

Proposed Local Law Number 12 Of 2022

County Of Ulster

A Local Law Providing For The Rights Of The Residents Of Ulster County To Clean Water, And For The Rights Of Protection And Restoration Of The Hudson River, Also Known As Mahicannituck, And For The Rights Of The Residents Of Ulster County And The River To Clean Water And A Healthy And Productive Ecosystem

BE IT ENACTED, by the Legislature of the County of Ulster, as follows:

SECTION 1. TITLE.

This Local Law shall be known and referred to as the ~~“Clean Water and Rights of the Hudson River / Mahicannituck”~~ **“The Hudson River / Mahicannituck Restoration and Protection”** law.

SECTION 2. AUTHORITY.

This Local Law is enacted under the authority of the Ulster County Charter, sections 10 and 33 of the Municipal Home Rule Law, section 10 of the Statute of Local Governments and art. I, § 19, art. IX, § 2, and art. XIV, § 4 of the New York Constitution.

SECTION 3. LEGISLATIVE INTENT AND FINDINGS.

~~The Ulster County Legislature hereby finds that the people of Ulster County possess the right to clean water.~~

~~The Legislature further finds that the Hudson River possesses the rights to exist, regenerate & flourish.~~

~~The Ulster County Legislature finds it necessary to enact laws to protect those rights from violation by business and government entities which have threatened them, and otherwise could continue to do so.~~

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A. The Ulster County Legislature hereby finds that the Hudson River is an essential environmental resource for the County and its residents. It is the defining feature of the Hudson Valley, the region of which the County is a part. It provides drinking water to residents of Ulster and neighboring counties. Historically, it was an abundant source of food for residents along its entire length. It provides scenery, recreation and a corridor for transportation, and the economic benefits associated with all these functions.

B. The Hudson is an estuary from the Federal Lock and Dam at Troy down to its confluence with New York Harbor and the Atlantic Ocean at New York City. Estuaries, where tides mix freshwater rivers with the sea, are uniquely productive and valuable waterways. The state Department of Environmental Conservation explains:

Estuaries . . . support abundant wildlife, and they function as reproductive, refuge and forage habitat for many resident and migratory species of fish, birds, reptiles, amphibians, invertebrates and mammals. Estuaries are home to an unequalled diversity of plant and animal species, many of which do not or cannot exist elsewhere. Nationally, 75 percent of commercially harvested fish and shellfish depend on estuaries and nearby coastal waters for some part of their life- cycle. Estuaries also provide food, erosion control, floodwater storage, and water purification by wetlands. In addition, they provide transportation routes and sites for industry and recreation.

Miller, Daniel E., 2013. Hudson River Estuary Habitat Restoration Plan. (DEC Hudson Habitat Restoration Plan”) New York State Department of Environmental Conservation, Hudson River Estuary Program at 5-6.

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C. The Hudson has long been an estuary of national significance. It is the only estuary that crosses the Appalachian Mountains, and so provided the main commercial route into the interior of the country in the early 19th century, in conjunction with the Erie Canal built for that purpose. Ecologically, the Hudson is home to more than 200 fish species, bringing together both coldwater and warmwater biota. In 2013 the state Department of Environmental Conservation summarized the River's functions as follows:

A healthy, vibrant and resilient Hudson River ecosystem has been and will continue to be an essential part of the well being of the people and communities of the Hudson River Valley. Today, the Hudson River has a vital role in the lives of the people of New York State and the nation as an environmental resource, providing drinking water and recreational opportunities and serving as habitat for plants and a wide variety of resident and migratory fish and wildlife. These include important coastal migratory fish species, such as: striped bass, river herring, American shad (*Alosa sapidissima*), Atlantic sturgeon and Atlantic tomcod (*Microgadus tomcod*). The Hudson also has been and continues to be an important economic engine providing a transportation corridor for the region's agricultural and industrial goods, providing a tourism destination and attracting businesses to the region. Finally, the Hudson is an integral part of the valley's identity. Its rich history and scenic beauty have inspired generations of artists, naturalists, philosophers, tourists and residents.

DEC Hudson Habitat Restoration Plan at 5.

D. Historically, the Hudson was a bountiful source of seafood for its residents and customers of its vibrant commercial fishery. River naturalist Robert Boyle termed the River a "protein plant," and writing in 1969, found it "likely that spawning grounds in the Hudson River supply the inshore Atlantic coast with 10 to 20 percent of the total run of striped bass on the summer months." Boyle, Robert H, *The Hudson River, a Natural and Unnatural History*, Expanded Edition 1979, WW Norton, at 23, 24. He also reports that during the colonial

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period the 350 square miles of oyster beds from New York harbor up the River to Croton Point provided more than half the world's supply of oysters, which were up to a foot long. Id. at 38.

E. The productivity of the River was reduced over the centuries by commercial exploitation, and particularly the last 150 years from overfishing, pollution, habitat destruction including the damming of the River and its tributaries, invasive species, and more recently the warming climate. Currently, the River's productivity is a fraction of its historic abundance and two of its signature species, the Atlantic and short nosed sturgeon, are federally endangered. A third, the American shad, has collapsed, and its fishery was closed in 2010.

F. Of the factors in reducing the River's productivity, the serious pollution that was evident by the mid-20th century has largely been abated, due primarily to the implementation of the federal Clean Water Act which was enacted in 1972. The River retains a legacy of toxic pollution from the discharge of polychlorinated biphenyls (PCBs) from the 1940s to the 1970s at two General Electric facilities in Fort Edward and Hudson Falls.

G. The PCB discharges resulted in the Hudson's designation as a CERCLA ("Superfund") cleanup site for 200 miles from Hudson Falls to New York City, the largest Superfund site in the country. From 2009-2015 approximately 2.75 million cubic yards of PCB laden sediments were dredged from the Upper Hudson. Despite the dredging, PCB levels in fish remain elevated, and the US EPA is in the process of determining further cleanup actions.

H. It is the intent and purpose of the Ulster County Legislature to protect and, to the extent practicable, restore the health, cleanliness and productivity of the Hudson River for the benefit of its residents and visitors as well as the River's natural components and ecosystems. The Legislature also intends to recognize and implement the rights of its residents to a clean, healthful and productive

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River and the right of the River itself to thrive, pursuant to the Green Amendment. Article I, section 19 of the New York State constitution

I. Since the state's division into counties in 1788, the westerly half of the Hudson River between Ulster County's northeast corner bordering Greene County to its southeast corner bordering Orange County has been within the jurisdiction of Ulster County. Laws 1788, chapter LXIII.

SECTION 3 4. DEFINITIONS ANTIDegradation.

As used in this local law, the following terms shall have the meanings indicated:

~~“Business entity” shall mean any individual, partnership, copartnership, association, owner or manager of a business, commercial or industrial establishment, joint venture, corporation, trust, estate, institution, not for profit organization or any other legal entity~~

~~“Clean Water” shall mean water free from the non-natural presence of any one or more substances, contaminants, noise, or pollutants in quantities which are, or may be potentially harmful or injurious to, human health or welfare, animals, fish, plant life, and water quality, or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.~~

~~“Exist” shall mean that the Hudson River has the capacity to naturally perform basic functions historically common to it.~~

~~“Flourish” shall mean that the Hudson River has the capacity to naturally prosper by vigorously growing and developing, which, in turn, allows it to robustly perform its basic functions.~~

~~“Government” shall mean any municipality or division, agency or authority of local or county government; as well as the governments of New York State and the United~~

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~~States of America in the case that they have not lawfully pre-empted Ulster County's authority to act.~~

~~"Hudson River" / "Mahicannituck" shall include the Hudson River ecosystem, including but not limited to its tributaries and its watershed.~~

~~"Regenerate" shall mean the capacity to regain historically basic functions following a natural or human-made interference with those functions.~~

A. The Ulster County Legislature finds that the federal Clean Water Act and its implementation by DEC have improved water quality in the Hudson substantially since the 1970s. However, certain discharges and other activities that may damage water quality remain unregulated, and at times the River can still be used to receive wastes from polluting activities and industries.

B. The Legislature finds proposed uses of the River to assimilate wastes from discharges and other activities to be inconsistent with the goal of restoring the river and the expectation by County residents in the progressive improvement of their environment and their right to beneficially use and enjoy the River for its natural attributes. The goals of the Clean Water Act were the elimination of the discharge of pollutants into US waterways by 1985, and in particular prohibition of discharges of toxic pollutants, and the attainment of water quality that provides for the protection and propagation of fish shellfish and wildlife by 1983. The attainment of these goals would also protect the use of the River as a source of drinking water by County residents and municipalities. Even where these goals have not been completely attained, Ulster County rejects the use of the unnecessary use of the River to receive and assimilate wastes, as inconsistent with the rights of its residents and the River, as well as the intent of the laws in place for decades to restore and improve the River.

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C. Ulster County hereby adopts the New York State antidegradation policy on the Hudson River, whether or not it is currently implemented by DEC. Water quality in the Hudson River shall be maintained and protected unless the proponent of lowering water quality shows after an analysis of alternatives that such lowering of water quality is necessary to accommodate significant social or economic development in the affected area. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. (DEC Organization and Delegation Memorandum 85-40; 40 CFR § 131.12).

D. Any activity under this section shall achieve the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control. No such activity may result in a loss of a recognized use for the Hudson River or any violation of applicable water quality standards.

E. For purpose of this section, “lowering of water quality” shall mean any increase in the water column of the Hudson River within Ulster County of any non-water substance, heat or radioactivity, effected directly or indirectly by the proposed activity.

F. For purpose of this section, “significant social or economic development” shall mean the development of workforce or affordable housing, or development or expansion of a mixed use hamlet, village or city pursuant to a local comprehensive plan, or ecological restoration activities on or adjacent to the Hudson River or a tributary (including removal of non-native species). It does not ordinarily include private commercial activities, unless taken in conjunction with a public agency pursuant to resolution of the policymaking body of such agency that such activity provides significant social or economic development.

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SECTION 4-5. PROHIBITIONS PRECAUTIONARY PRINCIPLE.

~~It shall be unlawful for any business entity or government to violate any of the following:~~

~~A. The right of the people of Ulster County to:~~

- ~~1. have a healthy Hudson River / Mahicannituck, and~~
- ~~2. be free from activities or projects which violate that right; and~~

~~B. The right of the Hudson River / Mahicannituck to:~~

- ~~1. exist~~
- ~~2. flourish~~
- ~~3. regenerate~~
- ~~4. have clean water~~
- ~~5. naturally recharge~~
- ~~6. flow~~
- ~~7. have water quality necessary to provide habitat for native plants and animals~~
- ~~8. be restored, and~~
- ~~9. be free from activities or projects which violate those rights.~~

The precautionary principle shall apply to determinations relating to the potential lowering of water quality, or degradation of any of the River's biota or associated ecological processes shall apply. For purposes of this section "precautionary principle" shall mean that where there are reasonable grounds for concern that a proposed activity could result in adverse impact on the human health or welfare, or water or ecological quality of the River, the insufficiency, inconclusiveness or uncertainty of scientific evidence shall not preclude appropriate restrictions or denial of the proposed activity. The burden of demonstrating the safety and lack of adverse impact from the proposal shall be on the proponent.

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SECTION 5 6. IMPLEMENTATION AND ENFORCEMENT RESTORATION OF THE HUDSON RIVER.

~~A. Implementation and Enforcement by Ulster County.~~ The County of Ulster shall take all necessary actions to implement, defend, and enforce the provisions of this Local law.

~~B. Enforcement by the Hudson River.~~ The Hudson River may enforce or defend the provisions of this Local law through an action brought by any resident of Ulster County in the name of the Hudson River as the real party in interest, in any appropriate court.

~~C. Enforcement by Residents of Ulster County.~~ Any resident of Ulster County may enforce or defend the provisions of this Local law in any appropriate court.

~~D. Damages and Fees.~~ Any business entity or government that violates any provision of this Local law shall be liable for any damages caused to the Hudson River as a result of that violation. Damages shall be measured by the cost of fully restoring the Hudson River to its natural state before the violation, and shall be paid to Ulster County to be used exclusively for the full and complete restoration of the River as affected by the violation. A prevailing plaintiff, in an enforcement action, shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

~~E. Duties and Obligations.~~ The rights of the Hudson River secured within this Local Law shall not be interpreted to confer liabilities, duties, obligations or responsibilities on the Hudson River.

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A. Shallow Habitat Findings.

1. Beginning in the 19th Century and through the mid-20th Century, the Hudson River's shorelines, wetlands and shallow habitats were extensively altered and degraded. These areas are among the most important in the estuary for spawning, sheltering and feeding fish in the early stages of their life, and thus are important for population resilience and recovery.

2. A key feature of these shallow areas is submerged aquatic vegetation, which can only occur where the River is shallow, as the turbidity in the River typically limits the penetration of sunlight to a maximum of 5-6 ft. According to NOAA, SAV occur in both freshwater and saltwater but in estuaries, where fresh and saltwater mix together, they can be an especially important habitat for fish, crabs, and other aquatic organisms. SAV is a great habitat for fish, including commercially important species, because it provides them with a place to hide from predators and it hosts a buffet of small invertebrates and other prey. They essentially form a canopy, much like that of a forest but underwater. Burrowing organisms, like clams and worms, live in the sediments among the roots, while fish and crabs hide among the shoots and leaves, and ducks graze from above. It has been estimated that a single acre of SAV can be home to as many as 40,000 fish and 50 million small invertebrates!

NOAA, Submerged Aquatic Vegetation: A Habitat Worth SAV-ing, July 27, 2020.

The U.S. Army Corps of Engineers dredged, deepened and channelized the River for commercial navigation from the early 1800s through the mid-1900s. Maintenance dredging of the channel continues today. These projects resulted in the greatest impact where the River was shallowest, in the upper third of the estuary (Catskill to Troy). DEC characterized this area as a "braided river-channel system dominated by vegetated shallows and intertidal wetlands. Side channels in this section provided important shallow water and intertidal habitats that were isolated from the higher energy regime of the main channel." Wes

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Eakin, Gregg Kenney, Elizabeth Streifeneder, Recovery Plan For Hudson River American Shad, March 2023, New York State Department of Environmental Conservation Division of Marine Resources (“DEC Shad Recovery Plan”) at 11.

3. The Corps’ also included sidecasting or depositing the dredged material in nearby shallows, which eliminated side channels and wetlands, connected islands, and effectively doubled the area damaged by dredging. Altogether, these actions resulted in the loss of the majority of shallow-water habitat, nearly 4,000 acres including the near complete elimination of side channels, in the upper third of the estuary. DEC Hudson Habitat Restoration Plan at 6.

4. DEC has conducted an extensive, decade-long study on the loss of shallow habitat and in 2013 published a detailed analysis of restoration opportunities. This analysis and proposal, the “DEC Hudson Habitat Restoration Plan” emphasized the opportunity for restoration of the nearly 4,000 acres of shallow habitat lost in the upper third of the estuary between Catskill and Troy.

5. DEC’s study also noted that improved water quality conditions and increased interest in and study of the River in recent years has created “a unique opportunity to take the next step in recovery of the Hudson River ecosystem—restoration of habitats vital to supporting the biological and economic health of the Hudson and its surrounding community.” DEC Hudson Habitat Restoration Plan at 5.

6. Unfortunately, and despite DEC’s finding of a “unique opportunity” for restoration, particularly in light of the completion of its study, there has been virtually no implementation of the DEC proposals. This failure of implementation stands in stark contrast to the restoration efforts in the area of the River south of the Cuomo Tappan Zee Bridge, which is classified as the New York-New Jersey Harbor Estuary under the National Estuary Program. In the “Harbor” portion of the estuary, dozens of restoration projects have been

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completed. In contrast, only two projects have been completed since the release of DEC's proposal for the central and upper estuary in 2013.

7. In March, 2023 DEC published a study on the collapse of the Hudson's American shad population and the potential for recovery. The report found that recovery would likely be a long process, that the loss of habitat was a serious impediment to such recovery and that restoration of shallow habitat is likely essential for recovery of the American shad population.

8. The Ulster County legislature finds that implementation of the DEC proposals for restoration of shallow habitat in the upper third of the estuary to be indispensable for the River to reattain any semblance of its fecundity, and should be implemented at the earliest opportunity.

9. The legislature is particularly concerned about the disparity between restoration efforts in the Harbor Estuary, and the mid- and upper Hudson estuary. The Legislature finds this disparity untenable and inconsistent with the restoration of the health of the River, and a violation of state policy as expressed in the Hudson River Estuary Management Act, ECL § 11-0306, and the rights of Ulster residents and the River itself to such restoration.

B. PCB contamination and cleanup findings

1. The contamination of the Hudson River with PCBs for more than 75 years from large scale GE discharges has grievously damaged the River and Ulster County residents who rely on the River.

2. The discovery of the toxicity of the PCBs and of their contamination of Hudson River fish in the 1970s, and the resulting measures to limit the damage to human health, severely reduced the connection between Ulster residents and the River and the extent that Ulster residents could benefit from the River in their everyday lives. The greatest damage was in the ability of residents to enjoy and nourish themselves with fish from the River.

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3. The assertion of federal Superfund jurisdiction by USEPA to effect the cleanup of the River by General Electric, the responsible party, was appropriate and correct and the dredging to date has been an essential step toward reducing the ongoing damage from the PCB contamination.

4. Despite the dredging to date, there remains sufficient PCB contamination in the River's sediments and fish to continue to damage the River and its aquatic life.

C. Declaration of County policy

1. It shall be the policy of Ulster County to support, advocate, and, where applicable, effect the ecological restoration of the River, including its historic habitat for fish and other aquatic species and its water quality.

2. It shall be the policy of Ulster County to support, promote and demand the restoration of shallow aquatic habitat in the River, especially including the habitat and restoration activities identified and recommended in the DEC Hudson Habitat Restoration Plan.

3. It shall be the policy of Ulster County to support, promote and demand sufficient dredging and remedial action to reduce and limit the extent of PCB contamination in the River to restore the potential for the River's fish and other aquatic life to thrive as if there were no contamination, and to functionally eliminate the threat to the health of any resident or visitor who eats fish or other aquatic life that lives in the River.

4. It shall be the policy of Ulster County support, promote and demand the assessment of Superfund Natural Resource Damages in sufficient quantity to fund restoration of the River and its component habitat, species and ecosystems, and to compensate Hudson Valley residents for the loss of the River's bounty and function and impacts on human health during the decades of PCB contamination.

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SECTION 6-7. AUTHORITY IMPLEMENTATION.

~~This Local Law is adopted under the authority of the Ulster County Charter, pursuant to the authority provided to home rule municipalities as recognized by the New York Constitution and implementing statutes, and by the inherent right of the people of Ulster County to make laws which recognize and expand civil and environmental rights at the county level, under the authority of the current New York Constitution; and pursuant to democratic rights secured by prior New York constitutions.~~

A. The county executive and department of the environment are directed to implement the provisions of this local law to the maximum extent practicable, in light of the centrality of the River and its resources and services to the health, welfare and prosperity of the County's residents. The executive and department of the environment shall zealously advocate these policies with the jurisdictional agencies, and to annually report to the legislature as to the progress of the restoration. The executive and department of the environment shall recommend to the legislature any measures not currently within their authority, including any technical studies or research to apply these policies or advocate them to the jurisdictional agencies, or adjudication of disputes in administrative hearings or judicial proceedings.

B. The County, upon resolution of the legislature, or any County resident acting on their own behalf or that of the River, may bring an action to enforce the provisions of this local law in Supreme Court in any appropriate venue or in any other court of competent jurisdiction.

SECTION 7 8. INTERMUNICIPAL COMITY AND COOPERATION.

A. The Ulster County jurisdictional portion of the Hudson River, i.e. the western half of the River along the length of the County's shoreline, is not an independent resource. It is directly affected by flows into it from all directions, particularly in light of the River's ebb and flow tides, and therefore by the

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activities and actions affecting areas of the River outside the jurisdictional portion.

B. More fundamentally, the River is a deeply interconnected ecological resource, due to the migration of fish into and through the Ulster jurisdictional portion during and between their life stages, including spawning migration, and the diffusion of nutrients and other ecological components. Accordingly, each part of the River necessarily affects the ecological integrity of other parts of the River.

C. Ulster County residents enjoy access to the resources of other portions of the River than the County's jurisdictional area. Conversely residents of other counties and visitors to the region enjoy access to and the opportunities to take advantage of, the resources of the Ulster County jurisdictional portions of the River.

D. In light of the foregoing and the essential unity of the River as a resource, the County seeks the assistance of other jurisdictional municipalities as to the preservation and restoration of the River, and securing the rights of the people to a clean, healthful and abundant River and offers its assistance regarding the same.

SECTION 9. SEVERABILITY.

In the event that any portion of this Local Law is found to be invalid, such ~~finding~~ **invalidation** will not have any effect on ~~either~~ the remaining portions or applications of this Local Law; ~~or any provisions of the Ulster County Charter, which shall remain in full force and effect.~~ **The Legislature intends that each section of this Local law shall be in full force and effect so as to provide increased benefit to the River, even if other provisions are invalidated or suspended.**

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SECTION 8 10. EFFECTIVE DATE.

This Local Law shall become effective immediately upon filing with the Office of the Secretary of State of the State of New York.