

JANUARY 25, 1960

HON. SALVATORE A. BONTEMPO
*Commissioner of the Department of
Conservation and Economic Development*
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1960—No. 1

DEAR COMMISSIONER:

We have been asked whether pursuant to the Power Vessel Act, Laws of 1954, c. 236, N.J.S.A. 12:7-34.1, power vessels operating on the Delaware River above tidewaters and on Greenwood Lake, a nontidal body in New York and New Jersey, should be registered and whether the operators of such vessels must be licensed. The Power Vessel Act provides in part:

"No person, company, or corporation shall operate any power vessel or motor on any of the waters of this State, other than tidal waters, unless such power vessel or motor shall have been first registered with the department, and such registration remains in force and the operator thereof shall have been duly licensed to operate a power vessel." (N.J.S.A. 12:7-34.4.)

"With each such registration there shall be delivered to the person, company or corporation registering the power vessel or motor a set of registration plates which shall be displayed on the bow of the power vessel. It shall be the duty of the person, company or corporation registering or operating a power vessel to have such vessel at all times when it is being operated, properly equipped with the required life preservers, fire extinguishers and lights pursuant to the rules and regulations prescribed by the department and operated only by a licensed operator, having in his possession an operator's license card issued by the department under the provisions of this act." (N.J.S.A. 12:7-34.5.)

Inasmuch as Congress may regulate vessels on navigable waters of the United States pursuant to Article I, section 8, clause 3 of the United States Constitution, the Commerce Clause, the effect of certain pertinent federal statutes on the Power Vessel Act must be considered. The Act of June 7, 1918, 40 Stat. 602, as amended, 46 U.S.C. § 288 (1952), provides in part:

"*Every undocumented vessel*, operated in whole or in part by machinery, owned in the United States and found on the navigable waters thereof, except public vessels, and vessels not exceeding sixteen feet in length measured from end to end over the deck excluding sheer, temporarily equipped with detachable motors, shall be numbered. Such numbers shall be not less in size than three inches and painted or attached to each bow of the vessel in such manner and color as to be distinctly visible and legible.

"The said numbers, on application of the owner or master, shall be awarded by the Coast Guard official of the district in which the vessel is owned and a record thereof kept in the district in which the owner or man-

aging owner resides. *No numbers not so awarded shall be carried on the bows of such vessel.*" (Emphasis added.)

The foregoing section is repealed as of April 1, 1960 by the Federal Boating Act of 1958, better known as the Bonner Act, 72 Stat. 1754, 46 U.S.C.A. § 527 et seq. (1958). The Bonner Act, with reference to navigable waters of the United States, authorizes the Secretary of the Department in which the Coast Guard is operated to establish "an overall numbering system" for *undocumented* vessels propelled by machinery of more than 10 horsepower and permits him to approve any state system for the numbering of vessels meeting standards set forth in the act. 46 U.S.C.A. § 527a (1958). The numbering system under the Power Vessel Act has not been so approved. It further provides that the owner of any undocumented vessel required to be numbered who keeps his vessel principally in a state not having an approved numbering system must after April 1, 1960 carry a federal number issued by the Secretary. In language similar to that of 46 U.S.C. § 288 (1952) it is announced that no number not awarded pursuant to the act ". . . shall be carried on the bow of such vessel." 46 U.S.C.A. 527(f).

In view of the potential conflict between these federal statutes and the Power Vessel Act we must ascertain whether the two waterways are navigable waters of the United States. Waters, whether or not tidal, which in their ordinary condition or with reasonable improvements by themselves, or by uniting with other waters, form a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water are navigable waters of the United States. See *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). The Delaware River, being traversable for commerce between New Jersey and Pennsylvania, is a navigable waterway of the United States in its entire length within this state. A similar conclusion must be reached for Greenwood Lake, it being of sufficient size for commerce by marine vessels between New York and New Jersey. These results accord with those heretofore reached by the United States Coast Guard.

A vessel is documented when issued a marine document by the Bureau of Customs. Title 46 of the United States Code provides three forms of documentation: (1) registration, see 46 U.S.C. § 11 (1952); (2) enrollment, see 46 U.S.C. § 252 (1952); and (3) licensing, see 46 U.S.C. § 263 (1952). Though it is unnecessary to set forth the prerequisites to documentation, it should be noted that Greenwood Lake and the nontidal waters of the Delaware River are used almost exclusively by undocumented vessels. Complete application of the Power Vessel Act on Greenwood Lake or the nontidal portion of the Delaware River would require a complying owner of a vessel governed by 46 U.S.C. § 288 (1952) or the Bonner Act to violate federal law by placing numbers not awarded by the Coast Guard on the bow of his vessel. Therefore, to the limited extent that the Power Vessel Act requires state numbers to be carried on the bows of vessels on navigable waters of the United States including Greenwood Lake and the Delaware River, it is unconstitutional as violative of the Supremacy Clause of the Federal Constitution and is superseded. Cf. *United Automobile Workers v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 271 (1956); *Local 24 v. Oliver*, 358 U.S. 283 (1959). The federal statutes, however, are not inconsistent with the provisions that the vessels on these waters be registered and their operators licensed. And the state police power extends to the regulation of persons and vessels on navigable waters of the United States. 56 *Am. Jur., Waters* § 197 (1947); see *The Vessel M/V "Tungus" v. Skovgaard*, 358 U.S. 588 (1959);

Silas Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937); *Hamburg Am. S.S. Co. v. Grube*, 196 U.S. 407 (1905); *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). Thus since there are no further constitutional infirmities in N.J.S.A. 12:7-34.4 and 34.5 it must be resolved whether the Legislature would have intended that the Power Vessel Act otherwise continue in effect to require registration of vessels even if the vessels could not display the issued plates. Registration without the carrying of plates would be useful for several reasons. Firstly, in cases of theft or disputed ownership a claimant could produce his plates or otherwise prove registration. Secondly, fees collected for registration are available for the use of the State without regard for the carrying of the plates. N.J.S.A. 12:7-34.10. Thirdly, registration provides an opportunity for the Department of Conservation and Economic Development to examine the registered vessel in order to determine whether the vessel complies with the equipment requirements in the regulations to the act. We therefore conclude that the Power Vessel Act is severable to the end that the unconstitutionality traceable to the federal pre-emption does not interfere with the registration of vessels on navigable waters of the United States. And, of course, operators must be licensed on navigable waters of the United States. But when vessels kept on Greenwood Lake or the Delaware River are registered, plates should be issued because they must be attached should the vessel be transported to a landlocked lake entirely within New Jersey or the nonnavigable portion of a river in New Jersey.

One further problem remains. By *Formal Opinion No. 22*, 1956, this office held that the boundary between Pennsylvania and New Jersey along the nontidal portions of the Delaware is the middle of the river. But by the Compact of 1783, Pennsylvania and New Jersey agreed that each State would "enjoy and exercise a concurrent jurisdiction within and upon the water . . . between the shores of said river." N.J.S.A. 52:28-25. Accordingly there is no doubt but that the Legislature could have authorized enforcement of the Power Vessel Act, so far as not pre-empted, on the entire nontidal portion of the Delaware. Such a construction must be adopted. The phrase "waters of this State" in the Power Vessel Act is used in a jurisdictional rather than proprietary sense for the State as sovereign does not own the nontidal waters of New Jersey or the soil beneath them. See *Baker v. Normanoch Ass'n*, 25 N.J. 407 (1957); *Formal Opinion No. 22*, 1956. And although the boundary between New Jersey and Pennsylvania above tidewaters is the middle of the river, jurisdictionally the power of the State to control the operation of vessels is of equal scope on either side. Further as was held in *Attorney-General v. Delaware and Bound Brook R.R. Co.*, 27 N.J. Eq. 631 (E. & A. 1876) and *Board of Health v. Phillipsburg*, 83 N.J. Eq. 402, 416 (Ch. 1914), *aff'd*, 85 N.J. Eq. 161 (E. & A. 1915) the object of the compact was "to secure the administration of justice and the use of the river as a public highway." The Power Vessel Act is directed at the latter object. Thus within that act the entire nontidal portion of the Delaware River between Pennsylvania and New Jersey is a "water of this state." While under N.J.S.A. 52:28-25 jurisdiction over the river is concurrent and not exclusive, it does not follow that consent of Pennsylvania is a prerequisite to enforcement of the Power Vessel Act on the Delaware. In *Commonwealth ex rel. Reed v. The Sheriff*, 13 Phila. 446 (Ct. Quar. Sess.) it was held that Pennsylvania could require licenses for pilots on the Delaware River though New Jersey had not consented to or participated in the administrative action. The court declared:

"After examining all the legislation, it is clear that, as between the States of Pennsylvania and New Jersey, concurrent jurisdiction exists, and as the relator was first arrested by the Pennsylvania authorities, under a Pennsylvania warrant, expressly authorized by the statute, we have jurisdiction; . . ."

Prosecutions for violation of the registration, licensing or other provisions of the Power Vessel Act on the Delaware River may be brought in a county or district court. N.J.S.A. 52:28-33 provides:

"The judicial investigation and determination of any capital or other offense, trespass or damage committed within and upon the water of the river Delaware, which this State is entitled to enjoy and exercise, by virtue of sections 52:28-23 to 52:28-28 of this Title, shall belong to and be exercised by the Superior Court or the courts and officers in the county lying and being nearest to the place where such offense, trespass or act was committed, as fully as if said place was within the body of such county, and it shall be lawful to describe said offense, trespass or act as having been committed in or upon the water of the river Delaware in the said county."

All violations of the Power Vessel Act are offenses within this section. By N.J.S.A. 12:7-34.28 the Legislature announced that violators of provisions of the Power Vessel Act not governed by a specific penalty section are disorderly persons. The only specific penalties are imposed for operation under the influence of narcotics or intoxicating liquors, N.J.S.A. 12:7-34.19, and these penalties are far more severe than those which may be awarded pursuant to N.J.S.A. 12:7-34.28 for other violations. Disorderly conduct has always been deemed an offense, *State v. Labato*, 7 N.J. 137 (1951); *Sawran v. Lennon*, 19 N.J. 606 (1955); *Cannon v. Krakowitch*, 54 N.J. Super. 93 (App. Div. 1959) and the severity of punishment afforded by N.J.S.A. 12:7-34.19 requires that violations of it be placed in the same category. Prosecution for such violations, however, should not be brought in the Marine Navigation Court because N.J.S.A. 52:28-33, in vesting the county, district and Superior courts with jurisdiction over Delaware River offenses, impliedly has excluded the navigation and municipal courts from such cases. See 2 *Sutherland, Statutory Construction* § 4915 (3d ed. 1943).

Very truly yours,

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