

In the Matter of

A Request for a Declaratory Ruling

DEC 17-02

by the

KINDERHOOK LAKE CORPORATION

Under Section 204 of the State Administrative Procedure Act

INTRODUCTION

The Department of Environmental Conservation ("DEC") has received a petition for a Declaratory Ruling as to the applicability of the statutory requirements of Article 17 of the Environmental Conservation Law ("ECL") and of the regulatory requirements of 6 NYCRR Part 751 to the development and construction of a subdivision known as Woodridge Park in the Town of Kinderhook, County of Columbia, State of New York.

The Petition (Appendix A) has been submitted by the Kinderhook Lake Corporation, the owner of the lands under the waters comprising Kinderhook Lake ("Lake") seeking declaratory rulings from the DEC as follows:

1. that the requirements of Article 17 of the ECL and 6 NYCRR 751 apply to the construction

- and development activities of the subdivision;  
and
2. that the discharge of the sediment and debris into the Lake as the result of the construction and development activities in making the subdivision is a "significant contributor of pollution" to the Lake, as that term is used in 6 NYCRR 751.3(a)(7); and
  3. that the deposit of sediment and debris in the discharges from the construction and development of the subdivision have polluted the Lake to the extent that the eastern portion of the Lake cannot be used for the purposes required and mandated by a "B" classification and "B" standard, namely contact recreation and swimming.

FACTS

DEC records show that a State Pollutant Discharge Elimination System ("SPDES") permit (Appendix B) was issued to Mr. Bob Boli on October 20, 1977, effective November 1, 1977 and expiring on November 1, 1982. That SPDES permit regulates only the

discharge of sanitary sewage by means of individual septic systems. There is no application for a surface discharge.

For the sole purpose of issuing this declaratory ruling, DEC will assume the facts as set forth in the petition to be correct, without any formal determination as to their accuracy. We take this position for two reasons. First, because the State Administrative Procedure Act and DEC regulations concerning declaratory rulings (6 NYCRR Part 619) provide neither authorization nor procedures for the DEC's determination of the accuracy of facts alleged in a petition for a declaratory ruling. In comparison, in an action for a declaratory judgment pursuant to Section 3001 of the Civil Practice Law and Rules, a court may require and direct the submission of disputed questions of fact to a trial for disposition before it renders a final judgment as to the rights of the parties involved. Rockland Power and Light Co. v. City of New York, 289 NY 45 (1942).

Second, in a declaratory judgment under CPLR 3001 the parties whose rights are to be determined must be joined as parties. In the absence of a necessary party a court may refuse to render

a declaratory judgment. Wood v. City of Salamanca, 289 N.Y. 279 (1942). However in this petition for a declaratory ruling, in an administrative setting, Mr. Boll, whose activities in developing the subdivision are alleged to be governed by certain sections of the Environmental Conservation Law, and whose obligations and liabilities may flow from the accuracy of the alleged facts, is not a party and has no opportunity to agree with or controvert the alleged facts as set forth in the Petition. Normally a Declaratory Ruling is used by a Petitioner to obtain a ruling on his own liabilities or entitlements under law, not to obtain a ruling on the liabilities or entitlements of a third party. Nevertheless, the statute and the regulations allow an agency to issue a declaratory ruling on the applicability of a statute and given facts to any person, not merely the person requesting the ruling. Furthermore, whereas §204 of the State Administrative Procedure Act leaves a response to a request for a declaratory ruling to the discretion of the agency, Part 619 of the DEC regulations mandate a response.

Consequently, this Declaratory Ruling assumes the facts as alleged and leaves to some other administrative proceeding, if necessary, the resolution of those facts with the participation, or opportunity for participation, by Mr. Boll.

DISCUSSION OF APPLICABLE LAW

The following portions of Article 17 of the ECL and 6 NYCRR Part 751 do apply to the construction and development of a subdivision such as that of Mr. Boll:

- Title 5 of Article 17, especially §§17-0501 and 17-0505;
- Title 7 of Article 17, especially §§17-0701.1 and 17-0701.5;
- Title 8 of Article 17, especially §17-0803;
- Title 15 of Article 17, especially §17-1505.1;
- 6 NYCRR 751.1(a); and
- 6 NYCRR 751.3(a)(7).

However, rather than discussing each of these provisions separately it would be easier to discuss the three ways that subdivisions are regulated by Article 17:

- subdivision approval under Title 15 of Article 17;
- a prohibition against violation of water quality standards; and
- a SPDES requirement.

1. Realty Subdivision Approval

First, any realty subdivision consisting of five or more parcels of land, each of which is five acres or less in size, must, for approval, obtain and furnish adequate and satisfactory sewerage facilities (ECL §17-1505). Approval of the map and plans for the provision of such facilities rests either with DEC or with the local department of health depending on whether the proposed treatment system is a community system (centralized sewer system or centralized septic tank) or whether it is comprised of individual septic tanks. Here, however, the Petitioner has posed no questions concerning the adequacy of sewerage service and therefore this ruling does not address the applicability of Title 15 to Woodridge Park.

2. Water Quality Standards

The second manner in which a subdivision could be regulated by Article 17 of the ECL is through violations of water quality standards. ECL §17-0501, entitled "General prohibition against pollution," prohibits activity causing or contributing to a condition in contravention of water quality standards.

The Petition alleges that the construction of the subdivision has resulted in the directing of increased amounts of sediment and debris into an unnamed tributary which flows into the eastern portion of Kinderhook Lake with a resultant buildup of sediment deposits on the bottom of the lake (Petition, Paragraphs 10-13). It is further alleged that such activity has in effect polluted the Lake in contravention of water quality standards promulgated in the DEC regulations (Petition, Paragraphs 5, 14 and 19).

Such standards, adopted pursuant to ECL §15-0313 and ECL §17-0301, are set forth in the DEC regulations at 6 NYCRR Part 701 and are made applicable to Kinderhook Lake by 6 NYCRR 863, Item 269, which designates a "B" classification for and assigns "B" standards to Kinderhook Lake. Water quality standards for Class "B" waters prohibit, in pertinent part, the addition of settleable solids deleterious for any determined best usage (6 NYCRR 701.4).

In addition, pursuant to subdivision 701.2(a) of the Regulations, an upstream discharge also must not result in a contravention of downstream water quality standards. Consequently, a discharge that meets the water quality standards of the immediate receiving stream may not be permitted if it is shown that water quality standards downstream would be violated.

The alleged discharge of sediment and debris into the Lake as a result of Mr. Boll's construction and development activities (Petition, Paragraphs 10-13) would consequently constitute the addition of settleable solids deleterious for the determined best usage of the Lake, namely primary contact recreation, such as swimming.

3. SPDES

The third way in which a subdivision could be regulated under Article 17 and 6 NYCRR Part 751 is through the SPDES permit program. A SPDES permit is required by various provisions of Article 17. First, §17-0505 prohibits the making or use of an outlet or point source without a valid SPDES permit. Second, §17-0701.1 prohibits, inter alia, the use of an outlet or point source for the discharge of sewage, industrial waste, or other waste without a SPDES permit. Third, §17-0803 prohibits the discharge of pollutants from any outlet or point source without a SPDES permit. Fourth, §17-0505 requires a valid SPDES permit before one can make or use an outlet or point source discharging into the waters of the State. "Outlet" is defined in ECL §17-0105(11) as

"the terminus of a sewer system, or the point of emergence of any water-borne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state."

The statutory definition of "other wastes" is garbage, refuse, decayed wood, sawdust, shavings, bark, sand, lime, cinders, ashes, offal, oil, tar, dye-stuffs, acids, chemicals, and all other discarded matter not sewage or industrial waste which may cause or might reasonably be expected to cause pollution of the waters of the State in contravention of standards adopted as provided herein".

ECL §17-0105(6). This would include sediment. ✓

Also §17-0811 requires that the terms of SPDES permits comply with state water quality standards.

Initially it might appear that no SPDES permit is needed since the sewerage system in the subdivision is individual private septic tanks and not a community system and because §17-0701.5 exempts discharges of sewage effluent from a private dwelling to groundwater from a disposal system with a flow of less than 1,000 gallons. Although the petition does not identify the number of units nor the

number and size of the septic tanks, the SPDES application form does reveal a total daily discharge to groundwater of 7,200 gallons for 96 persons from multiple systems. Consequently, the individual units of the subdivision would seem to fall within the SPDES exception for a discharge to groundwater of sewage effluent from a private dwelling with a flow of less than 1,000 gallons.

However, the subdivision may also require a SPDES permit for two separate reasons found in the two sections of the Department's regulations noted above - §751.1(a) and §751.3(a)(7).

First, §751.1(a) basically states that no person shall discharge a pollutant without a SPDES permit. However, in the last sentence of that section it is stated that the sale or rental of parcels from a subdivision by the person who has divided such parcels shall be considered to cause a discharge. Consequently a SPDES permit is required even though there is no surface discharge of treated sewage effluent and even though individual SPDES permits are not required due to the exception in §17-0701.5 for multiple small discharges to

groundwater of sewage effluent from septic tanks. The SPDES permit issued in October 1977 was issued to comply with this requirement.

However, even if there were no requirement in subsection 751.1(a) of NYCRR (or if the requirement were repealed) that a subdivision is considered to cause a discharge, §751.3(a)(7) of 6 NYCRR could still require a permit under the alleged facts. Basically, §751.3(a)(7) states that no SPDES permit is required for uncontrolled discharges of stormwater. However, when contaminated by a commercial activity or when identified by the Department as a significant contribution of pollution the stormwater discharge may require a SPDES permit. Consequently if the allegations of the petition concerning the impact on the deposition of sediment in Kinderhook Lake by the construction of the subdivision are accurate, especially in paragraph 19, and especially if there results a violation of water quality standards to the extent that the water cannot be used for its classified best usage, then the construction and development

activities of Bob Boll have made the subdivision a significant contributor of pollution to Kinderhook Lake.

CONCLUSIONS

With the understanding that DEC is mandated, under 6 NYCRR 619, to issue a declaratory ruling upon request, in spite of the lack of any formal mechanisms to determine alleged facts or to include necessary or proper parties, DEC concludes that:

1. Certain provisions of Article 17 (17-0501; 17-0505; 17-0701.1; 17-0701.5; 17-0803; 17-1505.1) and certain provisions of 6 NYCRR Part 751 [751.1(a); 751.3(a)(7)] do apply to the construction and development of the subdivision;
2. the discharge of the sediment and debris into the Lake as the result of the construction and development activities in making the subdivision is a significant contributor of pollution to the Lake, as that term is used in 6 NYCRR 751.3(a)(7); and

3. that the deposit of sediment and debris in the discharges from the construction and development of the subdivision have polluted the Lake to the extent that the eastern portion of the Lake cannot be used for the purposes required and mandated by a "B" classification and "B" standard, namely contact recreation and swimming.

The determination of the actual facts, if necessary, with opportunity for participation by all necessary parties, must be left to some other administrative or judicial proceeding.

DATED: Albany, New York  
May 23, 1980

  
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