

Navigability: It's Not Just for the Federal Clean Water Act Anymore



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No, we do not reference the U.S. Supreme Court's latest Clean Water Act decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, ___ U.S. ___ (2020) from May, where six of the nine justices held that permits are required for discharges from a point source that travel through the "functional equivalent" of a conveyance through groundwater before reaching a jurisdictional, navigable "water of the United States."

Rather, we refer to the June 12 decision by the Pennsylvania Commonwealth Court in *Beishline v. Department of Environmental Protection*, ___ A.3d ___ (Pa. Commw. Ct. 2020). And instead of opining as to which waters are subject to regulation—after all, in Pennsylvania all waters, surface and ground, navigable and nonnavigable, are "waters of the commonwealth" under the state's Clean Streams Law—the Commonwealth Court considered the issue of navigability in assessing private party water ownership rights.

Under Pennsylvania law, only nonnavigable waterways may be privately held; navigable waterways are impressed with the public trust and belong to the commonwealth. The public trust derives from an ancient common law doctrine that guarantees the public's right to fish and commercially navigate on navigable waters. Private landowners cannot, therefore, exclude the public from access to a navigable water.

The Beishlines and others owned real property in Fishing Creek Township, in Columbia County. They repeatedly sought assistance from various Pennsylvania state agencies—including the Department of

Environmental Protection (DEP), the Department of Conservation and Natural Resources (DCNR) and the Pennsylvania Fish and Boat Commission (FBC)—in protecting their property rights after claiming that members of the public repeatedly entered their property to access Fishing Creek for swimming, fishing, bathing and boating.

According to the Beishlines, the state agencies believed that the reach of Fishing Creek was navigable and therefore belonged to the commonwealth. After their repeated entreaties afforded them no protection from the incursions, the Beishlines sought redress from the Pennsylvania Department of Community and Economic Development’s Board of Property (board), a tribunal with “exclusive original jurisdiction over any claims involving title to land occupied or claimed by the commonwealth, such as claims in actions to quiet title.”

In its final adjudication on the Beishlines’ petition, the board held that it did not have jurisdiction to opine on the navigability of Fishing Creek—especially since the state agencies had already tacitly asserted that the stream was navigable. On appeal, the Commonwealth Court disagreed, holding that the board had denied the Beishlines due process, confirming that the board does indeed have jurisdiction to hear the dispute over property rights disputes between private parties and the commonwealth, and remanding for further adjudication. In resolving the dispute, the Commonwealth Court said, the board has authority to decide the necessary corollary issue of navigability

In issuing its decision, the Beishline court recited approvingly a seminal Pennsylvania Supreme Court decision from 1959: “The concept of navigability should not be limited alone by lake or river, or by commercial use, or by the size of water or its capacity to float a boat. Rather it should depend upon whether water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes, or whether with all of the mentioned factors counted in the water remains a local focus of attraction, which is the rule sensibly applicable to shallow streams and to small lakes and ponds. The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private.” See *Lakeside Park v. Forsmark*, 396 Pa. 389, 153 A.2d 486, 489 (1959).

The Forsmark logic differs little from the implicit definition of navigability under the federal Clean Water Act. The provision at 40 CFR Section 120.2(1)(i) states that waters of the United States include: “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.” As a practical matter, though, the Environmental Protection Agency has found streams far smaller than would be capable of supporting interstate commerce to be jurisdictional waters of the United States.

The Beishline decision has caused Pennsylvania practitioners to fret over the necessary predicates for teeing up a surface water property interest matter for the board. The Commonwealth Court has confirmed the Board’s jurisdiction over “cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the commonwealth.” But what legal mechanism must one use to initiate a claim?

In Beishline both the Commonwealth Court and the board agreed that the Beishlines had used the wrong procedural hook to invoke the board’s authority. (The Beishlines initiated their action via a “caveat.”) Neither the board nor the Commonwealth Court denied the Beishlines’ request on narrow procedural grounds.

While we do not know how the board will rule on remand, the Commonwealth Court cited several authorities that stand for the proposition that merely being capable of supporting a small boat does not

transmogrify a surface water into a navigable water impressed with the public trust. Quoting Lakeside Park, the Commonwealth Court observed:

“Navigation and navigability are portentous words. They mean more than the flotation of buoyant vessels in water: if it were otherwise, any tarn capable of floating a canoe for which a charge could be made would make the water navigable. They mean more than some commercial use to which collected water is put: if this were not so, every spring-fed pool capable of being bottled and sold for drinking water would be navigable. No single factor can control.”

The record does not disclose the type of boating that occurred on the Beishlines’ reach of Fishing Creek. It is, therefore, far from certain how the board will decide, though its declining to consider the Pennsylvania regulatory agencies’ claims of navigability below may foretell its views on remand.

Going forward, landowners with surface waters may have to bring trespass or other common law claims against people who utilize their waters without permission or consider other legal mechanisms to quiet title. In the worst case, landowners may have to follow the Beishlines’ example: seek assistance from state government to oust trespassers and then seek review by the board.

About the Author:

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