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December 5, 2016

Admiral Paul F. Zukunft  
Commandant  
United States Coast Guard  
2703 Martin Luther King, Jr. Avenue SE  
Washington, DC 20593

RE: Petition to withdraw Advanced Notice of Proposed Rulemaking (ANPR), docket number  
USCG-2016-0132

Dear Admiral Zukunft:

We are students of the Environmental Policy Clinic at Pace University. We write to petition you to withdraw the Advanced Notice of Proposed Rulemaking (ANPR), docket number USCG-2016-0132, which is based on a request by the Maritime Association of the Port of New York and New Jersey, the Hudson River Port Pilot's Association, and the American Waterways Operators (MAPNYNJ et al.) to create 43 special anchorages in 10 locations on the Hudson River between Yonkers and Kingston. This petition is not intended as a public comment on the ANPR but as a formal request for immediate administrative relief.

## Introduction

After careful review of the Coast Guard's *Waterways Management: Anchorage Management Tactics, Techniques, and Procedures (TTP) (CGTTP 3-71.2 July 2015)* (WWM), we have determined that the Coast Guard did not comply with its own recommended procedures for evaluating the special anchorage request by MAPNYNJ et al. prior to publication of the ANPR in the Federal Register on June 9, 2016. If followed, the WWM procedures would have assured a transparent decision-making and public review process, enabled the Coast Guard and the public to make an early determination regarding the merit of the MAPNYNJ et al. special anchorage request, avoided unnecessary public controversy, provided the benefit of a wide range of public and private maritime expertise, and created open public dialogue and discussion. The Coast Guard failed on each of these counts.

The Coast Guard's decision to disregard internal procedures may not be litigable but that does not alleviate the agency of its responsibility to serve the public interest through careful execution of its discretionary duties. By publishing the ANPR in direct contravention of its WWM, the Coast Guard provided the shipping industry a distinct advantage in the rulemaking process, and significantly prejudiced the public interest. It denied the public many opportunities to review the earliest form of the request prior to its publication as an ANPR, and deprived local governments,

environmental organizations, fishers, boaters and others of essential information with which to evaluate the MAPNYNJ et al. request. And yet, the Coast Guard has adhered to the section of the WWM that effectively precludes it from participating in public discussion once the ANPR is published. The premature publication of the proposal triggered a Coast Guard rule that effectively shielded the agency from having to communicate with the public or participate in numerous government forums. Additionally, the Coast Guard chose to forgo essential studies cited by the WWM that would have ensured public safety, and provided the public vital information regarding potential environmental, economic, political and social impacts.

Specifically:

**The publication of the MAPNYNJ et al. request as an ANPR is not a “first step” in the recommended public review process for a special anchorage, the Coast Guard’s claim to the contrary notwithstanding.**

In its WWM the Coast Guard specifies substantial activities and initiatives ranging from individual stakeholder contact to public meetings to detailed studies that should have been implemented *prior to* publication of the ANPR, notwithstanding Coast Guard statements to the contrary (See Coast Guard August 23, 2016 notes regarding a conference call with NYSDEC and NYSDOS, USCG-2016-0132-3048). By prematurely filing the ANPR, the Coast Guard circumvented essential recommended steps that direct the agency to avail itself, and allow the public the benefit of, diverse maritime expertise from both the public and private sectors, as well as Coast Guard safety and impact studies that should have been completed before an ANPR was even drafted. To the benefit of the MAPNYNJ et al., the Coast Guard’s action has eliminated consultation with the public that could have changed the outcome of the MAPNYNJ et al. request. This has undermined public faith in the Coast Guard, and lent an appearance of conflict and lack of transparency. It has created an uneven playing field that favors MAPNYNJ et al. and disadvantages the public interest.

**The Coast Guard should have requested “feedback” from all “port partners” immediately upon the submission of the special anchorage request by MAPNYNJ et al.**

Pursuant to Section C.3. of the WWM, upon receipt of a special anchorage request from MAPNYNJ et al. the Coast Guard should have conducted early outreach to “port partners and other maritime stakeholders” in order to “receive constructive input and address adverse feedback.” Among the techniques that WWM suggests are “public meetings.” The Coast Guard did not avail itself of the special maritime expertise that would have allowed it to refine, or even reject, the MAPNYNJ et al. request prior to the next phase of stakeholder outreach (below). As a result, it did not consider the needs, concerns, or objections of those in the maritime field who would be directly affected by the designation of special anchorages along the Hudson River. As will be emphasized herein again, the Coast Guard also insulated itself from participation in public discussion simply by the action of filing the ANPR for special anchorages.

**The Coast Guard failed to take the next step of involving a broader group of stakeholders to refine further the MAPNYNJ et al. request.**

Pursuant to Section C.3., the Coast Guard should have conducted a second phase of additional stakeholder outreach, such as recreational boaters, environmental groups, labor organizations, and citizen groups, in order to further refine the MAPNYNJ et al. request prior to it becoming an ANPR. The clear intent is to ensure that critical information and participation can be obtained from virtually all stakeholders through *direct* communication by the Coast Guard, and that

relevant issues will be addressed in “anticipation of controversy.” The significance of this part of the process cannot be emphasized too much. As previously stated, once the ANPR is published, the Coast Guard is effectively precluded from conducting such outreach or addressing stakeholder concerns. The Hudson Valley-wide opposition against the ANPR is proof that this step was essential to ensuring community collaboration and involvement. The failure by the Coast Guard to provide this transparent process is cause enough for immediate corrective action.

**Publication of the ANPR empowers the Coast Guard to reclassify public information as exempt from disclosure under the Federal Freedom of Information Act.**

Because publication of the ANPR launched a formal regulatory process, it triggered the “deliberative privilege” exemption under the Federal Freedom of Information Act, empowering the Coast Guard to deny public access to documents regarding the agency’s internal review and decision-making processes. This could include documents crucial to public review and comment regarding the ANPR, such as communications within the Coast Guard and its branches, agency assessments of the MAPNYNJ request, and communications with MAPNYNJ.

**Statements regarding Hudson River navigation and safety in the ANPR are conclusory and unsubstantiated because the Coast Guard failed to follow the WWM procedures for consulting with port partners, marine experts and other interested parties.**

In the ANPR, the Coast Guard makes the following statement which contains a sweeping and unsubstantiated claim, presumably made to the Coast Guard by MAPNYNJ et al.: “We are considering this action after receiving requests suggesting that anchorage grounds may improve navigation safety along an extended portion of the Hudson River.” The credibility of the ANPR hinges on the issues of safety and navigation. Yet, because the Coast Guard did not consult with port partners, maritime experts or the public in advance of the ANPR, the agency seems unable to provide facts upon which the public can base an informed review. In the thousands of comments responding to the ANPR in the June 9, 2016 Federal Register, members of the public and government officials have almost universally expressed frustration because of the Coast Guard’s failure to offer data, statistics or studies. By default, the public record regarding the details of the ANPR are based on the statements of the MAPNYNJ. On October 19, 2016, Captain Edward Kelly, director of MAPNYNJ, testified before the *New York State Senate Hudson River Barge Hearing* led by New York State Senator Terrence Murphy. He stated, “We are seeking formal designation because the river has become busier. . . Vessels are forced to anchor for many safety reasons including fog, weather conditions, equipment issues, ice and many other reasons.” He made no offer of proof for these assertions. Since MAPNYNJ et al. appear to be the only basis for the ANPR, and the Coast Guard has declined to provide additional information or conduct the requisite studies, it is reasonable to conclude that no such proof exists and the ANPR is based solely on the conclusory statements of the shipping industry. The very intent of the Coast Guard’s WWM procedures is to prevent such a biased process and instead gather data from multiple sources through the early involvement of marine experts and concerned parties, and through key navigational studies. Only in this fashion could it have assured balanced and comprehensive information upon which to create the ANPR.

**By ignoring its procedures and immediately publishing the MAPNYNJ et al. request as an ANPR, the Coast Guard precluded its own ability to participate in forums, thereby prejudicing the public interest.**

As stated previously, and specifically stated in a note in section C.3.a., the Coast Guard is instructed: “Once a proposed rule is published, avoid ex parte communication, or private communication between agency employees and individuals outside the agency concerning the substance of a rulemaking.” Accordingly, following its publication of the ANPR, the Coast Guard declined repeated invitations to participate in local meetings throughout the Hudson River Valley. At the aforementioned New York State Senate hearing, criticism of the Coast Guard for its failure to participate in the hearing was pointed and vocal. Yet, the representative from MAPNYNJ forcefully testified for his organization’s request, upon which the Coast Guard ANPR is based, and implied it already enjoyed Coast Guard support. Such a presentation would have been more properly included in a Coast Guard-organized meeting of “port partners” six months earlier, as called for in the WWM. The public would have had the much needed opportunity to pose questions to MAPNYNJ et al. and to the Coast Guard. Such a forum has yet to be conducted.

**The Coast Guard should have conducted a focused Waterways Analysis and Management System (WAMS) study prior to publication of the ANPR, in order to determine potential effects of the MAPNYNJ et al. request.**

Section C.5.a. explicitly states that the Coast Guard should conduct a WAMS study if one has not been conducted within two years prior to the special anchorage request. A WAMS study is crucial in order to account for the interests of communities and stakeholders involved, and to reflect how the proposed additional anchorages would impact navigation, military matters, key environmental concerns, changing economic and political trends, the Hudson River ecosystem and nearby communities. Alternatively, this section spells out specific criteria and data that the Coast Guard should have collected as a substitute for the WAMS study. As far as we have been able to determine, no such studies have been conducted. By its failure to conduct a WAMS study prior to the ANPR, the Coast Guard denied the public vital information for informed participation, review and comment.

**The Coast Guard should have conducted a Ports and Waterways Safety Assessment (PAWSA) prior to the publication of the ANPR in order to determine navigational safety issues regarding the MAPNYNJ et al. request.**

Pursuant to section C.5.b., a Ports and Waterways Safety Assessment (PAWSA) report should have been conducted to detail key Hudson River users and stakeholders, and identify agencies and/or entities responsible for implementing risk mitigation measures. This information is crucial for proper evaluation by the Coast Guard of the MAPNYNJ et al. request. The Hudson River can be a busy waterway for navigation and commerce, as the MAPNYNJ representative testified at Senator Murphy’s hearing. A PAWSA study would help ensure that the proposed special anchorages do not pose hazards to individuals or communities who rely on the river on a daily basis. There is no evidence that the Coast Guard has conducted a PAWSA study for the sections of the Hudson River where the special anchorages have been proposed.

## **Conclusion**

An aim of the *Waterways Management: Anchorage Management Tactics, Techniques, and Procedure* is to address “adverse feedback” and address problem issues in “anticipation of controversy” and before publication of an Advanced Notice of Proposed Rulemaking. At this juncture, it should come as no surprise to the Coast Guard that its decision to forgo its own procedures has caused one of the largest Hudson River controversies in recent history, and at a substantial cost to the Coast Guard in public faith. The only viable remedy is for the Coast Guard

to withdraw the proposal and begin the proper public process as articulated by the WWM. The WWM's *ex parte* guidance alone points to the necessity for this action.

In addition, we recommend that all public comments to the Federal Register notice be preserved as part of a continuing public record. We further recommend that no later than March 31, 2017, the Coast Guard convene a public scoping session of port partners, citizen's groups, interested individuals and governmental representatives as a true first step in complying with the WWM. The purposes of the scoping session would be to further inform the public regarding the details, need and potential impacts of the MAPNYNJ et al. special anchorage request; identify salient issues of public concern; and begin crafting the priorities and content of the WAM and PAWSA studies.

Respectfully,

[Signatures]

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cc: Captain Michael H. Day, Commander, Sector New York, Captain of the Port

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