

11/28/2016

United States Coast Guard

15 Mohegan Ave

New London, CT 06320

RE: Anchorage Grounds, Hudson River; Yonkers, NY to Kingston, NY Docket Number USCG–
2016–0132

Why More Anchorage Grounds Will Inhibit and Repute All

Progress Made in Cleaning the Hudson River

I. Who I am, Why I am affected, and What I will Argue:

My name is Trey Bowman, and I am a lifelong resident of the Hudson Valley. I live approximately 30 minutes from the Hudson River, not far from the proposed Newburgh Anchorage Grounds. I am arguing not simply because I am required to for my Environmental Law class, but because I believe that this proposal bares greater costs than benefits. For far too long, agencies have made decisions that forget to assess the affect it has on the current “younger” generation, in addition to the future generations that currently have no voice. The proposal at hand presents blatant violations of laws it is bound to abide by, and therefore I respectfully urge the United States Coast Guard to not approve this proposal. I present the following arguments in support of my request:

- How Regulations of Jurisdiction tie this to Environmental Law Requirements;
- How the National Environmental Policy Act’s requirements were violated;
- How this proposal meets the threshold to require an EIS;

- How this meets each requirement of a “major Federal action significantly affecting the quality of the human environment”;
- Why this proposal would violate the New York Department of Environmental Conservation’s river cleanup efforts;
- How this proposal poses a taking and fails to meet the interagency meeting requirements of the Endangered Species Act.

II. **How Regulations of Jurisdiction tie this to Environmental Law Requirements:**

The U.S Coast Guard (USCG) acts as both a federal agency and a military service branch simultaneously. As an agency, it is officially regarded as a part of the Department of Homeland Security, while its military capacity is governed by the Department of the Navy (USCG). The ability of the U.S Coast Guard to partake in rulemaking, and the subsequent enforcement of those rules, stems from powers delegated to them by the Secretary of the Department of Homeland Security. The Secretary is responsible for the promulgation of rules surrounding navigable waters, which has hence been redelegated to the Coast Guard by the Secretary.

This delegation is enabled by 33 U.S.C. 1224, which is titled “Considerations by Secretary”. This statute lists the duties and responsibilities that the secretary must adhere to, the scope of which is extrapolated under sub-section (a): “take into account all relevant factors concerning navigation and vessel safety, protection of the marine environment, and the safety and security of United States ports and waterways, including but not limited to”. Not only is the mention of the environment at the beginning of the outline of duties, but is once again the focus under 33 U.S.C. 1224 (a)(6). Here, the statute specifically mentions environmental factors. Therefore, the enabling legislation is

grounded with an emphasis on the preservation of the environment, and thus this proposed rule must adhere to those considerations. It also establishes a connection, and thus a subjugation, of any rules to environmental statutes.

III. How the National Environmental Policy Act's requirements were violated:

As with any federal action promulgated by a federal agency, the proposal is subject to meeting the requirements of National Environmental Policy Act (NEPA) of 1969. NEPA's purpose is detailed under 42 U.S.C. 4321 (2) in which Congress declared that:

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

This sets the scaffolding upon which any regulation or rule must be constructed, for the purpose demonstrates that there is an obligation to ensure the environment is left unscathed by them. This requirement is one that the U.S. Coast Guard, as a Federal agency, must adhere to. Thus, the question becomes whether the proposed rule by the U.S. Coast Guard meets the threshold for NEPA's provision of requiring an Environmental Impact Statement (EIS) to apply.

IV. How this proposal meets the threshold to require an EIS:

The answer to that question is found in 42 U.S.C. 4331 (102). This section of the statute gives the directive to all federal agencies as to what they must be done prior to

issuing a rule or regulation to maintain compliance with NEPA. The statute 42 U.S.C. 4331 (102) (c) states:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The threshold extrapolated from this is all “major Federal actions significantly affecting the quality of the human environment”. NEPA applies to all federal actions, but the requirement of a detailed statement, i.e. an EIS, is what is required for proposals that meet this threshold. The alternative is an Environmental Assessment or Categorical Exclusion, if that threshold is not met.

V. How this meets each requirement of a “major Federal action significantly affecting the quality of the human environment”:

There is precedent surrounding each component “major Federal action significantly affecting the quality of the human environment” because Congress did not create substantive environmental standards through NEPA. Rather, it only produced the

minimum procedural requirements for an agency to comply with. Therefore, the development of a standard came through case law.

One of the first cases was Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Although brought under the pretenses of a NEPA violation, the main issues focused on violation of other major acts. Regardless, the standard espoused from this precedent was the narrow review of “arbitrary and capricious”, which coheres to the standard brought forth by the Administrative Act (APA). A later case generated another standard of review. That case, Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973), was one of first impression in which the court was addressing what standard to use when the action met the “major Federal action” criterion but not the “significantly affecting the human environment” criterion. The result was the court advocating for use of the “reasonableness standard”. The reasoning of the court was as follows:

The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review.

The purpose of NEPA would fail to be met if the courts only utilized the “arbitrary and capricious” standard, since an action could be minor but significantly affect the human environment, and thus not require an EIS. Henceforth, this would produce a large gap of cases where EIS’s should have been constructed but were not because they failed to meet the entire requirement. Therefore, there are multiple standards applied in answering questions regarding NEPA’s EIS requirement, with the latter described being the laxer of the two.

In response, legal scholars took these two standards and examined it in correlation with the legislative history of NEPA. In a law review written by Claire M. Desrosier's titled *Major Federal Actions Under the National Environmental Policy Act*, she argues the following:

Therefore, by interpreting the phrase "major Federal actions significantly affecting the quality of the human environment" as involving primarily questions of law, rather than fact, the reviewing court is no longer bound by the narrower standard. Agency decision-making generally involves mixed questions of fact and law.

The question at hand is indeed a mixture of fact and law, and although the reviews vary in their degree of narrowness, the result is the same: An Environmental Impact Statement is necessary for this proposal by the USCG.

To begin, this rulemaking is a "major" action. In Scherr v. Volpe, 466 F.2d 1027 (1972), the question of whether the highway construction at hand constituted a major change, as it only covered a 4.1-mile section of highway. The court cited Federal Highway Administration Policy and Procedure Memorandum P.P.M. 90-1 (1971) as its reasoning for determining that it was major. It stated that:

(b) Major upgrading of an existing highway section resulting in a functional characteristic change (e.g., a local road becoming an arterial highway). Such changes usually result by adding lanes, interchanges, access control, medians, etc., and require extensive right-of-way acquisition and construction (grading, base, paving, bridges, etc.) which have the potential of significantly affecting the environment."

The proposal by the Coast Guard is 43 berths at ten locations spread across nearly 100 miles of the Hudson River. It would add access controls, interchanges, right of way acquisition by increased traffic and extensive construction. Although this is comparing highway construction to waterway construction, it is necessary to apply it in this case, since both are means of transport in interstate commerce and have similar governances for movement along them. Hence, this constitutes a major action.

Second is to address whether this is a federal action. The precedent surrounding this definition is straightforward and provided by DOT v. Public Citizen, 541 U.S. 752, 763 (U.S. 2004). The Supreme Court found that “major Federal action is defined to include actions with effects that may be major and which are potentially subject to Federal control and responsibility”. As this proposal is fully subject to the U.S. Coast Guard’s, which is the federal agency with discretion for the necessary permitting, it establishes that this proposition is indeed a federal action.

Finally, this proposal must be one that “significantly affects the human environment”. Although these factors are defined in separate cases, there is one that defines this entire portion: Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). The court, in determining whether an EIS was required for the construction of a detention center in downtown Manhattan, found that an action that meets this criterion is defined as:

Environmental subject areas [that may display significant impact] include, but are not limited to:

(1) Human population distribution changes and its effect upon urban congestion (including vehicular traffic), water supply, sewage treatment facilities, other public services, and threats to health:

(2) Actions which directly and indirectly affect human beings through water, air, and noise pollution, and undesirable land use patterns.

The proposed action would inherently cause an intensification of boat traffic on the Hudson River. In turn, this would pose a greater threat to a safe water supply under the increased chance of an oil spill. Furthermore, there would be an increase in noise pollution, which is defined as a significant adverse effect on the human environment.

It has been proven that this proposal meets all the criterion of MFASAQHE. Consequently, the lack of an EIS being produced, whether a draft or a final version, is a blatant violation of NEPA. This is an opinion shared by several commenters, including State Senator George Latimer of the 37th District of New York, which represents Yonkers. Yonkers is one possible site of anchorage expansion as part of this proposal. In correlation with this, another violation of NEPA has been generated.

This proposal also fails to adhere to the guidelines for “significance” provided by the U.S Coast Guard’s NEPA handbook, *Tools for Decision Making: Environmental Considerations*, written by David Reese, COMDT G-SEC-3. The factors of significance are Geology/Soils, Air Quality, Topography, Infrastructure, Environmental Justice, Hydrology/ Floodplains/Wetlands/Water Quality, Land Use, Vegetation/Wildlife/ Threatened and Endangered Species, Historic/Cultural/Archeological Resources, and Socio-economic factors. This is based off 40 CFR 1502.16, which dictates that these factors must be examined under multiple lenses.

Finally, the failure to fabricate and make public an EIS for comment is also violation of NEPA. Under 40 CFR 1503.1, an agency is required to invite comment from

a multitude of distinct groups. The statute 40 CFR 1503.1 (a)(4), which specifically governs the collection of state and local reviews on draft EIS's, and states that they must "request comments from the public [on the EIS]". In the absence of an EIS being made public, let alone produced, the U.S. Coast Guard has again clearly violated NEPA once again. The entire commenting process has thus failed, as insufficient information has been produced to implore the collection proper and informed comments.

VI. Why this proposal would violate the New York Department of Environmental Conservation's river cleanup efforts:

The lenses in which impact factors must be considered are provided under 40 CFR 1502.16. This statute essentially states that direct, indirect, and cumulative impacts, along with possible conflicts between the objectives of the proposal and current federal, state, and/or local land use policies are the pretenses along which environmental consequences must be measured. Herein lies a major issue, as the possible effects of this proposal strike a major conflict with the New York Department of Environmental Conservation's "Hudson River Estuary Action Agenda, 2015-2020" ("Department of Environmental Conservation").

This action plan is one that is formulated under the Hudson River Estuary Management Act, Environmental Conservation Law § 11-0306, 1987 ("Department of Environmental Conservation"). The act establishes the entire Hudson River, including its "tidal waters, the tidal waters of its tributaries, and wetlands from the federal lock and dam at Troy to the Verrazano-Narrows" as an estuarine district. Hence, the area affected by this proposal is part of what is managed by this conservation act. The area of focus includes emphasis on Clean Water, Resilient Communities, Vital Estuary Ecosystem,

Estuary Fish, Wildlife, and Habitats, Natural Scenery, and Education, River Access, Recreation, and Inspiration. This effort has “increased water quality in the watershed, protected over 46,000 acres, increased fish populations for an improved economic output of \$7.5 million, and enhanced waterfront communities along the shoreline in nearly its entirety” (“Department of Environmental Conservation”). This renders this as undoubtedly New York’s largest conservation and restoration effort to date. Therefore, the implementation of this proposed anchorage plan would cause a drastic and adverse impact on this effort by leading to environmental degradation along a large scope of factors.

This has led to the common belief among commentators on this rulemaking that to strike a balance that enables continued conservation and restoration, along with increased economic output, which is achieved at the expenditure of increased risk of water pollution, noise pollution, and major waterway traffic changes, is impossible.

VII. How this proposal poses a taking and fails to meet the interagency meeting requirements of the Endangered Species Act:

The Endangered Species Act (ESA), passed in 1973, was developed to protect both threatened and endangered species from further harm. The Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) is a species that lives in a handful of habitats, including the Hudson River. In 2009, the Natural Resources Defense Council (NRDC) petitioned the National Marine Fisheries Service (NMFS), under 50 CFR 424.14, to list the species as endangered and to define its critical habitat (Jones-Burns). In 2012, under 77 FR 5880, the species was listed by the NMFS and the Hudson River Estuary was defined as part of its critical habitat (Jones-Burns). Therefore, certain procedures must be

adhered to in going forward with the Coast Guard's proposal, as adverse effects are to be expected.

The issue at hand is the expected adverse effects of an increased level of dredging of the river floor. This is caused by anchors dragging on the river floor, leaving temporary scars in the estuary, which negatively impacts sturgeon breeding. It has been concluded that the Hudson River area most likely to be impacted by this proposal is a key "foraging and refuge habitat for early life stages of the Atlantic Sturgeon" (Van Eenennaam). This would trigger Section 9 of the ESA, commonly known as the "take prohibition".

Essentially, this prohibition forbids the unauthorized "take" of a listed species and/or its critical habitat. A "take" is described by the ESA as any action that harasses, harms, pursues, hunts, shoots, wounds, kills, traps, captures, or collects any threatened or endangered species. A "harm" has been found to include any significant habitat modification that will potentially kill or injure a listed species through damage of areas that enable essential behaviors, such as reproduction. By virtue of the implementation of more anchorage grounds, this dredging would compose a harm.

Hence, to maintain compliance with the ESA, the USCG must adhere to Section 7 of the ESA. That section requires consultation with the relevant agency ("Endangered Species Act"). In this case, the agency to consult is the NMFS. The proper procedures for this consultation are found under 50 CFR Part 402, and in doing so will remove liability for any violations by producing possible alternatives and/or an Incidental Take Permit (ITP). That permit would allow the construction if it is deemed plausible to do so, but only without major infliction of damage on the species. However, it is the belief, once

again shared by multiple commentators, including Dr. James Madsen of the Geological Sciences Department at the University of Delaware, that this proposal offers too high a risk for too little a reward.

VIII. Conclusion

In conclusion, this proposal has failed to meet a multitude of essential criteria of NEPA and poses a possible violation of the ESA. It has been proven that the regulation is subject to the EIS threshold by the substantiating, through precedent, that it meets the standard of MFASAQHE, and that even after following all ESA procedures, it poses too great a risk. Henceforth, it would be both irresponsible and a clear violation of multiple laws to continue with this rule proposal, and thus the U.S. Coast Guard must abandon this action.

Works Cited

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40 CFR 1502.16

40 CFR 1503.1

50 CFR 402

50 CFR 424.14

77 CFR 5880

33 U.S.C. 1224

42 U.S.C. 4321 (2)

42 U.S.C. 4331 (102)