

Statutes and Regulations

ECL Section 15-0505;
6 NYCRR Section 608.1(h).

NOTE:

Definition of 'navigable waters of the state' under 6 NYCRR Section 608.1(h) was amended in July of 1979 to exclude only 'single private ownership' from a navigability determination.

Issue

Whether or not Burden Lake was navigable under the regulation as it stood at the time of the application in 1978 thereby requiring a Department permit to fill a pond contiguous to and connected with the lake.

Summary of Facts

The applicant was prevented from filling in a small pond of water by departmental personnel who indicated that a permit under ECL Section 15-0505 was necessary. The applicant applied for the permit and, after the same was denied, a hearing was held. The applicant contended that the Department lacked jurisdiction since Burden Lake was not navigable within the meaning of the regulation as the same stood in May 1978. It was admitted by the applicant that the pond is adjacent to and contiguous to Burden Lake. The hearing officer did not address the jurisdictional issue and affirmed the denial. Thereupon the applicant sought judicial relief through an Article 78 proceeding. The Appellate Division, Third Department, ruled that it was error for the Department not to consider the applicant's jurisdictional objection and remanded the matter to the Department for further proceedings whereupon the applicant requested a declaratory ruling with respect to the jurisdictional objection it had raised.

Summary of Ruling

There was no jurisdiction in the Department to require a permit since Burden Lake was not navigable within the regulation as the same stood in May 1978. A search of real property records indicates that the bed of Burden Lake was in private ownership at the time of application to the Department (1978). Private ownership negated jurisdiction based on the definition of 'navigable waters of the state' as it was defined prior to a July 1979 amendment.

Judicial Disposition

No party has challenged the ruling.

Text of Ruling

July 14, 1982

Wager, Taylor, Howd, Brearton
and Kessler
P.O. Box 479
Troy, NY 12181

ATTENTION: Michael W. Kessler, Esq.

RE: Declaratory Ruling -
In the Matter of the
Application of MARION STAPF

Dear Mr. Kessler:

This letter will serve as a declaratory ruling pursuant to State Administrative Procedure Act Section 204 and in response to your letter of February 2, 1982 addressed to Mr. Ulasewicz of this office.

The declaratory ruling seeks a jurisdictional determination from the Department of Environmental Conservation regarding the need for Marion Stapf ('Applicant'), to secure a permit pursuant to ECL Section 15-0505 before filling a certain pond of water adjacent to and connected to Burden Lake. Applicant contends that this permit requirement does not apply to the pond in

question since, while it is admitted that the pond is adjacent to and contiguous [sic] to Burden Lake thus meeting the definition in the statute, Burden Lake is not a navigable water of the State. For the purpose of determination of this question, the controlling definition of 'navigable waters of the State' is that found in 6 NYCRR 608.1(h) as the same was in effect in May 1978, the time of the application. That definition read 'all waters within the boundaries of the State and not privately owned.' The use of this definition and regulation is required by and consistent with the ruling of the Supreme Court Appellate Division, Third Judicial Department, issued March 5, 1981 in the case of Marion Stapf, Petitioner v. Robert Flacke, as Commissioner of the New York State Department of Environmental Conservation, Respondent.

The applicant contends that a certain deed, dated June 10, 1902 and recorded June 17, 1907 in Liber 310 of Deeds at page 284 in the Rensselaer County Clerk's Office from James A. Burden et al., to the Wynantskill Improvement Association ('Association'), a domestic corporation, establishes that Burden Lake is owned by the association and is thus not a navigable water of the State.

Search of the records of the Rensselaer County Clerk's Office confirms the fact that there is no public ownership of the bed of Burden Lake, the same being held by the successors-in-interest to the Wynantskill Improvement Association. Accordingly, the jurisdictional prerequisite for requiring a permit under ECL Section 15-0505 as the same was amplified by 6 NYCRR 608.1(h) as it read in May 1978, was lacking.

It is noted that during the pendency of this matter, 6 NYCRR 608.1(h) was amended to read 'all waters within the boundaries of the state and not in single private ownership'. This amendment was effective July 25, 1979. It is worth noting that no statutory change preceded this promulgation of the revised regulation. However, as pointed out above, the nature and extent of private ownership is not an issue provided there is no public ownership.

In view of the foregoing, the Department of Environmental Conservation, pursuant to statute, issues this declaratory ruling to the effect that no application for a permit was necessary prior to the filling of the pond in question.

Sincerely,

/s/ Richard A. Persico
General Counsel/
Deputy Commissioner