S T A T E O F N E W Y O R K

370

2011-2012 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 5, 2011

Introduced by M. of A. HOYT, SCHROEDER, GALEF, CLARK, JAFFEE, ROSENTHAL -- Multi-Sponsored by -- M. of A. BOYLAND, CAHILL, GLICK, GOTTFRIED, JACOBS, LAVINE, McENENY, PERRY, REILLY, SWEENEY -- read once and referred to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to the public right of passage upon the navigable waterways of the state and the rights of private property owners over which such waterways pass

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 15 of the environmental conservation law is amended by adding a new title 35 to read as follows:

TITLE 35

NAVIGABLE WATERWAYS

SECTION 15-3501. STATEMENT OF LEGISLATIVE FINDINGS, POLICY AND INTENT.
15-3503. DEFINITIONS.
15-3505. PUBLIC RIGHT OF PASSAGE.
15-3507. COMMON LAW REMEDIES PRESERVED.
15-3509. INTERPRETATION; SEVERABILITY.

S 15-3501. STATEMENT OF LEGISLATIVE FINDINGS, POLICY AND INTENT.

1. THE LEGISLATURE HEREBY FINDS THAT WATERWAYS IN THE STATE THAT ARE SUBJECT TO THE PUBLIC RIGHT OF NAVIGATION AS THIS RIGHT IS DEFINED IN COMMON LAW CONSTITUTE A VALUABLE COMMERCIAL AND RECREATIONAL RESOURCE OF THE STATE AND, AS SUCH, THEY PROVIDE IMPORTANT HEALTH BENEFITS AND LOCAL AND STATEWIDE ECONOMIC BENEFITS. THE LEGISLATURE FURTHER FINDS THAT THE COURTS OF THE STATE HAVE HISTORICALLY APPLIED A COMMON LAW TEST TO DETERMINE WHETHER PARTICULAR WATERWAYS ARE NAVIGABLE IN FACT AND ARE THEREFORE SUBJECT TO THE PUBLIC RIGHT OF NAVIGATION, AND THAT ON WATERWAYS FOR WHICH SUCH DETERMINATIONS HAVE NOT BEEN MADE BOTH THE PUBLIC AND THE AFFECTED PRIVATE PROPERTY OWNERS MAY BE UNCERTAIN AS TO WHETHER SUCH WATERWAYS ARE SUBJECT TO SUCH RIGHT. THE LEGISLATURE FURTHER FINDS

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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THAT WATERWAYS THAT SATISFY THE COMMON LAW TEST ARE NAVIGABLE IN FACT AND THAT THE BED AND BANKS OF SUCH WATERWAYS ARE SUBJECT TO A SERVITUDE OR EASEMENT FOR THE PURPOSE OF NAVIGATION THAT IS HELD IN TRUST BY THE STATE FOR THE PEOPLE OF THE STATE AND HAS BEEN SO HELD FROM THE TIME OF THE ORIGINAL GRANTS FROM THE STATE OR SOVEREIGN. THE LEGISLATURE FURTHER FINDS THAT THIS NAVIGATIONAL EASEMENT PROVIDES A PUBLIC RIGHT OF PASSAGE AND THAT WATERWAYS THAT ARE SUBJECT TO SUCH EASEMENTS ARE CONSIDERED TO BE PUBLIC HIGHWAYS FOR NAVIGATIONAL PURPOSES, INCLUDING WHERE SUCH WATERWAYS ARE SITUATED ON PRIVATE PROPERTY. THE LEGISLATURE ALSO FINDS THAT THE PUBLIC RIGHT OF NAVIGATION INCLUDES SEVERAL ESSENTIAL INCIDENTAL RIGHTS THAT MAY BE EXERCISED BY THE PUBLIC AS NECESSARY TO ACCOMPLISH SAFE PASSAGE. ALSO, THE LEGISLATURE FINDS THAT IN EXERCISING THE PUBLIC RIGHT OF NAVIGATION THE PUBLIC IS REQUIRED BY LAW TO RESPECT THE RIGHTS OF PRIVATE PROPERTY OWNERS AND MAY NOT ENTER ON PRIVATE PROPERTY FOR PURPOSES OTHER THAN TO EXERCISE THE LAWFUL RIGHT OF SAFE PASSAGE AND THEN ONLY TO THE MOST MINIMALLY INTRUSIVE EXTENT POSSIBLE.

2. THE LEGISLATURE HEREBY DECLARES ITS INTENT TO ENSURE THAT THE PUBLIC SHALL BE ABLE TO FREELY NAVIGATE ON WATERWAYS THAT ARE NAVIGABLE IN FACT AND TO ENSURE THAT THE RIGHTS OF PRIVATE PROPERTY OWNERS ARE NOT VIOLATED OR INFRINGED UPON BY THOSE WHO ENGAGE IN THE PUBLIC RIGHT OF NAVIGATION. THE LEGISLATURE FURTHER DECLARES ITS INTENT TO DETERMINE WHICH WATERWAYS IN THE STATE ARE NAVIGABLE IN FACT UNDER THE COMMON LAW.

3. THE LEGISLATURE HEREBY DECLARES IT TO BE THE POLICY OF THE STATE TO PROTECT THE COMMERCIAL AND RECREATIONAL USES OF ALL WATERWAYS IN THE STATE THAT ARE NAVIGABLE IN FACT UNDER THE COMMON LAW, TO PRESERVE AND PROTECT THE PUBLIC RIGHT OF PASSAGE UPON THESE WATERWAYS, AND TO PRESERVE AND PROTECT THE RIGHTS OF OWNERS OF PRIVATE PROPERTY THROUGH WHICH THESE WATERWAYS PASS.

S 15-3503. DEFINITIONS.

THE FOLLOWING TERMS WHEN USED IN THIS TITLE SHALL BE DEEMED TO MEAN AND INCLUDE:

1. "COMMERCE" SHALL MEAN ANY REMUNERATIVE ACTIVITY INCLUDING, WITHOUT LIMITATION, USE OF A WATERWAY FOR THE TRANSPORT OF GOODS OR MINERALS IN VESSELS, FLOATING LOGS TO MILLS OR MARKET AND TRANSPORTING PEOPLE OR GUIDING PEOPLE FOR HIRE IN VESSELS.

2. "LINING" SHALL MEAN REGULATING THE PASSAGE OF A VESSEL ALONG AN OBSTRUCTED STREAM SEGMENT BY MEANS OF LINES CONTROLLED FROM THE BED AND BANKS OF THE STREAM, PROVIDED THAT USE OF THE BED AND BANKS OF A STREAM FOR SUCH PURPOSE SHALL BE TO THE MINIMUM AND LEAST INTRUSIVE EXTENT THAT IS REASONABLY NECESSARY TO ACCOMPLISH SAFE PASSAGE.

3. "NAVIGABLE IN FACT" SHALL MEAN ANY WATERWAY WHICH SATISFIES THE COMMON LAW TEST THAT THE WATERWAY, IN ITS NATURAL STATE AND ORDINARY VOLUME OF WATER, HAS PRACTICAL UTILITY TO THE PUBLIC AS A HIGHWAY FOR TRADE, TRAVEL OR TRANSPORT. BOTH UTILITY FOR COMMERCIAL USE AND CAPACITY FOR RECREATIONAL USE CAN BE CONSIDERED IN DETERMINING WHETHER A WATERWAY HAS PRACTICAL UTILITY TO THE PUBLIC AS A HIGHWAY FOR TRADE, TRAVEL OR TRANSPORT. A WATERWAY MAY BE NAVIGABLE IN FACT EVEN IF IT IS NOT CAPABLE OF BEING NAVIGATED AGAINST ITS CURRENT AND EVEN IF THE CAPACITY OF THE STREAM FOR SUPPORTING NAVIGATION IS NOT CONTINUOUS OVER TIME, AS LONG AS THE CAPACITY NECESSARY TO SUPPORT NAVIGATION CONTINUES FOR A SUFFICIENT LENGTH OF TIME TO MAKE THE STREAM USEFUL AS A HIGHWAY FOR TRADE, TRAVEL OR TRANSPORT. A WATERWAY MAY ALSO BE NAVIGABLE IN FACT EVEN THOUGH IT CONTAINS OCCASIONAL RAPIDS, FALLS, DAMS OR OTHER NATURAL OR MANMADE OBSTRUCTIONS.

4. "PASSAGE" SHALL MEAN THE ACT OF NAVIGATION, INCLUDING THE RIGHT TO ENGAGE IN INCIDENTAL ACTIVITIES WHICH ARE, UNDER THE CIRCUMSTANCES, AN

INSEPARABLE AND INDISPENSABLE PART OF SAFE NAVIGATION, INCLUDING BUT NOT LIMITED TO SCRAPING OR PUSHING OFF THE BED OF THE WATERWAY, POLING, LINING, PORTAGING AND SCOUTING.

5. "POLING" SHALL MEAN PROPELLING A VESSEL BY USING A POLE TO PUSH OFF THE BED OR BANKS OF A WATERWAY.

6. "PORTAGING" SHALL MEAN TRANSPORTING OR CARRYING A VESSEL UPON THE BED OR BANKS OF AN OBSTRUCTED STREAM SEGMENT, PROVIDED THAT USE OF THE BED OR BANKS OF A STREAM FOR SUCH PURPOSES SHALL BE TO THE MINIMUM AND LEAST INTRUSIVE EXTENT THAT IS REASONABLY NECESSARY TO ACCOMPLISH SAFE PASSAGE.

7. "RECREATION" SHALL MEAN ANY ACTIVITY WHICH IS NOT COMMERCE, AS DEFINED IN THIS SECTION, INCLUDING BUT NOT LIMITED TO PERSONAL TRAVEL FOR PLEASURE OR TO TRANSPORT GOODS OVER A WATERWAY AS A MEANS OF ACCESS TO A PRIMARY OR SECONDARY RESIDENCE.

8. "SCOUTING" SHALL MEAN INSPECTION OF RAPIDS OR OTHER POTENTIAL NATURAL OR MANMADE OBSTRUCTIONS TO SAFE PASSAGE IN ORDER TO DETERMINE WHETHER AND BY WHAT ROUTE SAFE PASSAGE IS POSSIBLE, PROVIDED THAT USE OF THE BED AND BANKS OF A STREAM FOR SUCH PURPOSE SHALL BE TO THE MINIMUM AND LEAST INTRUSIVE EXTENT THAT IS REASONABLY NECESSARY TO ACCOMPLISH SAFE PASSAGE.

9. "VESSEL" SHALL MEAN ANY WATERCRAFT DESIGNED FOR NAVIGATION, INCLUDING SKIFFS, ROW BOATS, CANOES, RAFTS AND OTHER SMALL CRAFT.

10. "WATERWAY" SHALL MEAN ANY NON-TIDAL WATERBODY, INCLUDING LAKES, PONDS, RIVERS, CREEKS OR STREAMS, REGARDLESS OF WHETHER THE WATERBODY HAS BEEN DETERMINED TO BE NAVIGABLE IN FACT AT COMMON LAW.

S 15-3505. PUBLIC RIGHT OF PASSAGE.

1. THE PUBLIC HAS A RIGHT OF PASSAGE FOR ANY LAWFUL PURPOSE, INCLUDING COMMERCE, TRAVEL AND RECREATION, ON ALL WATERWAYS OF THE STATE THAT ARE NAVIGABLE IN FACT.

2. THE PUBLIC RIGHT OF PASSAGE ON WATERWAYS THAT ARE NAVIGABLE IN FACT DOES NOT INCLUDE THE RIGHT TO ENTER PRIVATE PROPERTY FOR HIKING, PICNICKING, NATURE OBSERVATION, CAMPING, EGRESSING FROM OR ACCESSING A WATERWAY, OR ANY OTHER PURPOSE NOT RELATED TO PASSAGE.

3. THE COMMISSIONER SHALL HAVE THE AUTHORITY TO PROMULGATE RULES AND REGULATIONS TO IMPLEMENT THIS SECTION, INCLUDING BUT NOT LIMITED TO RULES AND REGULATIONS WHICH IDENTIFY AND DESIGNATE WATERWAYS THAT ARE NAVIGABLE IN FACT, USING THE COMMON LAW TEST SET FORTH IN SUBDIVISION 3 OF SECTION 15-3503 OF THIS TITLE, AND WHICH ADDRESS ISSUES OF PUBLIC SAFETY OR NATURAL RESOURCE PROTECTION. THE COMMISSIONER MAY AMEND ANY SUCH RULES AND REGULATIONS AS MAY BE APPROPRIATE FROM TIME TO TIME. THE COMMISSIONER SHALL NOT HAVE THE POWER TO DETERMINE THAT WATERWAYS WHICH SATISFY THE COMMON LAW TEST ARE NOT NAVIGABLE IN FACT AND SHALL NOT HAVE THE POWER TO DETERMINE THAT WATERWAYS WHICH DO NOT SATISFY THE COMMON LAW TEST ARE NAVIGABLE IN FACT.

4. THE PUBLIC RIGHT OF PASSAGE ON THE WATERWAYS THAT ARE NAVIGABLE IN FACT IS SUBJECT TO ALL OTHER APPLICABLE PROVISIONS OF LAW AND RULES AND REGULATIONS THAT REGULATE OR LIMIT THE USE OF VESSELS.

S 15-3507. COMMON LAW REMEDIES PRESERVED.

NOTHING IN THIS TITLE SHALL BE CONSTRUED TO LIMIT ANY REMEDY AVAILABLE IN COMMON LAW, STATUTE OR RULE OR REGULATION FOR OBSTRUCTING, HINDERING, HARASSING OR OTHERWISE INTERFERING WITH THE PUBLIC RIGHT OF PASSAGE BY PERSONS LAWFULLY EXERCISING THE RIGHT OF PASSAGE ON WATERWAYS THAT ARE NAVIGABLE IN FACT. WARNING OF A DANGEROUS CONDITION SHALL NOT IN ITSELF BE DEEMED AN INTERFERENCE WITH THE PUBLIC RIGHT OF NAVIGATION. FURTHERMORE, NOTHING IN THIS TITLE SHALL BE CONSTRUED TO LIMIT ANY REMEDY

AVAILABLE IN COMMON LAW, STATUTE OR RULE AND REGULATION FOR TRESPASS ON PRIVATE PROPERTY FOR ACTIVITIES OTHER THAN PASSAGE.

S 15-3509. INTERPRETATION; SEVERABILITY.

1. THIS TITLE SHALL BE INTERPRETED TO PRESERVE AND PROTECT THE COMMON LAW RIGHT OF PASSAGE ON WATERWAYS THAT ARE NAVIGABLE IN FACT AND ALSO SHALL BE INTERPRETED TO PRESERVE AND PROTECT THE RIGHTS OF PROPERTY OWNERS WHO OWN PROPERTY THROUGH WHICH NAVIGABLE IN FACT WATERWAYS FLOW.

2. THE PROVISIONS OF THIS TITLE SHALL BE SEVERABLE, AND IF ANY CLAUSE, SENTENCE, PARAGRAPH, SUBDIVISION, SECTION OR PART OF THIS TITLE SHALL BE ADJUDGED BY ANY COURT OF COMPETENT JURISDICTION TO BE INVALID, SUCH JUDGMENT SHALL NOT AFFECT, IMPAIR OR INVALIDATE THE REMAINDER THEREOF BUT SHALL BE CONFINED IN ITS OPERATION TO THE CLAUSE, SENTENCE, PARAGRAPH, SUBDIVISION, SECTION OR PART THEREOF DIRECTLY INVOLVED IN THE CONTROVERSY IN WHICH SUCH JUDGMENT SHALL HAVE BEEN RENDERED.

S 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.