United States Court Of Appeals
For The First Circuit

No. 10-1664 UNITED STATES; AMERICAN WATERWAYS OPERATORS INTERNATIONAL ASSOCIATION OF INDEPENDENT TANK OWNERS, et al.,
Plaintiffs - Appellees
v.
COALITION FOR BUZZARDS BAY
Defendant - Appellant
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants
US COAST GUARD; US DEPARTMENT OF HOMELAND SECURITY
Counter Defendants - Appellees

No. 10-1668 UNITED STATES; AMERICAN WATERWAYS OPERATORS INTERNATIONAL ASSOCIATION OF INDEPENDENT TANK OWNERS, et al.,
Plaintiffs - Appellees
v.
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants - Appellants
COALITION FOR BUZZARDS BAY
Defendant
US COAST GUARD; US DEPARTMENT OF HOMELAND SECURITY
Counter Defendants – Appellees

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
(CIVIL ACTION NO. 05-10112 (DPW))

BRIEF OF AMICUS CURIAE CONSERVATION LAW FOUNDATION IN SUPPORT OF APPELLANTS AND SEEKING REVERSAL

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 DISCLOSURE STATEMENT FOR CONSERVATION LAW FOUNDATION

Pursuant to Federal Rule of Appellate Procedure 26.1, the Conservation Law Foundation states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there is thus no publicly held company that owns any such stock.

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I. STATEMENT OF INTEREST, IDENTITY AND AUTHORITY

The Conservation Law Foundation (CLF), a nonprofit, member-supported, public interest environmental advocacy organization, works to solve the environmental problems that threaten the people, natural resources, and communities of New England. Founded in 1966, CLF's approximately 4,200 members live, work and recreate in the New England region; numerous member live near or use Buzzards Bay.

CLF's advocates use law, economics, and science on behalf of its members to design and implement strategies that conserve natural resources, protect public health and promote vital communities in our region. To this end, CLF has an unparalleled record of advocacy on behalf of the region's marine environment, including the application and enforcement of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (NEPA).[1]

This case involves efforts by the Commonwealth of Massachusetts to reduce the risk of oil spills in Buzzards Bay, a water body appropriately designated by Congress as an Estuary of National Significance, *Joint Appendix*, 573 (*J.A.*), and as

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[1] *See*, *e.g.*, *Conservation Law Found. v. Clark*, 594 F. Supp. 1373 (D. Mass. 1984); *Conservation Law Found. v. Sec'y of the Interior*, 790 F.2d 965 (1st Cir. 1986); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467 (D. Mass. 1984); *Conservation Law Found. v. Metro. Dist. Comm'n,* 757 F. Supp. 121 (D. Mass 1991); *Conservation Law Found. v. Evans*, 209 F. Supp. 2d 1 (D.D.C. 2001); *Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27 (D.D.C. 2002); *Conservation Law Found. v. Evans*, 211 F. Supp. 2d 55 (D.D.C. 2002).

an Ocean Sanctuary by the Commonwealth of Massachusetts, MASS. GEN. LAWS ch. 132A, §13(c). Home to a diverse and abundant population of marine and avian species, Buzzards Bay supports the cargo transit of an estimated two billion gallons of petroleum over its waters each year. But Buzzards Bay's shallow waters, reefs, ledges and currents make the area prone to maritime accidents. In the wake of a devastating 98,000 gallon spill of heavy fuel oil in 2003, the Massachusetts Legislature took action to protect the ecologically sensitive bay from the risk of future oil spills. *See* An Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays of the Commonwealth, 2004 Mass. Acts 251 (MOSPA), *amended by* 2004 Mass. Acts 457, § 1 (Dec. 30, 2004).

In response, the United States Coast Guard proposed its own regulations. *See* Final Rule, Regulated Navigation Area, Buzzards Bay, *J.A.* at 1090 *et seq.* (Final Rule). The Coast Guard's regulations purport to expressly preempt provisions of the MOSPA relating to manning and watch requirements for single-hull tank barges and tug escorts for double-hull tank barges through a statement in an un-codified preamble to the Final Rule. *J.A.* at 1094-95.[2]

[2] In its *amicus curiae* memorandum, CLF focuses only on the district court's conclusion that the Coast Guard's failure to comply with NEPA is harmless error. CLF supports and joins the Appellants' arguments regarding the absence of preemptive effect of the Coast Guard's Final Rule on the MOSPA.

Because NEPA considers the Final Rule a "major federal action," the Coast Guard had to comply with the procedural obligations imposed by NEPA. In what the district court described "as an act of procedural hubris," the Coast Guard chose not to do so. Although the district court concluded that NEPA required the Coast Guard to prepare an Environmental Assessment (EA), it went on to rule the "procedural error of not following NEPA formalities was essentially harmless." *J.A.* at 496.

By allowing the Coast Guard to improperly bypass NEPA's legal mandates, the district court's decision severely undermines the fundamental purpose of NEPA and harms interested parties, the public, and the environment. At stake here is not just the protection of Buzzards Bay, but the rule of law with respect to a mandatory review process that subjects all major federal actions such as the Coast Guard's Final Rule to a "hard look" through NEPA's environmental lens.[3]

CLF respectfully submits this *amicus curiae* memorandum in support of the positions of the Commonwealth and the Coalition for Buzzards Bay, seeking reversal of the order of the United States District Court for the District of Massachusetts dated March 31, 2010, adopting the Magistrate Judge's June 6, 2008 and July 29, 2009 Reports and allowing the United States and Intervenor-Plaintiffs' Motions for Summary Judgment. *J.A.* at 491, *et seq.*

[3] *See* MASS. GEN. LAWS ch. 21M, §§ 4(a)-(b), 6(a); *J.A.* at 1094-95.

II. ARGUMENT

A. Legal Standard

1. The Administrative Procedure Act's Harmless Error Standard

The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA), requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). If they find a technical violation, courts reviewing agency decisions must take "due account . . . of the rule of prejudicial error" before they set aside an agency action. 5 U.S.C. § 706. In this Circuit, an agency's failure to follow proscribed procedures is "harmless" only when remand "would accomplish nothing beyond further expense and delay." *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 61-62 (1st Cir. 2001) (quoting *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965)).[4]

[4] Other circuits take a stricter approach with agencies that fail to follow NEPA's statutory procedure. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (placing the burden on the agency to show its error "*clearly* had *no bearing* on the procedure used" (citation omitted)); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001); *Shelton v. Marsh*, 902 F.2d 1201, 1206 (6th Cir. 1990). Some circuits also have held that "[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip [NEPA section 4332] of its fundamental importance." *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109,

2. The NEPA Procedure

a. NEPA's Purpose

NEPA's primary goal of ensuring that all major federal actions are given a "hard look" through an environmental lens is achieved through its review obligations. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).[5] First, NEPA forces agencies "to consider every significant aspect of the environmental impact of a proposed action." *Massachusetts v. United States*, 522 F.3d 115, 119 (1st Cir. 2008) (internal citations and quotation marks omitted) (quoting *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). Second, NEPA requires agencies to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.*

Because it does not impose any substantive obligations on federal agencies, NEPA's force lies in its procedural mandates. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). Agencies, therefore, must strictly follow the NEPA process. *See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of*

1115 (D.C. Cir. 1971); *Environmental Defense Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1172 (6th Cir. 1972) (same).

[5] The Council on Environmental Quality (CEQ), under authority of NEPA Title II, has established regulations that counsel agencies on how to properly comply with NEPA. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985). *See* 40 C.F.R. § 1500 *et seq.*

Okla., 426 U.S. 776, 787 (1976) (the "duty NEPA imposes upon the agencies to consider environmental factors shall not be shunted aside in the bureaucratic shuffle"). Accordingly, section 4332 requires agencies to comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

b. The NEPA Process

NEPA calls for agencies to take discrete, comprehensive steps in conducting their environmental review of a proposed action. Generally, for "major federal actions" such as rulemaking, an agency first prepares an environmental assessment (EA) for the project, including possible alternatives to the proposed action. 42 U.S.C. § 4332(C) & (E).[6] Unless the agency initially decides to prepare a full environmental impact statement (EIS), the agency uses the EA to determine "whether the environmental effects of a proposed action are 'significant.'" *Sierra*

[6] Generally, an EA must "include brief discussions of the need for the proposal, of alternatives as required by section [4332(E)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). Section 4332(E) obligates the agency to "study, develop, and describe appropriate alternatives to recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). The CEQ regulations, however, mandate that the agency itself promulgate specific procedures through which it will comply with NEPA. 40 C.F.R. § 1507.3. Coast Guard procedures require an EA to contain "[a] brief description of the proposed action," "[a] statement of need for the proposed action," "[t]he alternatives considered," "[a] summary of the environmental impacts of the proposed action and alternatives," "[a] comparative analysis of the proposed action and alternatives," "[a] statement of environmental significance of the proposed action," and "[a] list of all agencies and persons contacted during the [EA]." *J.A.* at 1114-1115.

Club, 769 F.2d at 870 (1st Cir. 1985) (citing 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, & 1508.27). Only after it completes the EA can the agency properly make a "finding of no significant impact" (FONSI), thereby obviating the need for further analysis under NEPA. *See* 40 C.F.R. § 1501.4.[7]

The EA can also lead to a more comprehensive environmental review of the proposed action. If an agency's EA finds that its action will "significantly affect[] the quality of the human environment," NEPA requires all federal agencies to prepare an extensive EIS, detailing

> (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.

42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11; *see generally J.A.* at 1119-1121.

If NEPA and the CEQ regulations obligate an agency to prepare an EIS, the agency must then begin the scoping process. 40 C.F.R. § 1501.7. An important part of the public's involvement in federal decision making, the scoping process obligates the agency to "[i]nvite the participation of affected Federal, State, and

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[7] A FONSI requires the agency to present "the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13. The FONSI must also include the EA. *Id.*; *see also J.A.* at 1116.

local agencies, any affected Indian tribe, the proponent of the action, and other interested persons." 40 C.F.R. § 1501.7(a)(1). An agency must next determine the scope of the actual EIS. 40 C.F.R. § 1501.7(a)(2).[8] Once it sets the scope of the EIS, the agency prepares a draft EIS that must "satisfy to the fullest extent possible the requirements established" in NEPA section 4332. 40 C.F.R. § 1502.9(a). The agency must obtain public comment on the draft EIS and make "every effort to disclose and discuss . . . all major points of view on the environmental impacts of the alternatives including the proposed action." *Id.* The agency must respond to these comments in a final EIS, in which the agency must discuss "any responsible opposing view which was not adequately discussed in the draft statement" and "indicate the agency's response to the issues raised." *Id.* The agency concludes the process by preparing a record of decision (ROD). 40 C.F.R. §1505.2.

Although not directly required by the plain text of the statute, the Supreme Court interprets NEPA to contain the implicit "understanding that the EIS will discuss the extent to which adverse effects can be avoided." *Robertson*, 490 U.S. at 351-52 ("without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" on the environment). The CEQ regulations require an agency to discuss possible

[8] In determining the proper scope of its EIS, the CEQ regulations specifically obligate the agency to "consider 3 types of actions, 3 types of alternatives, and 3 types of impacts." 40 C.F.R. § 1508.25.

mitigation measures when defining the scope of the EIS, any time an agency considers possible alternatives to the proposed action and the consequences of those actions (in preparing an EA, for example), and when it explains its final decision in a FONSI or ROD. *Id.* (citing 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), & 1505.2(c)).[9]

Categorical exclusions are the exception to the standard NEPA analytic procedures. 40 C.F.R. § 1501.4. A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. The agency has the authority to develop these categorical exclusions based on their historical experience and expertise, but any categorical exclusion must "provide for extraordinary

[9] The CEQ regulations define "mitigation" to include efforts to "[a]void[e] the impact altogether by not taking a certain action or parts of an action," "[m]inimiz[e] impacts by limiting the degree or magnitude of the action and its implementation," "[r]ectify[] the impact by repairing, rehabilitating, or restoring the affected environment," "[r]educ[e] or eliminate[e] the impact over time by preservation and maintenance operations during the life of the action," and "[c]ompensat[e] for the impact by replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20.

circumstances in which a normally excluded action may have significant environmental effect." *Id.*; 40 C.F.R. § 1507.3.

B. Statement of Fact

1. The Coast Guard's Procedure

The Coast Guard found that "there are no factors in this case that would limit the use of a categorical exclusion" under paragraphs (34)(g) and (34)(i) of Commandant Instruction M16475.1D. *J.A.* at 1096.[10] The Coast Guard relied on two categorical exclusions when it determined that a NEPA analysis was not necessary for its Final Rule.

In supporting this conclusion, the Final Rule refers to an "Environmental Analysis Checklist" and a "Categorical Exclusion Determination." *Id.* In its Categorical Exclusion Determination (CED), the Coast Guard says only that its Final Rule

> is not expected to result in any significant adverse environmental impacts as described in [NEPA]. The action has been thoroughly reviewed by the [Coast Guard], and the undersigned have determined this action to be categorically excluded from further environmental documentation . . . since implementation of this action will not result in any:

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[10] Paragraph (34)(g) categorically excludes "[r]egulations establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones." *J.A.* at 1135. Paragraph (34)(i) categorically excludes "[r]egulations in aid of navigation . . . ." *Id.*

> 1. Significant cumulative impacts on the human environment;
> 2. Substantial controversy or substantial change to existing environmental conditions;
> 3. Inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment.

Id. at 1069. The CED does not discuss or even mention any environmental data the Coast Guard considered in making this determination; the environmental impacts that it did not find significant; the reasons why it believed these impacts were not significant; the extent the Coast Guard consulted with other agencies or the public; any reasonable alternatives to the Final Rule; or any mitigation measures the Coast Guard considered before it made its CED.

The Environmental Checklist also does not give any insight into the Coast Guard's NEPA review process. The Coast Guard answered "No" to nine of the Checklist's ten questions concerning whether the proposed action posed any significant environmental consequences. *Id.* at 870. Only in a few instances did the Coast Guard elaborate on its response. For example, in answering whether there is "likely to be a significant effect on public health or safety," the Coast Guard only mentioned the benefits to public heath if the proposed rule "were effective in eliminating oil spills." *Id.* at 871. Negative answers to questions about the "potential for effects on the quality of the environment that are likely to be highly controversial in terms of scientific validity or public opinion," the "potential for effects on the human environment that are highly uncertain or involve unique

or unknown risks," and whether the proposed action would "set a precedent for future actions with significant effects or a decision in principle about a future consideration" did not receive any analysis, comment, or elaboration. *Id.* at 870. Although the Coast Guard's own instructions say that an "environmental assessment or EIS shall be prepared for actions normally categorically excluded, but which are likely to involve . . . substantial controversy on environmental grounds . . . [or] inconsistencies with any Federal State or local law or administrative determination relating to the environment," neither the CED nor the Checklist shed any light on the question of why such review was not warranted in this case. *Id.* at 1149.

2. The District Court's Decision[11]

The district court found that the Coast Guard improperly relied on these categorical exclusions because NEPA obligated it to at least prepare an EA and FONSI.[12] Because the "administrative record is replete with examples of

[11] Unless otherwise noted, CLF refers to the district court's decision adopting the Magistrate Judge's recommended decisions and the recommended decisions themselves collectively.

[12] The district court's decision is unclear as to whether the court thought NEPA required the Coast Guard to prepare a full "Environmental Impact Statement." *See J.A.* at 495 (using the phrase "environmental impact statement" to describe the procedure NEPA required under the circumstances, and saying that the agency's "actual rulemaking analysis was the functional equivalent of what an environmental impact statement would have generated"). The Magistrate Judge said that the "even if the Commonwealth is correct that the Coast Guard should

expressions of opposition to the Final Rule," and the "analysis of whether the Final Rule would have a significant effect on public safety . . . does not consider the potential impact of preemption," the court found the Coast Guard's CED arbitrary and capricious. *J.A.* at 543-44.[13]

Despite concluding that the Coast Guard's decision not to prepare an environmental impact statement "can only be described as an act of procedural hubris," the district court nevertheless found that the "procedural error of not following NEPA formalities was essentially harmless" for two reasons. *Id.* at 494-95. First, the court found that "the Coast Guard conducted via the rulemaking process the very analysis (*i.e.*, whether protection of the environment and/or vessel safety required escorts for double hull tank vessels) which would have been made via E[A] or EIS should it have determined that one was required." *Id.* at 544. According to the court's analysis, because the Coast Guard's Final Rule described "its receipt, and consideration of, interested parties' comments concerning, *inter alia*, the hazards presented by single-hull barges vis-à-vis double-hulled barges,"

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have conducted an EIS or an EA, the failure to make that assessment was harmless error." *Id.* at 544. Neither opinion discusses the substantial differences between an EIS or EA. CLF assumes the district court had in mind an EA, but to the extent that this Court finds that the district court held that the Coast Guard's procedures were equivalent to an EIS, CLF argues this is even clearer error.

[13] CLF joins in the Appellants' argument that the court correctly found that the Coast Guard impermissibly relied on two CEs when it decided not to prepare an impact statement.

the agency must have considered the issue. *Id.* at 546 (citing the Final Rule, *J.A.* at 1091-95). The district court further buttressed its reasoning by reference to the fact that "the Coast Guard indicated that it was considering requiring tug escorts for *all* tank barges, and solicited comments from interested parties on that basis." *Id.* at 547 (citing *Advanced Notice of Proposed Rulemaking*, 69 Fed. Reg. 62429). From this, the district court apparently inferred that the "evolution in [the Coast Guard's] position . . . suggests due consideration, rather than arbitrary and capricious refusal to consider opposing positions." *Id.* at 547.

Second, the district court held that the Coast Guard's error was harmless because the Appellants could not "identif[y] substantial defects in that analysis." *Id.* at 544 (citing *Save Our Heritage*, 269 F.3d at 61). Although the Commonwealth of Massachusetts argued that the Coast Guard did not consider whether its Final Rule sufficiently addressed the likelihood of an oil spill resulting from a collision, the district court found that the Commonwealth did "not adduce[] any evidence suggesting that a double hull tanker is more vulnerable to a spill resulting from collision or allision than it would be to one resulting from grounding." *Id.* at 545-46. Springing from that observation, the district court concluded that the Coast Guard's focus on grounding was "reasonable" in light of its description of the sea floor and its determination that grounding historically presented a greater threat. *Id.* Despite the Commonwealth of Massachusetts'

argument that NEPA obligated the Coast Guard to at least perform the same detailed modeling analysis it had performed in its "Regulatory Assessment: Use of Tugs to Protect Against Oil Spills in the Puget Sound Area," the district court found that this Puget Sound analysis only undermined the Commonwealth's position because it "concluded that tug escorts for single hull tankers were the most cost-effective of the escort options and added that an extension of escort requirements to double-hull tankers was less cost effective (both because double hulls reduce the risk of spills from grounding *and* collision accidents and because of the significant compliance costs of slowing down higher speed vessels to match the speed of escort tugs)." *Id.* at 546 (citing *J.A.* at 874 *et seq.*). Because both of the "principal objections to the Coast Guard's analysis are undermined by the sole environmental assessment in the record," the district court concluded that the Commonwealth did not show any substantive defects in the analysis. *Id.* at 545-46.

C. The Coast Guard's Violation of NEPA was not Harmless.

1. The Coast Guard's Procedures did not Serve NEPA's Informational Purpose and were not Adequate Substitutes for NEPA's Mandates.

The district court erred when it found that the Coast Guard's rulemaking analysis was the functional equivalent of NEPA's requirements. These requirements "ensur[e] that the agency, in reaching its decision, will have

available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008). Thus, courts have been cautious in applying the harmless error rule to agencies that violate NEPA's procedures. Only in situations where "the proposing agency engaged in significant environmental analysis before reaching a decision" will courts find NEPA violations to be harmless errors. *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (agency's failure to designate chosen approach as its preferred alternative in its final EIS held to be harmless error because it had considered five alternatives, solicited public comment on those alternatives and on its draft EIS, and gave notice and asked for public comment in the Federal Register on its preferred alternative before it issued its ROD); *see also Tahoe Tavern Prop. Owners Ass'n v. U.S. Forest Serv.*, 314 Fed. Appx. 919, 921 (9th Cir. 2008) (agency's failure to consider certain adverse impacts in its EIS harmless because agency considered a state report detailing these same effects before it reached its final decision); *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 344-47 (6th Cir. 2006) (agency's failure to consider alternatives other than approval, disapproval, and no action in its EA harmless because plaintiffs on appeal could not identify an alternative that should have been considered, agency incorporated mitigation measures into its EA after learning of adverse effects, and agency had already completed a programmatic EIS

considering relevant alternatives). These cases all have a common thread: the courts determined these NEPA violations were harmless because each agency employed procedures, intertwined with more traditional NEPA analyses, that presented the agency and the public with the same information, in the same detail, from the same sources, and with the same public appearance that it would have had if the agency had proceeded under the proscribed NEPA protocols. That is not the case here.

In *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001), for example, this Court cautiously analyzed whether held an agency's putative NEPA violation was harmless error. Without deciding whether NEPA in fact required the Federal Aviation Administration (FAA) to prepare an EA when it authorized new flights from Hanscom to LaGuardia airport, this Court held that the FAA's hypothetical NEPA violation was harmless based on a number of factors. For one, the agency had "examined each of the three principal possible negative effects [noise, fuel emissions, and passenger surface traffic] and found each to be *de minimis*." *Id.* at 62. Second, the FAA relied on a MassPort Environmental Impact Report that had already considered these impacts "under zero, modest, and robust growth scenarios for commercial aviation" in Hanscom and on a surface traffic study for a next-door Air Force base. *Id.* at 59. Third, the FAA had independently confirmed both the accuracy of the MassPort Environmental Impact Report and the

Report's pre-existing baseline conditions. *Id.* Finally, the FAA had conducted its own studies using discrete environmental data; and it had disclosed its findings to interested parties before it made a final decision. *Id.* In that situation, requiring the agency to prepare an EA after it had already considered the pertinent data and given the public a chance to comment would have had the hollow purpose of "remanding for a differently named assessment." *Id*. at 62.

Unlike the FAA situation, there is nothing in the record that shows that the Coast Guard considered any environmental effects of any alternatives including the "no-action" alternative that would have looked at the option of the protection provided by existing tanker regulation under state law, which requires escorts for both single- and double-hulled vessels. The Coast Guard also did not consider mitigation measures it could put in place if it decided not to require escorts for double-hull vessels, including, for example, increased manning requirements for un-escorted vessels. *See Robertson*, 490 U.S. at 351-52 (CEQ regulations require an agency to discuss possible mitigation measures any time an agency considers possible alternatives to the proposed action).

That the Coast Guard did not rely on a comprehensive environmental report like the FAA did in *Save Our Heritage* is also significant. There is nothing in the Final Rule indicating that the Coast Guard *actually* considered the findings of its

own Puget Sound report, the "only environmental assessment in the record." *J.A.* at 546.

Second, even if the Coast Guard did rely on the report, it was not probative on the NEPA issue before the Coast Guard in Buzzards Bay. Although the Puget Sound report did find that escort requirements for double-hull vessels were not *cost-effective* because double-hulls carry less risk of oil spills resulting from grounding or collision than did single-hulls, it did *not* conclude that requiring escorts for double-hulls would pose lower environmental risks, or even that such escort requirements would not be cost-effective in Buzzards Bay. An economic cost-benefit analysis is not the only analysis required in an environmental review, and the district court improperly compared the functional equivalence of this economic analysis to appropriate environmental review. Although NEPA does not mandate the course of action that poses the least environmental risk, it does require that the agency must adequately identify and evaluate every known environmental impact. *See Robertson*, 490 U.S. at 350. There is no evidence that suggests the Coast Guard evaluated the *environmental* impact of also requiring double-hulls to have escorts.

Third, even if the Coast Guard did consider its own Puget Sound report, the factual conclusions of the report are not applicable to the Final Rule for Buzzards Bay. The Puget Sound report considered six oil-spill scenarios in the Pacific

Northwest in light of factors such as "Time of Spill," "Wind and Current," "Spill Location," and "Resource Closures." *J.A.* at 963-966. Buzzards Bay and Puget Sound are affected by different water currents and weather patterns, and there is no basis on which the agency could assume that the concerns addressed in the Puget Sound report were adequately representative of the issues raised by the Coast Guard's Final Rule for Buzzard's Bay. Furthermore, unlike the FAA in *Save Our Heritage*, the Coast Guard did not verify the findings of the Puget Sound report through an independent assessment of the underlying environmental data or its relevance to Buzzards Bay. *See Save Our Heritage*, 269 F.3d at 59-60 ("the MassPort report was reliable because the FAA verified the . . . [report's] accuracy by conducting its own studies"). Here, the Coast Guard made no showing that the Puget Sound report applied to the environmental conditions in Buzzards Bay.

Fourth, the Puget Sound report was not premised on the express intent to preempt any state regulation underlying the proposed action in Buzzards Bay. *See J.A.* at 396-97 (saying the Coast Guard's CED was undermined because it contrasted "the agency's intended action with a completely hypothetical Buzzards Bay"). NEPA obligated the Coast Guard to review its Final Rule in the real world, under the actual regulatory and environmental scenario in Buzzards Bay and not the "completely hypothetical Buzzards Bay" it used to contrast with its intended action. *See id.*

In analyzing harmless error in the NEPA context, courts have been careful to compare the procedures actually used by an agency in reaching a decision to the procedures required by NEPA. Here, because the Coast Guard opted not to conduct any environmental review, such a comparison is not possible. The Coast Guard's procedures are in no way similar to the FAA's in *Save Our Heritage* nor to the extensive process required under NEPA, and the present case involves the "simple refusal to study environmentally problematic consequences" that this Court has previously cautioned against. *See Save Our Heritage*, 269 F.3d at 62.[14]

Nor is this a case where "an agency's failure to follow proscribed procedures [was] "harmless" . . . [because] remand "would accomplish nothing beyond further expense and delay." *Save Our Heritage*, 269 F.3d at 61-62 (citation omitted). Here, remand would force the Coast Guard to conduct its first environmental review of Buzzards Bay of the effect of its proposed course of action and existing and reasonable alternatives to that course of action. Such review, with the benefit of full and informed public participation may show that the Coast Guard too quickly dismissed the environmental impacts of its Final Rule, and may persuade it to alter or mitigate its decision, precisely the result NEPA is intended to produce.

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[14] The district court itself called the Coast Guard's environmental analysis a "supercilious denigration and dismissal of thoughtful environmental concerns." *J.A.* at 495.

2. The Coast Guard's Procedures did not Inform the Public that it Considered the Environmental Issues.

The Coast Guard's lack of environmental review and analysis also foreclosed any meaningful opportunity for public review and the associated rights interested parties have to notice and comment under NEPA. When preparing an EA, the "agency shall involve environmental agencies, applicants, and the public, to the extent practicable," 40 C.F.R. § 1501.4(b), which includes providing the public with notice of "NEPA-related hearings, public meetings, and the availability of environmental documents." 40 C.F.R. § 1506.6. Even if the agency ultimately makes a FONSI, NEPA requires the same public notice procedures. 40 C.F.R. § 1501.4(e)(1).

Although the public had a chance to comment on the propriety of regulating double-hull vessels in the rulemaking context, the Coast Guard's response to these comments was devoid of any serious analysis:

> The majority of tank barge casualties in Buzzards Bay have been caused by groundings, and the bottom characteristics of the area are generally rocky. Double hulls provide sufficient protection against this type of casualty, and there has never been a major oil spill from a double hull tank barge grounding in Buzzards Bay. Therefore, the Coast Guard does not feel it is necessary to require tug escorts for double hull tank barges at this time.

J.A. at 1092. The public and interested parties did not have any notice of hearings related to this issue, nor did they have notice and an opportunity to comment on any specific environmental documents the Coast Guard may have relied on when it

determined double-hulls provide "sufficient protection." Because the Coast Guard did not inform the interested parties of the data it considered or provide access to any of that material to the public, the interested parties and members of the public like CLF did not have the opportunity to comment specifically on the Coast Guard's environmental analysis, or to supplement the data used. A key aspect of NEPA's procedural requirements is to ensure that a larger public audience can impact the agency's decisionmaking process. *See Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (NEPA designed to "influence the decisionmaking process"). Here the Commonwealth, the Coalition for Buzzards Bay, and the broader general public did not have the opportunity to adequately participate in any meaningful assessment of the Final Rule's effect on the environment.

3. The Nature of NEPA is Such that Violations of the Act Should Rarely be Harmless.

The requirement that agencies comply with NEPA "to the fullest extent possible" is not advisory. As the legislative history makes clear:

> each agency of the Federal Government shall comply with the directives set out in [NEPA] [u]nless the existing law applicable to such agency's operations expressly prohib[it]s or makes full compliance with one of the directives impossible . . . . Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section [4332]. Rather, the language in section [4332] is intended to assure that all

> agencies of the Federal Government shall comply with the directive set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

115 CONG. REC. 39703, 40418 (1969) (Senate conferees). Because it does not impose any substantive obligation, allowing agencies to circumvent NEPA's procedures through the use of less environmentally rigorous or meaningful methods of investigation is to render the statute meaningless. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d 1109 at 1115 (NEPA's requirements are "not inherently flexible", noting that "[i]t is hard to imagine a clearer or stronger mandate to the Courts" than NEPA's procedural requirements (citation omitted)). Accordingly, "when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *Watt*, 716 F.2d at 952.

The harm suffered when an agency violates NEPA, moreover, is not exclusively procedural. As this Court has held, "the harm at stake in a NEPA violation *is* a harm to the *environment,* not merely to a legalistic 'procedure.'" *Marsh*, 872 F.2d at 504. This harm "consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Id.* at 500. Thus, when an agency violates

NEPA's procedures, it necessarily harms the environment. *See id.* at 505 ("harm to the NEPA process" and "harm to the environment" are not separate categories of harms).

If this Court remands the case and requires the Coast Guard to comply with NEPA, the agency will have to take a number of steps designed to prevent this harm. It will have to prepare an EA, discretely outlining the need for the rule, the environmental effects of the rule, alternatives to the rule, and impacts of the alternatives. *See* 40 C.F.R. § 1508.9(b). It will be forced to consult with outside parties regarding potential environmental effects in the NEPA context. After the EA analysis, the Coast Guard may come to the conclusion that either the adverse environmental effects are in fact significant, in which case it will have to prepare an EIS, or it may have to put in place mitigation measures that allow it to make a FONSI.

Absent a meaningful environmental review fully informed by public input, neither the district court nor this Court can determine whether the Coast Guard's violation is in fact harmless. Although the Coast Guard apparently believes its Final Rule does not impose any environmentally significant impacts, it has not demonstrated the basis for its belief, and this uncertainty poses a significant threat to the environment and an important Massachusetts natural resource. If this Court does not remand the case, the Coast Guard will be rewarded for thumbing its nose

at the express language and purpose of NEPA, the public will be ignored, and the potential for catastrophic harm to the environment, and the NEPA process, will continue.

This Court need look no further than the past practice of the Mineral Management Service of giving categorical exclusions to drilling operations in the Gulf Coast for a prime example of the harm that may be caused when federal agencies do not thoughtfully and genuinely consider the environmental consequences of their actions. *See Defenders of Wildlife v. Mineral Mgmt. Serv.*, No. 10-0254-WS-C, 2010 WL 3522399 (D. Ala. 2010). Indeed, in light of the recent disaster in the Gulf of Mexico, it is unthinkable that an agency drafting oil regulations would address the potential environmental impacts with such a hollow gesture. It cannot be harmless error when a federal agency so clearly and cavalierly ignores the requirements of NEPA, particularly in connection with a resource as valuable, and at risk, such as Buzzards Bay.

III. CONCLUSION

For these stated reasons, the Conservation Law Foundation respectfully requests that the Court vacate the Order of the United States District Court for the District of Massachusetts and remand the case to the District Court for further proceedings, with instructions to remand the Final Rule to the Coast Guard for an appropriate NEPA analysis.

Respectfully Submitted,

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Certificate of Compliance With Rule 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,416 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point typeface, and that this brief complies with all the requirements of Fed. R. App. P. 29.

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CERTIFICATE OF SERVICE

I, Peter Shelley, hereby certify that on this 14th day of October, 2010, I electronically filed the foregoing Brief of Amicus Curiae Conservation Law Foundation with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel are registered as ECF filers and that they will be served by the CM/ECF system:

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