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FEDERAL REGISTER

40 CFR Part 228

Ocean Dumping Regulations

[FRL-3823-2]

RIN 2040-AB61

56 FR 8133

February 27, 1991

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today revises the list of designated **ocean** dumping sites as set forth in 40 CFR part 228. This revision is necessary to eliminate two unused and un-needed sites. The revision **de-designates** the Gulf **Ocean** Incineration Site located in the Gulf of Mexico and the Acid Waste Site in EPA's Region II.

EFFECTIVE DATE: This rule becomes effective on March 29, 1991.

ADDRESSES: Supporting information for this final rule is available for inspection and copying at the Environmental Protection Agency Public Information Reference Unit, 401 M Street SW., room 2402, Washington, DC 20460. The Environmental Protection Agency's public information regulations (40 CFR part 2) provide that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: John Lishman at (202) 475-8448, Marine Operations Division, Office of Marine and Estuarine Protection (WH-556F), 401 M Street SW., Washington, DC 20460.

TEXT: SUPPLEMENTARY INFORMATION:

1. Description of Final Rule

Today's final rule **de-designates** two **ocean** disposal sites designated in *40 CFR 228.12(b)*. The sites being **de-designated** are no longer being used. The **de-designated** sites are the Gulf of Mexico **ocean** incineration site (*40 CFR 228.12(b)(1)*), and the Region II acid waste **ocean** dumping site (*40 CFR 228.12(b)(2)*). n1

n 1 Today's final rule reflects earlier rulemaking which extensively renumbered the list of **ocean** dumping sites (*55 FR 3692* (February 2, 1990)). Thus, while the proposal referred to the Acid Waste Site -- Region II as appearing at *40 CFR 228.12(b)(7)*, today's final rule reflects the fact that this site subsequently was renumbered to appear at *40 CFR 228.12(b)(2)*.

De-designation of these sites was previously proposed at 55 FR 3693 (February 2, 1990). As explained in the preamble to that proposal, these sites are being **de-designated** because they are no longer needed and the Marine Protection, Research, and Sanctuaries Act (MPRSA), as amended by the **Ocean** Dumping Ban Act (Pub. L. 100-688), establishes prohibitions on **ocean** disposal of industrial waste which have effectively acted to bar the use of these sites. The preamble to the proposed rule **de-designating** these sites sets forth the rationale for the **de-designation** of these two sites, and readers should refer to the proposed rule's preamble for further details.

2. Public Comments on Proposal

The public comment period for the proposed rule closed on March 19, 1990. The Agency received a total of 134 letters in response to the proposed rule from congressional members, State and local governments, the general public, and environmental groups. No comments were received from prior or potential users of these two sites.

As will be discussed further below, only two letters raised questions regarding the proposal. All of the other comment letters received expressed support for the proposed rule or general opposition to the **ocean** disposal of industrial wastes. Copies of all the comments have been included in the administrative record for today's final rule, and may be inspected at the address set forth above.

One of the comment letters that raised a question about the proposal expressed support for **de-designation** of the two sites addressed in the proposed rule, but went on to recommend expanding the proposal to include **de-designation** of the Cellar Dirt Site located in Region II off the coast of New York/New Jersey. By the terms of its designation, the Cellar Dirt Site may be used only for excavation dirt and rock, broken concrete, rubble, tile, and other nonfloatable debris. 40 CFR 228.12(b)(8). The Cellar Dirt Site has not been used since 1988, and there are no outstanding permits or pending permit applications for its use. Therefore, the Agency is considering undertaking a rulemaking to **de-designate** this site if it determines that there is no demonstrable need for this site.

The second letter opposed the **de-designation** of the Gulf **Ocean** Incineration Site. The writer indicated that he had seen no data indicating there had been contamination of onshore air from incineration activities at the site and that burning of cane fields and operation of buses in some local cities causes more air contamination than incineration activities at the site. In addition, the writer stated that the Federal government already has the power to control **ocean** incineration through the requirement for a permit. The writer indicated that incineration is the best way to dispose of some toxic chemicals and that instead of finally **de-designating** the Gulf **Ocean** Incineration Site, the most prudent action would be to use designated areas with permits issued on an as-needed and as-studied basis.

The Agency's action in **de-designating** this particular site is not based upon an assessment of its potential on-shore air impacts, nor is it based on a judgment as to the overall merits of incineration-at-sea. Rather, this action is based upon changed circumstances surrounding this particular site. As described more fully below, the Agency continues to believe that **de-designation** of the Gulf **Ocean** Incineration Site is appropriate.

As pointed out in the proposed rule's preamble, the MPRSA was amended in November 1988 by the **Ocean** Dumping Ban Act (ODBA) to categorically prohibit the **ocean** dumping of sewage sludge and industrial waste. Specifically, ODBA establishes three key prohibitions on dumping as follows. First, ODBA amends the MPRSA to provide that no person shall **ocean** dump, or transport for purposes of **ocean** dumping, sewage sludge or industrial waste unless, within 270 days of enactment (i.e., August 14, 1989), such person has entered into an agreement to terminate such dumping and obtained a permit under the MPRSA. MPRSA, section 104B(a)(1)(A). Second, ODBA amends the MPRSA to provide that it shall be unlawful for any person to **ocean** dump, or transport for purposes of **ocean** dumping, sewage sludge or industrial waste after December 31, 1991, and provides penalties for dumping beyond that date. MPRSA, section 104B(a)(B). Third, ODBA amends the MPRSA to prohibit new entrants by forbidding the issuance of permits for the **ocean** dumping or transportation for the purpose of dumping of sewage sludge or industrial waste unless the permittee was previously authorized to dump such materials as of September 1, 1988, by an MPRSA permit or court order. MPRSA section 104B(a)(2). Because there are no existing **ocean** dumpers of industrial waste and ODBA has amended the MPRSA to prohibit new entrants, the ODBA prohibitions effectively act to bar any **ocean** dumping of industrial waste.

The MPRSA, as amended by ODBA, broadly defines "industrial waste" as any solid, semisolid, or liquid waste generated by a manufacturing or processing plant, other than (1) **dredged material** dumped by the Corps of Engineers or dumped pursuant to a Corps of Engineers permit and (2) waste from a tuna cannery operation in American Samoa or Puerto Rico dumped pursuant to an EPA issued permit. MPRSA, sections 104B(k) (3) and (4). The designation for the

Gulf **Ocean** Incineration Site (*40 CFR 228.12(b)(1)*) states the site's primary use is for "[a]t sea incineration primarily for organochlorine compounds." These particular types of wastes would typically be generated by manufacturing or processing plants. Moreover, as noted in the proposed rule's preamble, the bulk of potentially **ocean** incinerable hazardous wastes are generated by the petroleum and chemical industries. Thus, potential use of the Gulf **Ocean** Incineration Site would primarily be for the incineration-at-sea of wastes that would fall within the category of industrial waste as defined in ODBA.

As discussed in the proposed rule's preamble, the ODBA amendments prohibiting the dumping at sea of industrial waste, also extend to the incineration-at-sea of industrial waste. *Seaburn, Inc. v. EPA*, 712 F. Supp. 218 (D.D.C. 1989) (upholding EPA's interpretation that the ODBA amendments bar the issuance of permits for the incineration-at-sea of industrial wastes). Because the MPRSA, as amended by ODBA, operates to bar the incineration-at-sea of industrial waste, and the type of waste for which the site was primarily designated fits the definition of industrial waste, the statute acts to severely restrict, if not wholly eliminate, the ability to use this site for its primary purpose.

As also noted in the proposed rule's preamble, the site designation for the Gulf **Ocean** Incineration Site further provides that "[i]ncineration of other [i.e., non-organochlorine] wastes will require research studies or equivalent technical documentation to determine acceptability for **ocean** incineration." *40 CFR 228.12(b)(1)*. Thus, the suitability of this site for incineration of non-industrial wastes is unclear, and any such potential use of this site would require research evaluations. In addition, the site has not been used for incineration at sea since 1982, there are no pending applications for its use, nor were any comments on the proposed **de-designation** received from past or potential users expressing possible future interest in use of the site.

In conclusion, the statutory prohibitions on the **ocean** disposal of industrial waste have drastically limited, if not wholly barred, the ability to use the site for the primary purpose for which it was designated. The environmental acceptability of this site for incinerating non-organochlorine wastes is unclear and would require research studies. The Agency is unaware of potential future users for this site. In short, the fundamental circumstances giving rise to the designation of this site have changed, and the Agency believes that maintaining the designation of this particular site in light of such changed circumstances is inappropriate. Accordingly, the Agency is taking final action to **de-designate** the site.

In reviewing the comments received, the Agency also noted that a number of commenters expressing support for the proposed action mistakenly believed that there were two **ocean** incineration sites located in the Gulf of Mexico. In fact, there is only one such site, which is identified at *40 CFR 228.12(b)(1)*, and today's final rule completes the **de-designation** of that site.

3. Related Rulemaking

The Agency plans to take additional actions related to **ocean** dumping sites in the near future. The Agency is aware of typographical and technical errors in the listing of several **ocean** dumping sites as set forth in the Code of Federal Regulations. The Agency also believes that the format and arrangement of sites listed in the Code of Federal Regulations should be modified in order to identify approved **ocean** dumping sites more clearly and legibly. Finally, the Agency is aware that there are expired or terminated **dredged material** sites included in the existing list of sites. The Agency intends to take future action to correct identified errors in site designations, reformat the display of sites in the Federal Register, and remove expired or terminated **dredged material** sites from the list of sites published in the Code of Federal Regulations.

4. Executive Order 12291

Executive Order 12291 (*46 FR 13193*, February 9, 1981) requires that a regulatory agency determine whether a new regulation is "major," and therefore subject to the requirement for a Regulatory Impact Analysis. Under the Executive Order, a major rule is defined as a regulation that is likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State and local government agencies, or geographic areas; or

(3) Significant adverse effect on competition, employment, investment productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

As discussed in the preamble for the proposed rule, none of the sites being **de-designated** is being used by any **ocean** dumpers. In addition, use of these sites is severely restricted if not precluded by virtue of the **Ocean** Dumping Ban Act's prohibitions on the disposal of industrial waste at sea. Pub. L. 100-688, section 1002. Accordingly, today's final rule does not have any significant economic impacts, and thus does not meet the criteria established by Executive Order 12291 for classification as a major rule.

Executive Order 12291 further requires, regardless of whether a rule is "major," that it be submitted to the Office of Management and Budget for review. Today's final rule was submitted to the Office of Management and Budget for review as required by that Executive Order.

5. Paperwork Reduction Act

The Paperwork Reduction Act, *44 U.S.C. 3501 et seq.*, is intended to minimize the reporting and recordkeeping burden on the regulated community as well as minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and recordkeeping requirements affecting 10 or more non-Federal respondents be approved by the Office of Management and Budget. Because today's final rule does not establish or modify any information and recordkeeping requirements it is not subject to the requirements of the Paperwork Reduction Act.

6. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), *5 U.S.C. 601 et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities and defines them as follows:

- (1) Small governmental jurisdictions -- any government of a district with a population of less than 50,000.
- (2) Small business -- any business that is independently owned and operated and not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.
- (3) Small organization -- any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

None of the sites being **de-designated** is used by any **ocean** dumpers. In addition, use of these sites is severely restricted if not precluded by virtue of the **Ocean** Dumping Ban Act's prohibitions on disposal of industrial waste at sea. Accordingly, EPA has determined that today's final rule does not have a significant impact on a substantial number of small entities and that a Regulatory Flexibility Analysis therefore is unnecessary.

List of Subjects in 40 CFR Part 228

Water pollution control.

Dated: February 19, 1991.

William K. Reilly,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, part 228 of 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.

§ **228.12** [Amended]

2. Section **228.12** is amended by removing and reserving paragraphs (b)(1) and (b)(2).
[FR Doc. 91-4621 Filed 2-26-91; 8:45 am]

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