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Domestic Environmental Law

Controversy Grows Over Proposal for New Hudson River Anchorages

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On June 9, at the request of the local commercial shipping industry, the U.S. Coast Guard published an advance notice of proposed rulemaking to establish several new Hudson River anchorage locations between Yonkers and Kingston.¹ In recent years, shipping traffic on the Hudson has expanded, most notably from crude oil shipments from North Dakota arriving by rail to the Port of Albany that are then transferred to barges and ships for delivery along the east coast. The shipping industry asserts that new anchorages are needed for safety, supply chain management, and environmental protection, while environmental groups and municipalities that oppose the proposal dispute the industry's assertions and have requested a full environmental review.

Proposal Genesis

Under the Rivers and Harbors Appropriation Act of 1915, as amended, the Coast Guard is:

authorized, empowered, and directed to define and establish anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest...that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation...and to adopt suitable rules and regulations in relation thereto; and such rules and regulations shall be enforced by the Coast Guard under the direction of the Secretary of Transportation. [33 U.S.C. §471(a)]

In 2015, in response to reports of vessels anchored outside designated areas, the Coast Guard issued a Marine Safety Information Bulletin reminding vessel operators that their vessels can only anchor in federally designated anchorage grounds. The Bulletin, quoting the federal regulations, stated that "except in cases of great emergency, no vessel shall be anchored in the navigable waters of the Port of New York outside of the anchorage areas established in this section," and that "failure to comply with these regulations could result in a civil penalty of up to \$40,000."²

The recent increase in shipping traffic on the Hudson River is due largely to the growing shipment of crude oil from the Bakken oil fields in North Dakota by rail to Albany, where it is transferred to ships. In 2011, the Port of Albany was expanded to handle the crude oil shipments, transforming it into a major hub for oil shipments and a key supplier to refineries in New York Harbor, Philadelphia, and Brunswick, Canada.

With the resulting increased traffic on the Hudson River, approved anchorages became insufficient and barges began anchoring not just overnight but for several days at a time waiting for a spot to dock in the Port of Albany. Such was the state of affairs from late 2012 through

spring of 2015. Last year, the drop in oil prices slowed rail shipments to Albany and consequent river traffic.

In January, the Tug and Barge Committee of the Maritime Association of the Port of New York/New Jersey (Maritime Association) requested that the Coast Guard establish anchorage spots for up to 43 vessels at 10 locations between Yonkers and Kingston. The letter indicates that the existing anchorages cannot accommodate existing traffic and that new, legal anchorage grounds would improve navigation along extended portions of the Hudson River by allowing for safer and more efficient flow of vessel traffic, particularly during low tide or bad visibility, and will help avoid crashes and spills.³

In response, the Coast Guard published an Advance Notice of Proposed Rulemaking, setting forth the Maritime Association's proposal and requesting comments and information. According to the Coast Guard's Advance Notice, the approximate depths of the proposed anchorage grounds range from 21 to 65 feet, which would accommodate a variety of vessel types and configurations and would not interfere with the areas where ships have historically transited the Hudson.⁴ Due to the interest and large number of public submissions so far (over 2,100), the comment deadline has since been extended from September until Dec. 6. As noted by the Coast Guard, this is an early, preliminary step in the formal rulemaking process, and it seeks to "learn all possible navigational, environmental, terrestrial, and other effects of adding anchorages on the Hudson River," in order to "gather information that defines the multiple stakeholder considerations [it needs] to incorporate when considering [the] proposed rule for potential anchorage grounds."⁵

Marine Industry Position

The American Waterways Operators, the national trade association for the U.S. tugboat, towboat and barge industry, cites several safety concerns in its comment letter which weigh in favor of the proposal.⁶ It asserted that anchoring outside of designated anchorage areas has become necessary over the last two decades due to increased vessel traffic, larger equipment and a lack of dredging that has resulted in shallow draft areas along the river. It argues that creating additional anchorage areas is the most effective way for the Coast Guard to provide the towing industry the authorization it needs to continue the safe navigation practices it has followed for 20 years, and will facilitate daylight navigation, provide much needed anchorage space in shallow draft channels and enable effective communication between waterway users.

The Hudson River Pilot's Association also supports the proposal, stating that the use of marine transportation in the flow of goods through upstate New York is vital to the local and national economy.⁷ The association stated that the nature of marine transportation requires vessels to occasionally anchor for various reasons, such as inclement weather, restricted visibility, heavy ice, berth congestion, mechanical issues, crew fatigue or tidal constraints. In inclement weather, the association argues that it is unsafe for vessels to pass under bridges or meet other vessels in the narrow channels of the Hudson, and having a vessel securely anchored in a federally designated anchorage is in the best interest of safety since the alternative is to have the vessel adrift. There are certain stretches of the river that are too narrow to allow safe anchoring of commercial vessels.

Environmental Opposition

While proponents insist that the anchorages will promote safety on the river, the growing opposition believes the proposal will wreak havoc on the environment, tourism, drinking water, and the overall health of the Hudson River, and disputes the industry's claims about safety and current anchorage practice.

The Hudson River has made great environmental strides since it served primarily as a waste repository, and its surrounding communities have benefitted greatly with the river's resurgence. The Hudson has long been an environmental battleground, including historic litigation such as *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), which many view as the beginning of modern environmental litigation. Two hundred miles of the Hudson also have been designated a federal Superfund site due to dumping of PCBs by General Electric and has been the subject of a massive dredging operation.

Riverkeeper, an environmental organization whose mission is to protect the environmental, recreational, and commercial integrity of the Hudson River, has criticized the scale of the proposal and its potential environmental and community impacts.⁸ Riverkeeper states that the estuary is an irreplaceable habitat and spawning area for numerous fish species, including federally listed endangered species, and that the proposed plan designates thousands of acres of the Hudson River estuary as anchorage grounds. Another significant concern is that increased anchoring of large vessels with heavy ground tackle would cause environmental damage to the river bottom habitat.

Riverkeeper argues that encouraging ships to anchor adjacent to waterfront communities is likely to create noise and light pollution that will affect residents' quality of life by creating "stadium lighting" from the barges and generator noise throughout the night. Riverkeeper also has serious concerns that the anchorage plans will detract from municipalities' revitalization efforts, a concern that has resonated with several other local environmental groups and municipal leaders. Riverkeeper also disputes the industry's assertions that establishing new anchorages would legalize longstanding existing practice, provide safe harbor during periods of inclement weather, and would allow barges to avoid transiting dangerous parts of the river at night.⁹

Other environmental commenters note that the proposal "would put a National Heritage River at risk of oil spills after years of ecological restoration of the river," anchorages would jeopardize habitat for two endangered Hudson River sturgeon species, and that the proposal would turn the "river into an industrial storage facility."¹⁰ Environmental groups also raised concerns about increased risk of collision between anchored vessels and those underway in periods of low visibility.¹¹

Municipal Backlash

Yonkers mayor Mike Spano has spearheaded a petition opposing the plan, encouraging residents to join the fight to "ban the barges and protect our Hudson."¹² Notably, the largest of the anchorage locations would be an extension of the existing anchorages near Yonkers. Several other Hudson River communities have followed suit, emphasizing that the river should be a place where residents and visitors can gather to live, work and play.¹³ In his comment letter, Mayor Spano cites the long-term efforts to revitalize the Yonkers waterfront, and the adverse effects that such plan would have on the decades of efforts to reverse the impacts of previous industrialization. Recreational access to the river, scenic assets of the waterfront, and the hazards and liabilities associated with volatile cargo being carried by the moored vessels directly off the shore are all significant safety concerns.¹⁴

Responding to the increase in Bakken crude oil transport, Mayor Spano notes that the volatile Bakken oil has been involved in deadly oil train explosions and have made rail transport of these materials exceedingly controversial. Others have noted that the risk for watercraft incidents is particularly high when considering the likely barge cargo of such a “notoriously volatile petroleum product with a low flashpoint, now being shipped in bulk by rail and by barge down the river.”¹⁵

The Town of Cortlandt and the City of Peekskill also staunchly oppose the plan. Cortlandt notes that the anchorages would be a detriment to the visual aesthetics of the Hudson River that residents enjoy on a yearly basis, and which the town government has spent millions of dollars acquiring.¹⁶ Peekskill cites similar concerns, namely that the plan would be a significant setback to the Hudson River clean-up initiative that has taken years and several state and federal environmental laws to prevent further contamination.¹⁷

Conclusion

Typically, establishment of anchorages by the Coast Guard or an increase in commercial shipping would not be particularly controversial. However, similar to the opposition generated from the potential introduction of hydrofracking that would have opened up vast swaths of New York State to natural gas extraction, the transport of Bakken crude between Albany and New York Harbor is a lightning rod for opposition.

It will be interesting to see how the Coast Guard balances the need for a sufficient number of federally designated anchorages with environmental considerations and community concerns. Opponents of the proposed anchorage regulations have a difficult burden in arguing that a full environmental impact statement will be required, since regulations “establishing, disestablishing, or changing the size of Special Anchorage Areas or anchorage grounds” are categorically excluded from review under the National Environmental Policy Act, meaning that they generally do not require the preparation of an environmental assessment or environmental impact statement.¹⁸

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Endnotes

¹ 81 Fed. Reg. 37168, Anchorage Grounds, Hudson River; Yonkers, N.Y. to Kingston, N.Y. (June 9, 2016).

² Coast Guard Sector New York, Marine Safety Information Bulletin MSIB-(2015-014), available at http://www.americanwaterways.com/sites/default/files/Hudson_River_Anchorage_Grounds_-_MSIB.pdf; see also 33 CFR 110.155(1)(2).

³ Letter from the Maritime Association of New York and New Jersey to Craig Lapiejko (Jan. 21, 2016), available at <https://www.regulations.gov/document?D=USCG-2016-0132-0075>.

⁴ See 81 Fed. Reg. at 37169.

⁵ See 81 Fed. Reg. 61639 (Sept. 7, 2016).

⁶ Letter from American Waterways Operator to Craig Lapiejko (April 23, 2016), available at http://www.americanwaterways.com/sites/default/files/AWO_Hudson_River_Anchorage_Comments.pdf.

⁷ Hudson River Pilots Association Supports Safe Anchorages (September 2016), available at <http://www.boatingonthehudson.com/flippingbook/2016/sep/Articles/HudsonPilots.pdf>.

⁸ Letter from Pace Environmental Litigation Clinic Inc., on behalf of Riverkeeper, Inc. to Craig Lapiejko (June 30, 2016), available at <http://www.riverkeeper.org/wp-content/uploads/2016/06/Hudson-Anchorage-Pub-Mtg-Request-.pdf>.

⁹ Riverkeeper, Fact Check: Industry's False Claims about Hudson River Anchorages, BOAT BLOG (Aug. 18, 2016), available at <http://www.riverkeeper.org/patrol/fact-check-industrys-false-claims-hudson-river-anchorages/>.

¹⁰ Ned Sullivan, River is no Place to Park Oil Barges, TIMESUNION (Aug. 15, 2016), available at <http://www.timesunion.com/tuplus-opinion/article/River-is-no-place-to-park-oil-barges-9144087.php>.

¹¹ Letter from Hudson River Heritage to Craig Lapiejko (Aug. 5, 2016), available at http://www.hudsonriveranchorages.org/wp-content/uploads/2016/08/Comment_Submitted_by_Warren_Smith_Hudson_River_Heritage.pdf.

¹² Ban the Barges Protect Our Hudson Petition, available at https://www.change.org/p/craig-d-lapiejko-uscg-mil-ban-the-barges-protect-our-hudson?recruiter=307997405&utm_source=petitions_show_components_action_panel_wrapper&utm_medium=copylink&recurrit_context=copylink_long.

¹³ City of Yonkers, Ban the Barges, available at <http://www.yonkersny.gov/government/mayor-s-office/initiatives/ban-the-barges>.

¹⁴ Letter from The City of Yonkers to Craig Lapiejko (August 3, 2016), available at <http://www.hudsonriveranchorages.org/wp-content/uploads/2016/08/Mayor-Mike-Spano-Yonkers.pdf>.

¹⁵ Letter from Hudson River Heritage to Craig Lapiejko (August 5, 2016), available at http://www.hudsonriveranchorages.org/wp-content/uploads/2016/08/Comment_Submitted_by_Warren_Smith_Hudson_River_Heritage.pdf.

¹⁶ Letter from the Town of Cortlandt to Craig Lapiejko, available at http://www.hudsonriveranchorages.org/wp-content/uploads/2016/08/Comment_Submitted_by_Linda_Puglisi_Supervisor_Town_of_Cortlandt_Attachment.pdf.

¹⁷ Letter from the City of Peekskill to Craig Lapiejko (August 9, 2016), available at http://www.cityofpeekskill.com/sites/peekskillny/files/agenda/agenda-file/16_council_-_hudson_river_anchorage_proposal.pdf.

¹⁸ United States Coast Guard, "Complete List of USCG Categorical Exclusions," COMDTINST M16475.1D, Figure 2-1, available at <http://www.uscg.mil/hq/cg4/cg47/NEPARregs.asp>.