

Turnpike Authority's power to modify the application of Title 39 by regulations. Section 5, N.J.S.A. 27:23-29.

Therefore, it is our opinion that persons driving on the New Jersey Turnpike recklessly, carelessly or while under the influence of intoxicating liquor may be charged with violations of N.J.S.A. 39:4-96 or 97 or 50, respectively, and if convicted, punished pursuant to N.J.S.A. 39:4-96, 104 or 50, respectively.

Very truly yours,

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By: WILLIAM L. BOYAN
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DECEMBER 8, 1958

HON. SALVATORE A. BONTEMPO, *Commissioner*
Department of Conservation and Economic
Development
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 18

DEAR COMMISSIONER BONTEMPO:

We have been asked whether the State as owner of the Delaware and Raritan Canal may charge a water utility company a fee for the privilege of laying a 60" transmission main on canal property. Our opinion is that it may.

The suggestion has been made that since R.S. 48:19-17¹ gives water companies the right to "lay its pipes beneath such public roads, streets and alleys as it may deem necessary" without payment of any fee, and R.S. 48:19-19² gives them the right to "lay such supply mains and pipes as may be thought necessary * * * under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid," the statute under which the State took possession of the canal by declaring that it "shall continue to be a public highway," L. 1934, c. 139, §2; see L. 1934, c. 238, §1; R.S. 13:13-3, gives water companies the right to lay mains on the canal property. The short answer to this contention is that the

¹ R.S. 48:19-17: "Each such company may lay its pipes beneath such public roads, streets and alleys as it may deem necessary for its corporate purposes, free from all charge to be made by any person or body politic whatsoever for such privilege, and may also construct and maintain hydrants on and along such streets and alleys, provided that the consent shall be obtained of the corporate authorities of the municipality through which the pipes may be laid.

"The pipes shall be laid at least three feet below the surface and shall not in anywise unnecessarily obstruct or interfere with the public travel or damage public or private property."

² R.S. 48:19-19: "Every company organized under this chapter may contract with any company organized under any law of the State for a supply of water upon such terms and for such times as may be mutually agreed upon. Such companies may lay such supply mains and pipes as may be thought necessary to furnish such supply through any property upon obtaining the consent in writing of the owner thereof, or under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid.

"The municipal body having control of such streets, roads, highways or public places shall designate the place therein where and the manner in which the pipes or mains shall be laid."

designation of the canal as a public highway was impliedly repealed by L. 1944, c. 172, which provided that the use of the canal was to be "as a source of industrial water supply and for recreational purposes." N.J.S.A. 13:13-12.1. An examination of the history leading up to this enactment makes the implication of repeal clear.

The Delaware and Raritan Canal Company was incorporated by a special act of the New Jersey Legislature on February 4, 1830. Operation of the canal began in June 1834. Department of Conservation and Development and Delaware and Raritan Canal Commission Report on Final Disposition of the Delaware and Raritan Canal 1942 [hereinafter referred to as "Report (1942)"]. From that date up to and including 1932 the canal was continuously open to traffic except for shut-downs in winter months due to ice. The Pennsylvania Railroad succeeded to the control of the canal in 1872. See L. 1872, c. 223, and L. 1867, c. 69. On February 27, 1933 the railroad advised the Board of Public Utility Commissioners of the State of New Jersey that it did not plan to reopen the canal on March 1st of that year after the winter shut-down but intended to abandon operation. Report (1942), p. 1. Under section 17 of the original act incorporating the Delaware and Raritan Canal Company the State had an option to take possession of the canal if it were abandoned. On June 5, 1933 Joint Resolution No. 12 authorized the appointment of a commission to ascertain whether the canal could be acquired by the State for a nominal consideration and whether it could be operated by the State upon a self-sustaining basis. On April 10, 1934 this commission filed its report. Report of the Delaware and Raritan Canal Commission 1934 [hereinafter referred to as "Report (1934)"]. The report recognized the value of the canal as a transportation artery.

"The Delaware and Raritan Canal is an important link in the chain of inland waterways extending from Maine to Florida. With the exception of the Delaware and Raritan Canal, the Federal government owns or operates every canal on the Atlantic coastway. It is reasonable to assume that the Federal government will desire to acquire this link, particularly if the canal may be acquired without any cost to the government. Inasmuch as the canal is a short cut between the great commercial centers of New York and Philadelphia and affords the means of avoiding the great hazards and extreme dangers of the rough waters opposite Barnegat Bay, the government may well regard it as most desirable that the canal be kept open for transportation.

"A bill is now pending in Congress authorizing the Secretary of War to conduct a preliminary examination and survey, with a view to reopening the canal to water traffic. We have been advised that no appropriation accompanied this bill, inasmuch as the members of the Rivers and Harbors Committee of Congress were awaiting action of the State of New Jersey before they would go to the expense entailed in a survey, very properly feeling that it would be inconsistent on the part of the government to proceed with a comprehensive survey unless the government knew the medium through which the title would be acquired by the Federal government.

"We are advised that the States of Florida and Virginia have each first acquired canals within their boundaries and have then presented these canals to the government. These precedents have indicated the policy of the government to await prior State action." (Report (1934), p. 7.)

It is implicit in the report that the Commission considered it beyond the financial potential of the State to undertake the modernization and operation of the canal.

The Commission attached to its report a proposed act for the acquisition of the canal by the State. Report (1934), Exhibit B, p. 15. The draft act was substantially enacted as Chapter 139 of the Laws of 1934. It was approved May 3, 1934 and would have become effective on July 4th of that year. Although section 2 of this act provided that the canal "shall continue to be deemed a public highway," it is clear from Conclusion No. 2 of the report of the Commission accompanying the proposed act that it was not intended that the act make a permanent disposition of the canal. It was concluded therein that "The State should * * * take possession of the canal * * * to be used or disposed of as the Legislature may deem proper." Report (1934) p. 12.

On June 11, 1934, before Chapter 139 of the Laws of 1934 had become effective, Chapter 238 was enacted, effective immediately, to place control of the canal in the Department of Conservation and Development rather than the State Highway Commission. The Department was directed to "maintain, repair and keep in safe condition existing highway bridges over [the] canal." L. 1934, c. 238, §1. This was important to keep alive the possibility of reopening the canal to water traffic. Many of the bridges were low moveable bridges to permit the passage of barges and boats. Report of the Delaware and Raritan Canal Commission (1938) pp. 33-34 [hereinafter referred to as "Report (1938)"]. Report (1942), p. 9; Brief of the State of New Jersey, Delaware and Raritan Canal Commission to the Special Board of Army Engineers, the Delaware and Raritan Canal (October 21, 1937) p. 22 [hereinafter referred to as "Brief (1937)"]. If the bridges were allowed to deteriorate so as to become immovable, the canal would no longer be usable for water traffic. The department was also directed to keep the tow path free of weeds and "the wickets of the locks in the canal in condition that such wickets may be opened for the flow of water." L. 1934, c. 238, §1. The department was given permission but was not required to permit the use of the canal, including the locks, by pleasure and commercial craft or pleasure craft alone. L. 1934, c. 238, §3. On the same day that this act was passed Joint Resolution No. 6 memorializing Congress for the acquisition of the Delaware and Raritan Canal by the Federal government was passed. This resolution offered the canal to the Federal government at a cost of \$1.00 for incorporation into the inland waterway system which the Federal government operated from Maine to Florida. On May 18, 1935 the Legislature in Joint Resolution No. 9 appointed a commission to furnish information as to costs of improvement and maintenance and anticipated revenues of the canal as a navigable waterway to facilitate the determination by the Federal government whether to take over the canal.

On the same day it authorized the Department of Conservation to convey canal lands and rights in them under certain conditions, but in no case was a grant to "interfere with the canal as a waterway for either drainage, recreational or commercial use." L. 1935, c. 211, §2; R.S. 13:13-10.

On March 30, 1936 the city of Trenton was given permission to fill part of the canal for highway purposes. L. 1936, c. 44. However, this was not inconsistent with the continuing intention to persuade the Federal government to take over the operation of the canal as a navigable waterway because the Corps of Engineers in a preliminary investigation had already determined that it would be completely impractical to attempt to operate a modern canal through the city of Trenton with numerous bridges crossing the canal at such levels that they would have to be drawn to permit the passage of barges and boats, interrupting street traffic almost constantly. The Commission and the Department had agreed with this decision of the

Corps of Engineers and urged that a bypass be constructed around Trenton. Brief (1937), pp. 2; 5-6; Report (1938), pp. iv, 22, 33, 36, 37.

The act permitting the filling of the old route through Trenton, hopeful that the United States might still modernize the canal as a through navigable waterway, permitted the filling of the Trenton section "by agreement * * * with any federal agency * * *." L. 1936, c. 44, §2; R.S. 13:13-12.

On June 26, 1936 the Legislature appropriated \$5,000 for the use of this Commission. L. 1936, c. 254, §3. The next year the Legislature appropriated an additional \$10,000 to gather data to induce the Federal government to take over the canal. L. 1937, c. 18, §3.

A special Board of Army Engineers was constituted to consider the advisability of Federal operation of the canal. A hearing was held in Newark, New Jersey, on October 21, 1937. The Delaware and Raritan Canal Commission presented an extensive brief in support of Federal operation. After discussing other alternative inland waterway routes across New Jersey and concluding that they were not practical, the brief states:

"There remains then only the Delaware and Raritan Route now being preserved by New Jersey, pending action by the Federal government. *The State of New Jersey cannot maintain this waterway for an indefinite period of time pending some future solution of the Intracoastal Waterway System.* If the Federal government rejects the proposed dedication of the Delaware and Raritan Canal by the State, then some other disposal of the canal will be made by the State." Brief (1937), p. 43.

In connection with the discussion of an alternative route which the Federal government considered developing as a canal provided the State supplied the land, the Commission was of the view that the people of the State of New Jersey would be unwilling to spend even the 2 to 8 million dollars required for land alone. *Id.*, p. 40.

The Federal authorities decided finally on May 20, 1942 not to take over the Delaware and Raritan Canal and not to construct any canal at all in place of it. Report (1942), p. 11. But a decision of the Special Board of Army Engineers issued April 18, 1941 had previously indicated that this would be the outcome. Report (1942), p. 21. As a result of this adverse Federal action after 7 years of attempting to persuade the Federal government to take over the canal, the State faced the problem of the canal's ultimate disposition on its own. On June 14, 1941 the Department of Conservation and Development was directed to "investigate and study all available and feasible plans for the ultimate use or disposal of the * * * canal." L. 1941, c. 203, §1. The Department filed a report on November 16, 1942. In discussing the need for designation of permanent use, the report stated:

"Base maintenance has been justified for the interim while waiting decision as to whether there was federal interest in the reopening of the canal for transportation, but it will be both uneconomical and unwise longer." Report (1942), p. 11.

The report noted that:

"With navigation abandoned the downstream gates [of the locks] are unnecessary and some have already been removed." Report (1942), p. 15.

The report considered the following possible uses of the canal: (1) abandonment; (2) motor highways; (3) navigable waterway; (4) potable water supply; (5)

industrial water supply; (6) recreational areas; and (7) a combination of more than one of the above uses. Report (1942), pp. 18 to 27. It dismissed the first alternative as costly but unrewarding. *Id.*, p. 18. It dismissed the second on the advice of the State Highway Engineer as impractical because of the narrowness of the right-of-way and its location within an area already served by highways. *Id.*, p. 19. The Highway Engineer pointed out the troublesome drainage situation which would "plague the designing engineer * * *." *Id.*, Appendix C, p. 67. In discussing the third alternative the report describes the unsuccessful effort to interest the Federal government in taking over the canal. *Id.*, p. 20. The fourth alternative, a potable water supply, after a preliminary survey, was considered feasible but only at the expenditure of about \$40,000,000. *Id.*, p. 24. The fifth alternative, industrial water supply, was considered to require an additional investment to recondition the canal of only \$365,000. *Id.*, p. 25. It was estimated that the sale even of half of the estimated capacity of the canal would meet operating costs. *Id.*, p. 25. It was also thought that "the canal as an industrial water supply would prove a State asset through increased tax ratables and improvement." *Ibid.*, p. 25. In considering the sixth alternative, recreational use, the report stated that "the canal is uniquely located in that it traverses or is adjacent to the most densely populated region of the State, yet is itself almost entirely in open country." *Id.*, p. 26. In discussing combinations of uses, the following was stated:

"Use of the canal as a potable water source would be an irrevocable disposition, excluding or severely limiting any combination or secondary use.

"Its legislative designation as a recreational waterway would hold the canal in at least its present status for future development and at the same time, at slight additional cost, permit some immediate realization on its potential value. Designation as a combination industrial water supply and recreational waterway would permit larger immediate benefits and open the way to much greater future value. Such development would also preserve the diversion rights and improve the physical condition of the canal for future conversion to a potable water supply, if sufficiently urgent, or for a remotely possible revival of its Federal improvement for transportation. *It should be noted that any reservation binding the canal to the possibility of such future conversions is not recommended since it would seriously limit its potential value as an industrial water supply.*" (Emphasis added.) *Id.*, p. 27.

The report's principal recommendation was: "that the Legislature authorize the Department of Conservation and Development to hold the Delaware and Raritan Canal for use as a combined industrial water supply and State park." *Id.*, p. 28. In its detailed discussion of the industrial water supply use of the canal the report stated:

"The proposed industrial water supply is not adaptable to combination with highway use, which would involve a heavily reinforced conduit at prohibitive cost, or with a transportation waterway, which would limit industrial water use to cases where the water was returned to the canal, or with a potable water supply, which would require all the available flow." *Id.*, p. 40.

The recommended concurrent use of the canal for recreational purposes did not intend the use of the canal as a through waterway. Boating was intended only through a minimum number of locks. *Id.*, p. 51. Use of the canal as an industrial water supply was considered completely consistent with the proposed recreational use. *Id.*, p. 56.

The recommendations of the Commission were enacted in Chapter 172 of the Laws of 1944. See N.J.S.A. 13:13-12.1 to 12.8. In a preamble this act recited that the Department of Conservation and Development had been directed in prior acts to maintain the canal "until the Legislature shall have further directed the use or dispossession [disposition?] of the [canal]." The preamble further recited that the Department and the Delaware and Raritan Canal Commission had made a joint report "with recommendations as to the permanent utilization of [the] canal * * *" and that the Legislature was of the opinion that the canal was "the best source now available for increase in the industrial water supply * * * and that the best interests of the State will be served by the permanent utilization of [the] canal as a supply for industrial water and for recreational purposes * * *." Section 1 provided that the canal "shall henceforth be used as a source of industrial water supply and for recreational purposes * * *." N.J.S.A. 13:13-12.1. The Department of Conservation and Development was directed in section 3 to maintain the canal in such manner "as shall assure and maintain such flow of water through [the] canal as may from time to time be appropriate in order that the maintenance and operation of [the] canal as a source of water supply may be efficiently provided for." N.J.S.A. 13:13-12.3. This is in contrast with the direction in the acts by which the State took possession of the canal in 1934 directing the maintenance of the same depth of water in the canal as when it was operated as a navigable waterway. L. 1934, c. 238, §2; c. 139, §2. Under sections 4 and 5 of chapter 172 of the Laws of 1944, N.J.S.A. 13:13-12.4 and 12.5, the Department of Conservation was empowered to make long term contracts for the sale of industrial water from the canal. Under section 7 of the act, N.J.S.A. 13:13-12.7, the Department was authorized to develop canal properties for recreational and park uses. Nowhere in this act, which was intended to provide for the permanent disposition of the canal, is there any authorization to the Department to operate the canal as a through navigable waterway. This is in contrast with the permissive power to so operate the canal included in the laws by which the State took over the canal in 1934. L. 1934, c. 238, §3; c. 139, §4. This was in harmony with the observation in the report on the final disposition of the canal that the proposed industrial water supply was not adaptable to combination with a transportation waterway. Report (1942), p. 40, *supra*. In section 10 of chapter 172 of the Laws of 1944 it was enacted that "the provisions of any other act or acts inconsistent with the provisions of this act are hereby repealed."¹ The most obviously inconsistent provisions of prior acts and perhaps the only inconsistent provisions are those denominating the canal as a public highway, L. 1943, c. 238, §2; c. 139, §2, R.S. 13:13-3, and granting power to operate the canal as a through navigable waterway, L. 1934, c. 238, §3; c. 139, §4, R.S. 13:13-6.

From this history it is clear that these statutes have been repealed and that the Delaware and Raritan Canal is not now a public highway.

On May 19, 1949, the Department of Conservation was authorized to make long term contracts for the sale of water from the canal "at wholesale * * * to * * * corporations, municipalities, * * * and * * * water commissions for industrial, public, potable and other purposes." L. 1949, c. 168, §§1, 2; N.J.S.A. 13:13-12.9, 12.10. The act provided that devotion of the canal to recreational purposes was to be unaffected. L. 1949, c. 168, §1; N.J.S.A. 13:13-12.9. No attempt is made to "save" the canal as a

¹ Although this section does not appear in the text of the law in the current edition of New Jersey Statutes Annotated, its substance is noted under N.J.S.A. 13:13-12.1. It has not been repealed and remains law.

through navigable waterway. Obviously, sale of the water for consumption in substantial quantities is incompatible with use of the canal as a through navigable waterway.

Therefore, utility companies may not rely on R.S. 13:13-3 to encroach upon canal property without payment of a fee pursuant to statutes or charters authorizing them to use public highways.

Very truly yours,

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DECEMBER 16, 1958

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FORMAL OPINION 1958—No. 19

DEAR COMMISSIONER:

We have been asked whether for the purpose of determining State aid payable to regional school districts the "transition year" of 1954-1955 should be counted as one of the "first five years under [the State School Aid Act of 1954] that the regional school is in operation." The State School Aid Act of 1954 provides generally that aid shall be paid by the State to each school district which would provide a foundation program of \$200 per pupil in average daily enrollment if the school district pays its own fair share as defined by the act. N.J.S.A. 18:10-29.34, 29.32, 29.33.

N.J.S.A. 18:10-29.33 provides that the local fair share of every school district shall be composed primarily of a fraction of the equalized valuation of the property within the district. Ordinarily, this fraction is .005. Special provision is made for regional school districts and ordinary school districts embraced within the same territorial limits. The equalized valuations of all property within the territorial limits of the regional district are allocated among the regional district and its components in proportion to the number of pupils in each. The fraction of equalized valuation to be included in the fair share of the component districts is the same as in districts generally, .005. But in the case of regional school districts a lesser fraction is fixed during the early years of the regional district's existence under the act.

"* * * That part of the local fair share of the regional district measured by property valuations shall be determined at the rate of 3 mills per dollar of such allocated valuation during the first 5 years under this act that the regional school is in operation and at the rate of 4 mills per dollar during