

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Petition of :
GAIL BLACK and ROBERT HABERER for :
a Declaratory Ruling pursuant to : DECLARATORY
Section 204 of the State Administrative : RULING
Procedure Act : 15-11
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Introduction

Petitioners, Gail Black and Robert Haberer, by their attorney, David J. Seeger, Esq., seek a declaratory ruling that, under Environmental Conservation Law (ECL) §15-0503 and 6 NYCRR Part 608, a permit from the Department of Environmental Conservation (the Department) is not required for construction of a farm pond if the dam or impoundment forming such pond is not built in or across a natural stream or water course.

Background

Petitioners are partners and co-owners of Vinewood Acres, a farm that produces grapes and vegetables on 100 acres of land. Petitioners, with the intention of commencing fish farming, have begun construction of a farm pond consisting of an earthen dam approximately ten feet in height with a capacity in excess of 1,500,000 gallons. The Department has issued Petitioners a Farm Fish Pond License authorizing fish stocking and other activities in the pond. The pond is to be fed by overland runoff, and the dam impounding water for the pond is not situated in or across a natural stream or water course. Petitioners allege that inasmuch as the dam is not located in or across a natural stream or water course, no permit is required to erect such dam pursuant to ECL §15-0503 and 6 NYCRR Part 608 and they seek a ruling to that effect.

Analysis

Subdivision 1 of ECL §15-0503 provides:

Except as provided in subdivision 4 of this section, no dam or impoundment structure, including any artificial obstruction, temporary or permanent, in or across a

natural stream or water course, shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to subdivision 3 of this section. [Emphasis added.]

Subdivision (4) of ECL §15-0503 provides, in pertinent part, that the requirement of a permit shall not apply to:

b. A farm pond erected upon lands devoted to farming for the purpose of soil conservation, propagation of fish, irrigation, watering of livestock, maintenance of wildlife or general farm use which is formed by an earth embankment with an all-earth vegetated spillway and other accessory structures, unless (1) the height of earth embankment, measured from the top thereof to the lowest point of the excavation in the reservoir area, exceeds fifteen feet; or (2) the capacity of the farm pond exceeds one million five hundred thousand gallons measured as the total volume of water which would be impounded if the surface of the water were at the bottom of the spillway at its highest point; or (3) the area draining into the farm pond exceeds two hundred acres; or (4) the pond comprises more than ten acres of surface water when full; or (5) the water to said farm pond is diverted into said pond by an artificial obstruction in or across a natural stream or water course.

Petitioner apparently contends that the language "in or across a natural stream or water course" is intended to modify the term "dam or impoundment structure" in ECL §15-0503(1). However, both legislative and administrative history show that the phrase "in or across a natural stream or water course" modifies the term "any artificial obstruction", and the entire phrase "including any artificial obstruction, temporary or permanent, in or across a natural stream or water course" is an illustration -- not a precise itemization -- of the types of dams and impoundment structures which require a permit. This interpretation is consistent with the commonly accepted meaning of the word "including" as a term of enlargement, not of limitation. Words and Phrases, vol. 20A, p. 144 et seq.; Red Hook Cold Storage Co., Inc. v. Department of Labor, 295 NY 1 (1945); Matter of Goetz, 71 App Div 272 (1902); Matter of Link, 182 Misc 966 (1943).

The predecessor of ECL §15-0503, former Conservation Law §948, provided that:

No structure for impounding water and no dock, pier, wharf or other structure used as a landing place on waters shall be erected or reconstructed by any public authority or by any private person or corporation without notice to the superintendent of public works....

Section 948 expressly applied to all impoundments, not just those erected in a natural stream or watercourse. Nonetheless, the Legislature, in 1959, found that:

The unreasonable interference with the channels and beds of streams by the erection of dams and other structures, the alteration of water courses and gradients, the impounding of water ... and by other action, has resulted in pollution of such waters, increase in turbidity of waters and the deposit of silt and debris, irregular variations in velocity, temperature and level of waters, erosion of banks and uplands and flooding of valuable lands....

C. 602, L. 1959, §1(a). Thus, the Legislature passed, and the Governor signed into law, Chapter 602 of the Laws of 1959 which, among other changes, added to the Conservation Law a new section 179 clarifying that "[n]o dam or other structure may be placed in any stream ... except as authorized by Section 948", and requiring a permit from the Conservation Department (the Department's predecessor) before modifying or disturbing the bed of certain streams. C. 602, L. 1959, §2. In conjunction with the addition of the new section 179, Chapter 602 also amended section 948 to make the following explicit reference to "artificial obstructions" as a type of impounding structure requiring a permit:

No structure for impounding water, including any artificial obstructions, temporary or permanent, in or across a natural stream or water course [and no], nor any dock, pier, wharf or other structure, temporary or permanent used as a landing place on waters shall be erected, [or] reconstructed or repaired by any [public authority or by any private] person or public corporation without notice to the [superintendent] Superintendent of [public works,] Public Works.

C. 602, L. 1959, §4. Additionally, section 948 was amended to exempt from the permit requirement those farm ponds which are currently exempted under ECL §15-0503(4)(b).

That the amendments made by Chapter 602 were intended as an expansion, not a limitation, on the types of impoundments already subject to the statute's requirements is made clear by Governor Nelson A. Rockefeller's Memorandum approving Chapter 602. In approving Chapter 602, Governor Rockefeller stated:

The results of careful study by conservationists reveal that the unnecessary removal of sand and gravel from streams, the uncontrolled erection of dams and other structures and the alteration of streambeds, without proper safeguards endanger the availability of water supplies for domestic, municipal and recreational uses and threaten our natural resources....

Consistent with the purposes of this bill, the present authority of the Superintendent of Public Works to prescribe conditions for the construction of dams, docks and other structures on State controlled waters is extended to permit him to prescribe specifications.... [Emphasis added.]

Comments of other governmental agencies on the bill which became Chapter 602 lend further support to the conclusion that the amendment was intended to broaden, not limit, the State's jurisdiction to regulate dams and impoundments. Then Attorney General Louis Lefkowitz in his memorandum to the Governor on the bill stated:

The bill would also amend Section 948 of the Conservation Law with the design to clarify the present statute and to enlarge the present authority of the Superintendent of Public Works.... [Emphasis added.]

Similarly, Superintendent of Public Works J. Burch McMorran advised the Governor that:

The bill would also amend Section 948 of the Conservation Law so as to make that section more workable and to more specifically state the authority and responsibilities of this department with respect to the construction and repair of dams and other structures impounding water.

Chapter 955 of the Laws of 1965 repealed Conservation Law §948 and redesignated it Conservation Law §429-c. Section 429-c was recodified by Chapter 664 of the Laws of 1972 as ECL §15-0503, and both it and former Conservation Law §179 are now included in ECL §15-0501 and §15-0503.

The legislative history of Conservation Law §948 is thus germane to ECL §15-0503. Moreover, the historical interpretation avoids the curious result which would ensue if ECL §15-0503(1) were interpreted to allow construction, without a permit, of a farm pond in or across a natural stream or water course while ECL §15-0503(4)(b)(5) would require a permit for construction of a farm pond which has water diverted into it by an artificial obstruction in or across a natural stream or water course. A sensible construction is preferred to one which is absurd. McKinney's Statutes §145. The interaction between the permit requirement of ECL §15-0503(1) and the exemptions in ECL §15-0503(4) is much more rational when interpreting the phrase "in or across a natural stream or water course" as modifying "any artificial obstruction". Under this interpretation, all structures which impound water require a permit unless they are exempted under ECL §15-0503(4). A farm pond not situated in or across a natural stream or water course would be exempted under ECL §15-0503(4)(b) unless water was diverted to the pond by an artificial obstruction in or across a natural stream or water course or unless one of the criteria set forth in ECL §15-0503(4)(b)(1) through (4) is met.

The above interpretation of ECL §15-0503 is contained in the regulations adopted by the Department in 1972 to implement the statute. In particular, 6 NYCRR 608.3(b)(2) provides an exemption from the ECL §15-0503 permit requirement for certain farm ponds not in a natural stream or water course. A long-continued course of construction of a statute by State officers authorized to administer and enforce it is traditionally given great weight. McKinney's Statutes §129.

Conclusion

Based on the above analysis, it is my conclusion that dams or impoundment structures not in a natural stream or water course are not exempt from the permit requirement of ECL §15-0503 unless they are exempted under subdivision (4) of that section. Petitioner must therefore obtain a Protection of Waters Permit pursuant to ECL §15-0503. This requirement is separate and independent of the requirement to obtain a Farm Fish Pond License pursuant to ECL §11-1911.

The instant inquiry has brought to our attention the need to ensure greater clarity within 6 NYCRR Part 608 with regard to

impounding structures built on lands devoted to farming. The Department is currently in the process of preparing amendments to Part 608 in order to implement the authority conferred by Chapter 791 of the Laws of 1992. As part of those amendments, this Department will propose clarifying amendments with respect to the permit requirements for dams and impoundments. The proposed amendments should be available for public comment in the near future.



Marc S. Gerstman
Deputy Commissioner
and General Counsel

Dated: June 2, 1993