

New Hampshire Navigability Report

Summary

In New Hampshire, the public has the right to boat, fish, and engage in other reasonable activities in public waters, which encompass tidal waters, ponds over 10 acres, and navigable-in-fact streams. The public’s right to use public waters in New Hampshire appears to be fairly broad. In fact, state courts have held that the public’s right to use such waters is not merely “limited to navigation and fishery, but includes all useful and lawful purposes.”¹ Very few courts have addressed the issue of navigability, and accordingly, there is little guidance with respect to the breadth and scope of such “useful and lawful purposes.” Courts have suggested, however, that what is reasonable may depend on the capacity of the particular stream.²

State Test of Navigability

The New Hampshire Supreme Court has held that “navigable waters” are “all such waters as are actually navigable, whether fresh or salt” or subject to the tides, that is, navigable-in-fact.³ New Hampshire courts do not appear to impose a commercial use requirement. Moreover, the State’s Supreme Court has emphasized that “the flow of a navigable stream is in no sense private property; ‘that the running water in a great navigable stream is capable of private ownership is inconceivable.’”⁴

Although New Hampshire has utilized a test for navigability based on whether navigable-in-fact, it nonetheless finds that waters are public if “capable in its natural state of some useful service to the public.”⁵ Such “useful service” has been held to include the public’s recreational uses.⁶ Whether the public has rights depends on whether the waters are public, not on whether navigable,⁷ though as a practical matter, there does not appear to be a difference between public and navigable-in-fact waters.

New Hampshire’s test for navigability is a factual one, and is applied on a case-by-case basis.⁸ The U.S. Circuit Court of Appeals for the First Circuit held, interpreting New Hampshire law, a history of public use is the most compelling evidence in evaluating whether a stream is in fact navigable. As the court stated, “[p]ublic user [sic] is the most convincing evidence of the navigability of water—the most unailing test to apply.”⁹ This should not be construed to mean

¹ *St. Regis Paper Co. v. New Hampshire Water Res. Bd.*, 26 A.2d 832, 92 N.H. 164, 170 (N.H. 1942).; *Lakeside Lodge, Inc. v. Town of New London*, 158 N.H. 164, 168, 960 A.2d 1268 (2008) (citing *State v. Sunapee Dam Co.*, 70 N.H. 458, 460, 50 A. 108 (1900)).

² *Connecticut River Lumber Co. v. Olcott Falls Co.*, 21 A. 1090, 1097 (1890) (“The entire natural capacity of the river for flotation is public property.”).

³ *Concord Mfg. Co. v. Robertson*, 25 A. 718, 720, 728 (1890).

⁴ *St. Regis Paper*, 26 A.2d at 838 (citing *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940)).

⁵ *Id.*

⁶ *See Hartford v. Gilmanton*, 146 A.2d 851, 853 (1958) (public waters may be used to boat, bathe, fish, fowl, skate, and cut ice).

⁷ *St. Regis Paper*, 26 A.2d at 838.

⁸ *Id.*

⁹ *Percy Summer Club v. Astle*, 163 F. 1, 8 (1st Cir. 1908).

that actual use is always required, as courts have repeatedly stated that a stream may be navigable if it is “capable” in its natural condition to permit public use.¹⁰

In 1941, the Supreme Court of New Hampshire affirmed that “it is not questioned that the [Connecticut River] all the way from its source is a public water way.”¹¹

In 1908, the U.S. Court of Appeals for the First Circuit observed that “there can be no doubt, we think, that Massabesic Pond and all the large bodies of fresh water in New Hampshire are navigable.”¹²

Extent of Public Rights in Navigable and Non-Navigable Rivers

Per state statute, “public waters of New Hampshire are valuable resources held in trust by the state [and the] state has an interest in protecting those waters and has the jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit.”¹³

Regarding public waters, statute declares that “[a]ll natural bodies of fresh water situated entirely in the state having an area of 10 acres or more are state-owned public waters, and are held in trust by the state for public use.”¹⁴ Waters subject to the tides under usual circumstances are also public waters and are subject to the public trust to the high-water mark.¹⁵ The line between private and public land is the “ordinary high water mark,” which is the “level of mean high tide.”¹⁶

The “land covered by public water is capable of many uses” and “rights of navigation and fishery are not the whole estate,” but rather such waters are held for the use and benefit of the public for all useful and lawful purposes.¹⁷ Public trust rights on public waters include “‘all useful and lawful purposes,’ such as the common law right to boat recreationally.”¹⁸ Public waters may be used by the public to boat, bathe, fish, fowl, and skate.¹⁹ The public further has a “right of way in a floatable or navigable fresh river or small pond” in the form of “an easement in the submerged land of the riparian proprietors.”²⁰

¹⁰ See, e.g., *Connecticut River Lumber*, 21 A. at 1090 (internal citations omitted).

¹¹ *St. Regis*, 26 A.2d at 840.

¹² *Percy Summer Club*, 163 F. 1 at 19.

¹³ N.H. Rev. Stat. Ann. § 483-B:1(II) (2021).

¹⁴ *Id.* § 271:20(I) (2021).

¹⁵ *Id.* § 483-C:1(II), (V) (2021); Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994) (non-binding opinion on SB 636, “An act relative to the public use of coastal beaches for recreational purposes”); *Sibson v. State*, 259 A.2d 397, 399 (N.H. 1969).

¹⁶ *Purdie v. Att’y Gen*, 732 A.2d 442, 445 (N.H. 1999).

¹⁷ E.g., Opinion of the Justices, 649 A.2d at 610.

¹⁸ *Lakeside Lodge*, 960 A.2d at 1271 (quoting *State v. Sunapee Dam Co.*, 50 A. 108 (N.H. 1900) and citing *Hartford*, 146 A.2d 851); accord N.H. Rev. Stat. Ann. § 483-C:1(II); Opinion of the Justices, 649 A.2d at 610; *Sibson*, 259 A.2d at 400.

¹⁹ *Hartford*, 146 A.2d at 853; accord *Whitcher v. State*, 181 A. 549, 552 (1935).

²⁰ *Concord Mfg.*, 25 A. at 720.

The state holds title to the beds of “great ponds”²¹ and to lands beneath tidal waters to the high-water mark.²² Littoral owners (those whose property abuts lakes or the ocean), however, have rights “more extensive than those of the public generally,” to include “the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes,”²³ but “subject to the paramount right of the State to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes.”²⁴ Presumably, a riparian owner (those whose property abuts a stream) also has the same “more extensive” rights.

On streams not subject to the tides, including those navigable-in-fact, a riparian owner owns to the center of the stream, but “subject of course to the public easement to use the river for navigation, floatage and fishery.”²⁵

There is a general prohibition against the obstruction of free navigation in navigable waters.²⁶ Furthermore, riparian owners are required to exercise their property rights in a manner that does not unreasonably interfere with the public’s right to use navigable waters.²⁷ As the New Hampshire Supreme Court noted, such property owners are “always subject to the paramount right of the State to control them reasonably in the interests of navigation, fishing, and other public purposes.”²⁸

Regardless of the public’s right to use navigable waterways, the private owner’s rights the adjacent land “remains intact.”²⁹ In short, although “the public trust in tidewaters in [New Hampshire] extends landward to the high water mark,” private shorefront owners are entitled to exercise their property rights in the tidelands “so long as they do not unreasonably interfere with the rights of the public.”³⁰ And though the public has the right to use coastal beaches, the New Hampshire Supreme Court observed that the private rights of adjacent land owners include the right to “use and occupy the waters adjacent to their shore for a variety of recreational purposes, the right to erect boat houses and to wharf out into the water.”³¹

Case law makes no mention of the right to portage, but suggests that so long as the activity occurs below the high-water mark, portage would be acceptable as a “useful and lawful purpose” falling within the public trust right. The state had title to the beds of tidal waters and great ponds up to the high water mark, so the public should be free to use waters or beds to the high-water mark. On navigable non-tidal streams, the public’s easement for “navigation, fishing, and other public purposes” also extends to the high-water mark.

²¹ *Lakeside Lodge*, 960 A.2d at 1272. A “great pond” is one more than 10 acres. *Concord Mfg.*, 25 A. at 730.

²² Opinion of the Justices, 649 A.2d at 608 (citing *Concord Mfg.*, 25 A. at 727, 730-31).

²³ *Lakeside Lodge*, 960 A.2d at 1272 (quoting *Sundell v. Town of New London*, 409 A.2d 1315 (N.H. 1979)).

²⁴ *Id.* (State v. George C. Stafford & Sons, Inc., 105 A.2d 569, 573 (N.H. 1954)).

²⁵ *New Hampshire Water Res. Bd. v. Lebanon Sand & Gravel, Inc.*, 233 A.2d 828, 832 (N.H. 1967).

²⁶ *See State v. Hutchins*, 105 A. 519, 522 (N.H. 1919).

²⁷ *Concord Mfg.*, 25 A. at 726-27.

²⁸ *Lakeside Lodge*, 960 A.2d at 1272 (*George C. Stafford & Sons*, 105 A.2d at 573).

²⁹ *St. Regis Paper*, 26 A.2d at 838.

³⁰ *Concord Mfg.*, 25 A. at 727.

³¹ Opinion of the Justices, 649 A.2d at 609 (citing *Sundell*, 409 A.2d at 1318).

Because owners of land adjacent to public waters have title to the natural ordinary high-water mark, a littoral or riparian owner likely has a cause of action for trespass against anyone who goes above the high-water mark.

On non-navigable waters, the public likely has no rights as state courts have held the public as an easement over privately owned streams when navigable in fact.

Miscellaneous

The New Hampshire Department of Safety, Marine Patrol has issued a Safe Boating Program handbook which lists certain restrictions, which include a prohibition on anchoring boats overnight on “any inland surface waters of the State of New Hampshire.” An online copy of this handbook can be accessed from <https://www.nh.gov/safety/divisions/nhsp/fob/marine-patrol/boating-education/index.html>.

For additional information on boating in New Hampshire, such as key laws and restrictions on use of certain bodies of water, visit the Marine Patrol’s website at <https://www.nh.gov/safety/divisions/nhsp/fob/marine-patrol/index.html>.

The New Hampshire Department of Fish & Game has prepared a list of “public access sites” for fishing and boating at <https://nhfg.maps.arcgis.com/apps/webappviewer/index.html?id=2243091f322449819c244c0c3b2f3f43>, which also includes various site-specific regulations. Additional information can be found on the Department’s website at <https://wildlife.state.nh.us/boating/>.