



Board of Directors

June 13, 2024

Charles Clusen
Chair

Jonathan Gunther
NYS DEC – Office of General Counsel
625 Broadway, 14th Floor
Albany NY 12233-1500

James McMartin Long
Michael Wilson
Vice-Chairs

Barbara Rottier
Secretary

**Re: Draft Update to General Counsel Program Policy OGC-9:
Public Rights of Navigation and Fishing**

David Quinn
Treasurer

Dear Mr. Gunther:

Nancy Bernstein
John Caffry
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Dale Jeffers
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Protect the Adirondacks has reviewed the draft update to General Counsel Program Policy OGC-9: Public Rights of Navigation and Fishing, which was noticed in the ENB on May 15, 2024. We appreciate the opportunity to review and comment on this draft. This policy is important for ensuring that the public (both residents and visitors to New York State), landowners, and Department of Environmental Conservation (DEC) officials understand the legal landscape that applies to the public's rights of navigation and fishing on waterways in New York.

We are pleased to see that the draft policy generally provides strong support for the public's rights of navigation and fishing, and is soundly based in the existing case law. We do have a few comments on specific issues, which we believe could strengthen it.

Staff

Peter Bauer
Executive Director

The draft seems to be focused on navigable freshwater waterways and contains no discussion of New York state law regarding tidewaters which are navigable-in-law, discussing these waters only in the context of federal law. Discussions of the public right to navigate on such waters should be added. Without this, members of the public who consult this policy for guidance as to their rights may mistakenly believe that the navigable-in-fact test applies to tidal waters of the state.

Claudia K. Braymer, Esq.
Deputy Director

Christopher Amato, Esq.
*Conservation Director
and Counsel*

We support the policy's inclusion of the Federal standards that apply to the legal determinations of navigability. Upon comparing this draft policy with the old OGC-9 policy issued in 2011, there are a lot of useful additions of federal caselaw citations that apply to the public's rights on Navigable Waters of the United States located in New York.

Protect the Adirondacks

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The third paragraph on page 1 is somewhat confusing. Some waterways may be navigable under both the Federal standard and the New York standard. Also, even though the public's rights can vary depending on which standard(s) a waterway is found to be navigable under, these standards do provide the legal tests to be applied to all waterways, both navigable and non-navigable. This should be clarified.

The discussion of Dale v. Chisholm in footnote 21 could be confusing to people who do not read the published decision or the cases that it relied on, such as Mohawk Valley Ski Club v. Town of Duaneburg and Hanigan v. State of New York. All of these cases involved small lakes, with no navigable inlet or outlet, and thus had no potential for use for trade or travel, and so were found to be non-navigable. We suggest that the policy be revised to provide a more in-depth discussion of this issue, which explains why such lakes are an exception to the general rule that recreational travel can be the basis for a finding that a waterway is navigable-in-fact. At a minimum, we suggest adding the following after the quote from Dale v. Chisholm in footnote 21: "(case involving small lake with no evidence of it having been used for either trade or travel)."

Finally, we are concerned that DEC is signaling that it is taking a step back from enforcement of the public's rights with respect to navigable waters in the State because this policy "will no longer be considered enforcement guidance for NYS DEC staff" according to the notice in the Environmental Notice Bulletin. We understand that DEC is not the proper venue for litigating civil disputes between landowners and members of the public regarding navigability issues. However, in the appropriate situations DEC should not stand by idly while a landowner violates, or threatens to violate, the public's rights of navigation or fishing on navigable waters.

Language from the old policy should be added to the new policy to demonstrate more clearly that DEC will evaluate the options for, and take, legal action as necessary to defend the public's rights. For instance, Section V of the policy could include the following, which is similar to the language from the old policy, while still affording DEC flexibility in its enforcement responses:

When faced with situations involving legal and evidentiary issues of navigability and fishing rights, Office of Public Protection officers (OPP) 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. OPP officers should also advise all involved parties of the availability of this policy document. The OPP officer should collect sufficient information about controversies arising in the field, and consult with their supervisor and Regional Attorney for advice regarding specific statutory regulatory program authority or other legal authority prior to taking any enforcement action either against the users/anglers or against landowners.

If there is evidence that a landowner is obstructing, annoying, preventing or hindering any person from navigating on or fishing a waterway and there is evidence that the waterway is navigable-in-fact or navigable-in-law, then the Department will refer the matter to the Attorney General for review as to whether legal action is appropriate. In appropriate circumstances, the Department may 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.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our comments on this draft policy update. One of Protect's founders, Charlie Morrison, who recently passed away at the age of 96, was a long-time DEC official who spearheaded its work on this issue in the 1980s and 1990s. We greatly appreciate DEC's continuing commitment to maintaining a strong policy for the protection of the public's rights to use the waterways of the State.

Sincerely,

Handwritten signature of Claudia K. Braymer in black ink.

Claudia K. Braymer
Deputy Director

Handwritten signature of John W. Caffry in black ink.

John W. Caffry, Esq.
Co-Chair, Conservation Advocacy Committee