

OGC-9: Enforcement Guidance: Public Rights of Navigation and Fishing

New York State Department of Environmental Conservation

DEC Program Policy

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I. Summary

The purpose of this policy is to address program staff needs for guidance regarding the complex issues of the public rights of navigation and fishing in the context of private property ownership. Waterways that are affected by tides are "navigable-in-law" and the public has a right to navigate on these waters regardless of who owns the bed or whether the waterway is posted. (See Section III.A.) Waterways that are not affected by tides are "navigable-in-fact" and subject to the public right of navigation only if the waterway has or had the capacity for trade or travel, even if they pass through privately-owned lands. (See Section III.A.) The public has a right to fish on navigable waters that pass through privately-owned lands unless title to fishing rights has passed to the landowner and no fishing easement exists. (See Section III.B.)

This policy memorandum will serve as General Counsel Policy to guide OPP officers in carrying out their enforcement responsibilities concerning the public rights of navigation and fishing. All program staff should consult their Central Office or Regional program attorney(s) for advice regarding specific statutory and regulatory program authority or other legal authority such as public nuisance law, prior to taking any enforcement action.

Where the rights of parties have not been previously adjudicated, legal and evidentiary issues of navigability and fishing will often be too complex for Office of Public Protection (OPP) officers to address during the initial field investigation. Therefore, OPP officers shall collect sufficient information about controversies arising in the field and seek guidance from their supervisors and Regional Attorneys prior to taking any enforcement action.

II. Policy

It is the Policy of the Office of General Counsel (OGC) that:

1. Assuming all other elements of the underlying alleged offense are established by reasonable cause, OPP officers shall take enforcement action for Environmental Conservation Law trespass or Penal Law trespass in situations involving persons navigating on waterways only if there is clear evidence or a court decision (hereinafter "clear evidence") that the waterway is not navigable-in-law or navigable-in-fact.
2. Assuming all other elements of the underlying alleged offense are established by reasonable cause, OPP officers shall take enforcement action for Environmental Conservation Law trespass or Penal Law trespass in situations involving persons fishing on a waterway only if there is clear evidence that: the bed of the navigable non-tidal waterway is privately owned; the

private owner of the bed owns exclusive fishing rights; and neither the public nor the individual angler holds a deeded or prescriptive easement to fish on the waterway.

3. If an individual landowner makes a citizen's arrest for trespass for navigating or fishing as described in II-1 or II-2 above and delivers that person to an OPP officer for further enforcement action, the OPP officer shall take such action only if all other elements of the underlying alleged offense are established by reasonable cause and there is clear evidence that the waterway is not navigable in fact or the public does not have a right to fish in the waterway, as described in II-1 or II-2 above.

4. If a landowner obstructs, annoys, prevents or hinders any person in the exercise of the public right of navigation and there is no clear evidence that the waterway is not navigable-in-fact or navigable-in-law, OPP officers shall advise the landowner that: public navigation is lawful on waterways that are navigable-in-fact or navigable-in-law; the courts have held that it is a public nuisance for a landowner to obstruct, annoy, or hinder the public right of navigation on such waters; and continued obstruction, annoyance or hindrance may be sufficient grounds for the Department to refer the matter to the Attorney General for review as to whether prosecution as a public nuisance is appropriate.

5. If a landowner obstructs, annoys, prevents or hinders any person from fishing on a waterway and there is no clear evidence that the person or the public at large does not have a right to fish on the waterway, OPP officers shall advise the landowner that: there is insufficient evidence to conclude that such fishing is illegal; it may be a public nuisance for the landowner to obstruct, annoy, or hinder the public right of fishing in the waterway; and continued obstruction, annoyance or hindrance may be sufficient grounds for the Department to refer the matter to the Attorney General for review as to whether prosecution as a public nuisance is appropriate.

This Guidance replaces the May 9, 1991 Enforcement Guidance issued by former General Counsel Marc Gerstman.

III. Purpose and Background

A. Public Right of Navigation

Waterways that are affected by tides are considered "navigable-in-law" and the public has a right to navigate on them regardless of who owns the bed or whether the waterway is posted. In contrast, waterways crossing private lands which are not affected by tides are "navigable-in-fact" and subject to the public right of navigation only if the waterway has or had the capacity for trade or travel.

The public right of navigation is rooted in English common law and has been recognized by New York courts for more than 200 years. This right navigation is often described by the courts as an easement or right-of-way for travel or passage "as on a public highway" and the public right of navigation on navigable-in fact waterways is paramount to the rights of the private owners of the banks or beds of waterways that are navigable-in-fact. An early, seminal decision by the New York Court of Appeals recognized that the public has a common law right to navigate a fresh-water waterway if it has sufficient water for a sufficient length of time such that it is useful as a highway for trade and travel. *Morgan v. King*, 35 NY 453, 459 (1866). The *Morgan* court rejected the argument that a waterway is navigable only if boats or rafts could float on it, and held that a body of water is navigable if it would float even "single logs or sticks of timber." The court also stated that the public claim of navigability should be "liberally supported." *Morgan* at 459. In a more recent case, the court explained that this principle does not affect the property

rights of landowners, since they never owned the public easement. *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y. 2d 591, 604 (1998).

Determining whether a specific waterway is "navigable in-fact" requires a factual investigation to determine if there are periods of regularly occurring navigable capacity during a sufficient length of time to make a waterway useful as a public highway. Further guidance on the characteristics of navigable waters was provided by the Court of Appeals in the *Morgan* decision:

Nor is it essential to the easement, that the capacity of the stream . . . should be continuous, or in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity, ordinarily, *continue a sufficient length of time to make it useful as a highway*, it is subject to the public easement. (Emphasis added.) *Morgan* at 459.

Consequently, waters which are navigable for more than a brief period during the year under normal conditions of flow are likely to be subject to the public right of navigation.

If a waterway satisfies all the criteria for being navigable-in-fact, it is open to public navigation for any purpose, whether commercial or recreational, even if the stream cannot be navigated against the current. Moreover, a waterway, once navigable, remains navigable even if navigability subsequently diminishes or ceases. *People v. System Properties, Inc.* 120 N.Y.S. 2d 269, 278 (3d Dep't 1953).

Furthermore, the right of navigation includes all incidental uses that are reasonably necessary in order to enjoy the right, such as portaging over private property to avoid rapids, falls or obstructions, as long as this occurs by the shortest, most direct safe route. The public also has the right to walk on the bed of the waterway to guide a boat through shallow areas, to go on privately-owned shoreline to scout for the best route, and to otherwise touch the streambed incident to navigation. *Adirondack League Club, Inc.* at 607. However, the public right of navigation does not include a right to go on private property to picnic, hike, camp, or hunt, or to cross private property to gain access to or egress from navigable waterways. In other words, the public right of navigation does not include intrusion on private property except as necessary for safe water passage.

Finally, evidence of recreational use can be useful in determining whether a waterway is navigable in fact. The Court of Appeals has stated: "(w)e hold . . . that evidence of a river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel." *Adirondack League Club, Inc.* at 600. The Court also stated:

. . . We do not broaden the standard for navigability in fact, but merely recognize that recreational use fits within it. Many cases, including *Morgan v. King*, support the view that a river navigable by small boat, raft or skiff is subject to the public easement . . . We only hold that such transport need not be limited to moving goods in commerce, but can include some recreational uses. *Practical utility for travel or transport nevertheless remains the standard.* (Emphasis added). *Adirondack League Club, Inc.* at 603.

In light of these decisions, it is DEC policy that a waterway is subject to the right of navigation if it has capacity for trade or travel for either commercial or recreational purposes.

Waterways subject to the public right of navigation may be navigated for any commercial or recreational purpose, and attempts by landowners to interfere with the public's right to navigate violates the State's trust interest in the waterway, i.e., the owner of a navigable waterway has no right to close it to the public or otherwise harass the public. The presence of barriers, "no trespassing" or "posted" signs, signs that threaten criminal prosecution, or oral statements by landowners discouraging navigation do not alter whether a waterway is navigable-in-fact. Rather, such posting, obstructions and statements concerning a waterway that is navigable-in-fact constitute a public nuisance in violation of the common law right of public navigation. Either the State or the public can sue a landowner if a landowner tries to interfere with the public's right to navigate on waterways that are navigable-in-fact.

B. Public Right of Fishing

The right to fish while navigating on a navigable waterway depends on a variety of factors. Virtually all tidal waterways are publicly owned and a member of the public with the necessary license or permit therefore has a right to fish thereon. Also, the public may generally fish on non-tidal waterways that are publicly owned. However, the public's right to fish on privately owned non-tidal waterways necessitates a review of applicable land grants and deeds as well as a determination as to whether prescriptive easements exist. A 1997 ruling of the New York Court of Appeals, *Douglaston Manor, Inc. v. Bahrakis, et al*, 89 N.Y. 2d 472, 655 N.Y.S. 2d 745 (1997), indicates that where the bed of a navigable-in-fact waterway is privately owned, the owner has an exclusive deeded right to the fishery and there is no assertion that either individual anglers or the public-at-large hold a prescriptive right to fish, then the public does not have the right to wade in the water to fish or anchor a vessel in the water to fish without the permission of the property owner.

IV. Responsibility

This policy shall be maintained by the OGC. It is the responsibility of the OGC Central Office and Regional attorneys to interpret this policy, along with specific statutory and regulatory provisions, to determine the authority of OPP officers to enforce the public rights of navigation and fishing and the limits of that authority in specific situations. It shall be the responsibility of OPP officers to collect all relevant information about the matter at hand and refer it to the appropriate Regional Attorney. Staff of the Bureau of Real Property within the Division of Lands and Forests may also be called upon to research applicable land grants and deeds on specific navigation and fishing issues.

V. Procedure

With these principles in mind, staff should follow this general guidance regarding persons navigating on, or fishing in, waterways. OPP officers are advised to issue tickets for trespass in situations involving persons exercising the public right of navigation only if there is clear evidence that the waterway is *not* navigable-in-law or navigable-in-fact.

OPP staff are also advised to issue tickets for trespass to those who are fishing on navigable-in-fact waterways only if it is clear that: the bed of the waterway is privately owned, such ownership includes fishing rights, and neither the public-at-large or the particular individuals fishing on the waterway hold prescriptive easement(s) to fish on it.

Because of the difficulties in making the above determinations in the field, the appropriate response in situations where conflict has developed between a landowner and an individual navigating or fishing will normally be to collect information about the matter and refer it to the appropriate supervisor and Regional Attorney. If, at some future time, the Department is satisfied that the waterway is privately owned and not subject to the public right of navigation, or is privately owned and such ownership includes fishing rights and no prescriptive fishing easements held by the public or individuals exist, the Department may reconsider its enforcement posture and issue tickets. Of course, wherever fishing is permitted, people intending to fish must acquire the necessary permits and comply with all applicable laws and regulations.

If a landowner makes a citizen's arrest for trespass in a situation involving persons who are navigating or fishing and delivers that person to an OPP officer, the officer is not required to take the person into custody or take any other action prescribed in CPL §140.40 upon the request of the landowner without clear evidence as set forth above. The appropriate response in these situations will normally be to collect information about the matter and refer it to the appropriate supervisor and Regional Attorney.

OPP officers may also be asked to enforce the public right of navigation on behalf of boaters against private landowners attempting to prevent or hinder the exercise of this right on waterways that appear to clearly be navigable-in-fact. In these situations, OPP officers should request that the landowner desist and advise the landowner that public navigation is lawful, that the courts have held that it is a public nuisance for a landowner to obstruct, annoy, or hinder the public right of navigation on such waters, and that the Department may refer such matters to the Office of Attorney General if there is continued obstruction, annoyance or hindrance. The OPP officer should collect information about the complaint and refer the matter to the appropriate supervisor and Regional Attorney.

OPP officers should generally advise users of navigable waterways, anglers and landowners to avoid confrontation and that the civil court system is available to resolve disputes if the parties cannot amicably resolve the matter themselves. In appropriate circumstances the Department may also request the Office of the Attorney General to litigate the issue of whether a particular waterway is subject to the public right of navigation or whether the public has a right to fish on the waterway. The OPP officer should collect information and refer the matter to the appropriate supervisor and Regional Attorney.

VI. Related References

None other than those cited above.