bozrah, Colchester, East Lyme, Franklin, Griswold, City of Groton, Town of Groton, Jewett City, Lebanon, Ledyard, Lisbon, Montville, New London, North Stonington, Norwich, Preston, Salem, Sprague, Stonington, Stonington Borough, Waterford, and Windham. Its members include every town that borders LIS from the Rhode Island border to

East Lyme and the towns that border the Thames River. SCCOG counts as affiliate non-voting members the state's only two federally recognized Native American Tribes, the Mashantucket Pequot Tribal Nation and the Mohegan Tribe, and affords liaison representation on its board to the Commanding Officer of the Naval Submarine Base in Groton and the Superintendent of the U.S. Coast Guard Academy in New London.

The **South Central Regional Council of Governments** ("SCRCOG"), as its name suggests, covers the south central region of Connecticut and is comprised of 15 municipalities: Bethany, Branford, East Haven, Guilford, Hamden, Madison, Meriden, Milford, New Haven, North Branford, North Haven, Orange, Wallingford, West Haven, and Woodbridge. The SCRCOG region covers approximately 570,000 people, or 1/6th of the state's population, and seven of its members are located on LIS, covering approximately 45 miles of shoreline. The Housatonic, Quinnipiac, East and Hammonasset Rivers are also within its members' boundaries.

The **Western Connecticut Council of Governments** ("WestCOG") covers a region that contains approximately 610,000 residents, which makes it the second most populous of Connecticut's nine COGs. WestCOG serves 18 member municipalities: Bethel, Bridgewater, Brookfield, Danbury, Darien, Greenwich, New Canaan, New Fairfield, New Milford, Newtown, Norwalk, Redding,

Ridgefield, Sherman, Stamford, Weston, Westport, and Wilton. With five coastal municipalities, WestCOG accounts for approximately one-fifth of Connecticut's LIS frontage, ranging from the New York border to Westport.

ARGUMENT

As explained in the Appellees' briefs, the district court properly applied the narrow and deferential standard of review prescribed by the Administrative Procedure Act to the EPA's decision. In an administrative appeal like this one, a court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under the arbitrary-and-capricious standard, judicial review of agency action is necessarily narrow." *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008). The court's review is deferential; the reviewing court may not "weigh the evidence or substitute its judgment for that of the agency." *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 102 (2d Cir. 2017) (citation omitted). The deference owed to the agency is heightened when the agency's decision involves scientific or technical questions within the agency's expertise. *See Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989).

The Connecticut Amici submit this brief to amplify the importance of the effect of the agency's decision on economic activity in coastal Connecticut and the

importance of the EPA's findings regarding such activity pursuant to the statutory framework governing the agency's decision. The EPA's decision designating the ELDS came after a lengthy administrative process that involved comments from numerous stakeholders and careful consideration of the requirements set forth in the governing statutes. EPA's decision included findings, robustly supported by the record, regarding the economic impact of its decision on Connecticut's economy. The district court correctly determined, applying the APA's deferential standard of review, that EPA complied with the governing statutes and that its decision was supported by the facts in the record.

Under the MPRSA, in selecting a site for disposal of dredged material, the EPA is required to consider, *inter alia*, "[i]nterference with shipping, fishing, recreation, mineral extraction, desalination, fish and shellfish culture, areas of special scientific importance and other legitimate uses of the ocean." 40 C.F.R. § 228.6(a)(8). The MPRSA regulations also state that sites must be selected to "minimize 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).

These regulations require that the EPA consider the impact of a disposal site designation on economic activity. In the Final Rule designating the ELDS, the EPA determined that use of the ELDS would cause minimal interference with the

aquatic activities identified in 40 C.F.R. § 228.5(a) because: (1) the site is not located in shipping lanes or any other region of heavy commercial or recreational navigation; (2) the site is not located in an area that is important for commercial or recreational fishing or shellfish harvesting; (3) use of the site would have minimal potential for interfering with other existing or ongoing uses of the marine environment in and around the ELDS, including lobster harvesting or fishing activities; (4) the adjacent, and now closed, New London Disposal Site has been used for dredged material disposal for many years and activity there has not significantly interfered with the uses identified in this regulation, but mariners in the area are accustomed to dealing with the presence of a dredged material disposal site; and (5) time-of-year restrictions imposed to protect fishery resources will typically limit dredged material disposal activities to the months of October through April, thus further minimizing any possibility of interference with the various maritime activities in the area. Joint Appendix (“JA”) 121.

Regarding the criteria in 40 C.F.R. § 228.6(a)(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”), the EPA found that the placement of dredged material in the ELDS and impacts from vessel traffic transiting to and from the ELDS would not result in any

“unacceptable or unreasonable adverse effects on the considerations noted in this criterion.” JA 125.

EPA recognized that designating “an environmentally sound open-water disposal site to allow for and facilitate necessary dredging in the eastern region of [LIS] also will yield a number of public benefits.” JA 111. The first such benefit is “economic benefits.” EPA found that there are a large number of important navigation-dependent businesses and industries in the eastern LIS region, including shipping of materials such as petroleum fuels and bulk materials, recreational boating-related businesses, marine transportation, commercial and recreational fishing, interstate ferry operations, ship building, and military and public safety operations, such as those associated with the Naval Submarine Base in Groton and Coast Guard facilities in New London. *Id.*; *see also* JA 113. The EPA concluded that:

These businesses and industries contribute substantially to the region's economic output, the gross state product (GSP) of the bordering states, and tax revenue. Continued access to navigation channels, harbors, berths, and mooring areas is vital to ensuring the continued economic health of these industries, and to preserving the ability of the region to import fuels, bulk supplies, and other commodities at competitive prices.

JA 111.

The EPA also found that “preserving navigation channels, marinas, harbors, berthing areas, and other marine resources, improves the quality of life for residents and visitors to the eastern LIS region by facilitating recreational boating

and associated activities, such as fishing and sightseeing.” *Id.* Not only are these important public uses of LIS that improve the quality of life for residents and visitors, but that they also contribute to the local economy. JA 113.

Here, despite the substantial evidence in support of EPA’s decision on these criteria and others, the Appellants seek to overturn the approval of the ELDS, which would cause serious harm to the maritime industries that form an essential part of the economy of coastal Connecticut and the wider region by detrimentally affecting navigation, economic and industrial activity, and foreign and domestic commerce.

I. The robust maritime economy of coastal Connecticut would be harmed if the ELDS designation were overturned

The coastal region of Connecticut possesses a robust maritime economy. In designating the ELDS, EPA not only found that dredging is necessary to provide for safe navigation in and around LIS, but specifically acknowledged that the marine trade industry is an important contributor to the economies of both Connecticut and New York. JA 113. Maritime industries in coastal Connecticut contribute billions of dollars to the regional and national economy and employ thousands of individuals, including:

- \$9 billion contribution of statewide maritime industry to the economy of the State of Connecticut;
- 30,000 jobs;

- \$2.7 billion in Gross State Product (GSP); and
- \$702 million in annual tax revenues.

JA 204, 384, 443, 4924.

Of the total business output, marine transportation in Connecticut contributes approximately \$1.38 billion to the regional economy. JA 383. Ferry service alone contributes \$37.5 million of the total. JA 384. Recreational boating industries in eastern Connecticut add \$362 million to the regional economy. *Id.* Additionally, commercial fishing in eastern Connecticut contributes approximately \$57 million to the economy of the LIS region, including \$22 million in coastal Connecticut. JA 440.

The maritime industry in Connecticut also contributes substantially to the national defense. Electric Boat, the nation's premier submarine manufacturer, employs approximately 10,400 people in Southeastern Connecticut. JA 4903. The Navy's submarine base in Groton, Connecticut employs roughly 10,000 people. JA 383. It is estimated that the submarine base contributes approximately \$944 million to the regional economy. JA 443.

In order to maintain the level of economic impact provided by the maritime industry to the regional economy, that industry depends on access to maritime navigation – and access to maritime navigation requires dredging and, most importantly, cost-effective and environmentally appropriate dredge disposal

options. Without such access, the viability of coastal Connecticut's maritime economy would be threatened and the possibility of dredging projects not occurring in the future is not mere speculation. In EPA's response to the New York Department of State's Coastal Zone Management Act Objection to the Proposed Designation of the ELDS (Nov. 4, 2016), EPA stated:

It should be noted here that EPA finds that without an open-water disposal site in the eastern region of Long Island Sound, some needed dredging will not be able to proceed. This is because both the [Dredged Material Management Plan for Long Island Sound (the "DMMP")] and EPA's analysis conclude that other currently identified viable methods of dredged material management (e.g., disposal at other sites, beneficial use, upland disposal, or confined in-water disposal facilities) do not presently have sufficient capacity to handle the material from all needed dredging projects over the next 30 years and some projects would likely become too expensive to carry out.

JA 3248 n.16.

A dredge slow down or stoppage due to the lack of a practical disposal option in eastern LIS will impact the entire maritime sector on an escalating basis with the greatest economic harm to fishing, ship and boating building/repairing and marinas. Within twenty years, a dredge stoppage would produce the following results, the impact of which would be most seriously felt in coastal Connecticut:

- \$398 million in losses to GSP in the region;
- Sales and income losses of \$7.4 million to recreational boating; and
- \$11 million in losses to freight transportation

JA 3869-3870.

These impacts on the maritime economy of coastal Connecticut and the eastern LIS region are unacceptable, especially when there is no basis for overturning the ELDS designation.

II. Existing disposal sites in Connecticut and Rhode Island are not a viable alternative to the ELDS

Appellants' simplistic alternative to the ELDS is for maritime business that require dredging in eastern LIS to haul the dredge material to other approved sites – including the Central Long Island Sound Disposal Site (“CLDS”) and the Western Long Island Sound Disposal Site (“WLDS”), two sites in LIS that New York approved of and that operate under the same rules proposed for the ELDS. JA 115. In its Response to the New York Department of State, the EPA made clear the need for ELDS (even though, as noted in EPA's brief, an assessment of need is not required under the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1451 *et seq.*:

EPA has decided to designate the ELDS, however, because there is a need for a site in the eastern region of the Sound and the ELDS satisfies the applicable site designation criteria and will provide an environmentally sound dredged material management option for projects from the eastern Sound that need to use it.

JA 3243.

The closest designated dredge disposal sites outside the eastern LIS region are the CLDS and the Rhode Island Sound Disposal Site (“RISDS”). JA 110. EPA has determined that both are too far from dredging centers in the eastern region of

LIS to be reasonable alternatives to the designation of ELDS. *Id.* The distance from New London Harbor to the CLDS is 34.7 nautical miles and to the RISDS is 44.5 nautical miles. *Id.* The WLDS is approximately 59 nautical miles west of New London Harbor, making it an even less feasible alternative. *Id.*

While the CLDS, WLDS, and RISDS have all been determined to be environmentally sound sites for receiving suitable dredged material, proposing to use any of them for suitable dredged material from the eastern region of LIS would be problematic, and EPA considers them to be options of last resort. *Id.* Foremost, these sites do not provide the needed dredge disposal capacity that is predicted for the region. The CLDS and WLDS are each estimated to have a disposal capacity of about 20 million cubic yards, which is not enough to take the nearly 50 million cubic yards of material that is estimated to be suitable for open-water disposal over the lifetime of the sites. JA 113-14. Furthermore, the RISDS was designated in 2005 to serve the dredging needs of the Rhode Island and southeastern Massachusetts region, and was never designed to accept dredge material from the eastern LIS region. *Id.*²

² In addition, using the CLDS or RISDS would greatly increase the transport distance for, and duration of, open-water disposal for dredging projects from the eastern LIS region. This, in turn, would greatly increase the cost of such projects and would likely render many dredging projects too expensive to conduct. Although cost was not part of EPA's CZMA consistency determination that Appellants challenge on appeal, it was part of EPA's alternatives analysis in designating the ELDS, and EPA's findings on this point were adequately

EPA recognized negative implications of forcing dredging projects in the eastern LIS region to dispose of their material in CLDS or RISDS:

Furthermore, the greater transport distances would be environmentally detrimental, in that they would entail greater energy use, increased air emissions, and increased risk of spills and short dumps (FSEIS, Section 2.1). Regarding air emissions, increased hauling distances might require using larger scows with more powerful towing vessels, which would use more fuel and cause more air pollution. Longer haul distances also may increase the amount of time necessary to complete a dredging project, resulting in an extended period of disruption to the areas being dredged.

JA 110; *see also* JA 114 (“These longer trips would result in greater energy use, increased air emissions, increased risk of spills, more difficult project logistics, and greater cost.”).

The EPA also rightfully rejected the Appellants’ suggestion that dredge material can be managed in ways other than open-water disposal:

EPA cannot and should not base a decision not to designate an environmentally appropriate disposal site on as of yet unidentified upland management options that might or might not materialize in the future for all the dredged material that needs to be managed. Such an approach would pose an irresponsible threat to safe navigation and the related recreational, commercial, public safety, and national defense activities that depend on it. If, upon EPA designation of the ELDS, there is no actual need for the site (i.e., practicable alternatives are available for every dredging project), then dredged material will not be placed there, as the practicable alternatives will be used instead.

JA 115.

supported. JA 110 (noting that “the longer haul distance more than doubles the cost to the public for the federal government to dredge the same project” and providing calculations supporting that conclusion).

As found by the EPA, and supported by the substantial evidence in the record, the absence of the ELDS would have far reaching social, economic, and environmental impacts. Marine businesses in eastern Connecticut will have to use the RISDS, CLDS or WLDS, or simply not dredge at all. Not dredging could lead to the failure of a dredging dependent business, which has obvious economic and social impacts, as noted above. Disposal of dredge material in RISDS, CLDS or WLDS from projects in eastern Connecticut would cause significant economic and environmental impacts – including competition with dredging projects from the central and western LIS regions over the limited capacity of the CLDS and WLDS, which is insufficient to handle all of expected dredge material over the next 30 years.

III. Failure to authorize the ELDS would adversely affect commercial fishing

Failure to permit the disposal of dredged material in the ELDS would detrimentally affect commercial fishing in the LIS region. The commercial fishing industry requires sufficient harbor depth for vessels to navigate in and out of harbors. “The lack of dredging and resultant shoaling in specific harbors could result in potential groundings, collisions, tidal delays, and spoilage of catch and lost fishing days.” JA 440. As a result of these harmful effects, some fishermen could relocate to other harbors with sufficient depth, thus increasing their operating

costs. *Id.* Some fishermen may leave the industry if unable to meet the increased operating costs. *Id.*

In addition to aiding the commercial fishing industry through the maintenance of sufficient navigational depth, the ELDS site would not interfere with fish populations. Contrary to Town of Southhold's arguments, Southhold Brf. at 33-34, EPA considered and made well-supported findings about ELDS' impact on fish populations. In evaluating the location of the site, the EPA "carefully evaluated the potential effects on commercial and recreational fishing." JA 125. The EPA concluded that "there would be no unreasonable or unacceptable adverse effects." *Id.* The EPA also determined that any contaminants contained in the dredged material would not have any significant adverse effects on fish, the ELDS site does not encompass any important or sensitive fish habitats, there was no unacceptable impact due to the physical effects of disposal, and vessel traffic associated with dredging would not have any unacceptable effects on fishing. *Id.*

IV. Failure to authorize the ELDS would adversely affect maritime navigation

The maritime industries of coastal Connecticut are dependent on dredging of sediment to maintain sufficient depth in harbors to ensure safe navigation. Buildup of sediment can cause shoaling of channels and anchorages of harbors. JA 441. Over time, these phenomena cause a decrease in the average controlling depths of harbors, which in turn limits navigational access to harbors. *Id.* These navigational

restrictions would increase operating costs by forcing some commercial operators to either shift to other ports, alter their vessels in response to the reduced access, or shift to land-based transportation. *Id.* Allowing dredging disposal at the ELDS site will avoid these harmful results by “improv[ing] and facilitat[ing] navigation in many of the harbors, bays, rivers and channels around Eastern [LIS].” JA 125. Additionally, the ELDS site was selected to avoid any deleterious impact on shipping and navigation. The ELDS site is “outside of currently designated shipping lanes.” JA 482. The final ELDS location (its eastern boundary is 0.467 nautical miles west of the western boundary of the New London Harbor approach lane and submarine transit corridor) will “reduce any potential for conflicts between use of the disposal site and submarine and deep draft commercial marine traffic.” JA 125. While vessels transporting dredged material may cross shipping lanes and the current route of the Orient Point-New London ferry, any potential traffic conflicts “would be of short duration due to the limited dredging season and the moderate volumes of dredged material.” JA 482.³ Moreover, “[v]essel traffic generated by disposal activity [at the former New London Disposal site] is expected to be similar to that which has occurred over the past 20-30 years, which has not interfered with other shipping activity.” JA 125.

³ The operator of the Orient Point-New London ferry, Cross Sound Ferry Services, Inc., is one of the Connecticut Amici submitting this brief in support of Appellees.

V. Failure to authorize the ELDS would adversely affect recreational use of Long Island Sound

The ELDS site would also aid recreational use of LIS. In the Final Rule, EPA found that dredging is necessary to provide recreational boating access to LIS. JA 113. As with commercial vessels, recreational boating requires the maintenance of sufficient navigational depth in harbors. JA 443. Shoaling of channels would lead to reduced opportunities for recreational boating. *Id.* This downturn would reduce revenues to marina, ports, and other service providers. *Id.* In turn, the reduction of such revenues would detrimentally affect the regional economy as such businesses would have less to spend on payrolls, supplies, and services. *Id.* In addition, the ELDS site would create no adverse impact to the recreational use of LIS. All of the LIS disposal sites (including the ELDS site) are at least 1.7 nautical miles (3.2 kilometers) from public beaches in Connecticut and New York. JA 483. The distance between the site and the shore reduces the potential for any adverse impact on recreational activities such as swimming, sunbathing, or other use of beaches. *Id.*

VI. Failure to authorize the ELDS would adversely affect naval operations and defense manufacturing

Southeastern Connecticut is home to both a major naval base – Naval Submarine Base New London, located in Groton – and a premier defense contractor – Electric Boat, also located on the banks of New London Harbor in

Groton. The Submarine Base requires dredging of sediment to maintain sufficient navigational depth at its piers. The submarines stationed in Groton have a maximum draft of 36 feet. JA 443. If dredging does not take place, shoaling will eventually make the base inaccessible to submarines.⁴ *Id.* Thus, a suitable disposal site for the dredged material is required. Furthermore, the proposed ELDS site would not interfere with the operations of the base, as the ELDS boundaries lie outside the submarine transit corridor from LIS into New London Harbor and the Thames River. JA 125.

⁴ The precise time the base would become inaccessible to submarines would depend on the rate of shoaling. JA 443.

CONCLUSION

For the reasons set forth herein and in Appellees' briefs, the district court's judgment dismissing Appellants' claims should be affirmed.

**THE CONNECTICUT AMICI:
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Marine Trades Association, Connecticut
Maritime Coalition, Cross Sound Ferry
Services, Inc., Electric Boat Corporation,
Lower Connecticut River Valley Council
of Governments, Metropolitan Council of
Governments, New Haven Port
Authority, Southeastern Connecticut
Council of Governments, South Central
Regional Council of Governments,
Western Connecticut Council of
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Civil Procedure 29(a)(5) and 32(g)(1) and Second Circuit Local Rules 29.1(c) and 32.1(a)(4), I hereby certify that the foregoing document complies with the type-volume requirements:

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/s/ Linda L. Morkan
Linda L. Morkan

CERTIFICATE OF SERVICE

Pursuant to Rules 25 and 31 of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was filed electronically and notice of the filing will be sent to all counsel of record via e-mail by operation of the Court's electronic filing system.

I also certify that on this 30th day of April 2021, I caused 3 copies of the foregoing brief to be dispatched to the Clerk of the Court and 2 copies to counsel for each party as detailed below via third party commercial carrier with instructions for delivery within three (3) days.

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