

New York Navigability Report

Summary

The New York public right of navigation allows a range of vessels, including small boats and canoes, to navigate on New York’s freshwater rivers, streams, lakes, ponds, and other waterways that are navigable-in-fact. To qualify as navigable-in-fact, a waterway must provide practical utility to the public as a means of transportation; ability to support recreational use is one factor New York Courts consider in their determination. Waterways that are affected by tides are navigable-in-law, and the public has a right to navigate on these waters regardless of who owns the bed or whether the waterway is posted. The public has a right to fish on navigable waters that pass through privately-owned lands unless title to fishing rights has passed to the landowner and no fishing easement exists.

State Test of Navigability

New York courts have noted on numerous occasions that the State of New York, in connection with the public trust doctrine, maintains an easement on navigable waterways in trust for the people of the state. By statute, New York defines “Navigable waters of the state” as “all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable-in-fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties.”¹ “Navigable in fact” is defined as “navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable-in-fact a lake or stream must have practical usefulness to the public as a highway for transportation.”² Consequently, waters that are navigable for more than a brief period during the year under normal conditions are likely to be subject to the public right of navigation.

New York Courts have interpreted the statute in a manner consistent with the traditional common law rule: in order to be navigable-in-fact, a river must provide practical utility to the public as a means of travel or transportation.³ Traditionally, transportation was defined narrowly, referring to a body of water’s capacity for transporting commercial goods or materials to market. However, as social and economic conditions have evolved in New York, courts have broadened their interpretation of what activities satisfy the definition of transportation.⁴ According to the New York State Court of Appeals (the state’s highest court) in *Adirondack League Club, Inc. v. Sierra Club*, the “paramount concern is the capacity of the river to transport, *whether for trade or travel*.”⁵ Statute also suggests that “floating and running lumber, logs or other timber” may

¹ N.Y. Nav. Law § 2(4) (McKinney 2021).

² *Id.* § 2(5).

³ *E.g.*, *Friends of Thayer Lake LLC v. Brown*, 53 N.E.3d 730, 732 (N.Y. 2016).

⁴ *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998).

⁵ *Id.* at 603 (italics added).

suffice as valuable commerce for navigability.⁶ “the presence and nature of termini by which the public may enter or leave the waterway” also on the capacity for transport.⁷ A “Waterway’s navigability-in-fact must be determined based upon its utility for travel or trade as revealed by the testimony, affidavits, maps, photographs, historical records and other evidence in the voluminous record.”⁸

In determining whether kayakers and canoers on the South Branch of the Moose River had trespassed on a riparian owner’s property, the court in *Adirondack League Club* held that recreational use is part of the navigability analysis.⁹ Although the court did not make a final judgment on whether the Moose River itself was navigable, the court did take an important step in expanding the definition of what waterways qualify as navigable-in-fact.

In *Adirondack League Club*, however, the court did not discuss how much weight should be given to recreational use within the overall navigability test.¹⁰ Therefore, the issue remains somewhat open to debate. Courts have generally concluded that although the ability to sustain recreational use is a relevant factor when determining navigability, it is not the only or most important factor. Capacity to support transportation remains the paramount inquiry. In 1995, a New York State appeals court found that a pond was not navigable because there was no evidence of any historical use of the pond for commercial purposes, and the evidence of small boat and canoe recreational use on the pond was insufficient “to demonstrate that the pond has any capacity or suitability for commercial transportation.”¹¹

Even after the *Adirondack League Club* decision, New York courts have resisted the call to classify all waterways capable of recreational use as navigable-in-fact. In 2003, a New York court rejected the argument that the mere presence of motorized vessels on the Mariaville Lake was sufficient to have the lake classified as navigable.¹² The court noted that plaintiff failed to “demonstrate the extent of public access to the lake, the historical use of the lake by the general public and whether the lake was navigable in its natural state.”¹³ In 2009, a different appellate court reached a similar conclusion, holding that “[though] the defendants asserted that the lake could be used for recreational canoeing and kayaking, recreational use alone is insufficient to establish that a body of water is navigable in fact, as there must be some evidence that it has the capacity for transport, whether for trade or travel.”¹⁴

⁶ See N.Y. Nav. Law § 120 (McKinney 2021) (prohibiting erection of structures that would interfere with floating logs or timbers over waters “recognized by law or use as a public highway” unless it allows safe passage of timber).

⁷ *Mohawk Valley Ski Club, Inc. v. Town of Duansburg*, 757 N.Y.S.2d 357, 360 (N.Y. App. Div. 2003), *abrogated on other grounds*, *Town of North Elba v. Grimditch*, 948 N.Y.S.2d 137, 146 (N.Y. App. Div. 2012).

⁸ *Friends of Thayer Lake LLC v. Brown*, 1 N.Y.S.3d 504, 509 (N.Y. App. Div. 2015), *aff’d in relevant part*, 53 N.E.3d 730, 732 (N.Y. 2016).

⁹ *Adirondack League Club*, 706 N.E.2d at 1195.

¹⁰ *Id.*

¹¹ *Hanigan v. State of New York*, 629 N.Y.S.2d 509 (N.Y. App. Div. 1995).

¹² *Mohawk Valley Ski Club*, 757 N.Y.S.2d at 360, *abrogated on other grounds*, *Town of North Elba*, 948 N.Y.S.2d at 146.

¹³ *Id.*

¹⁴ *Dale v. Chisholm*, 889 N.Y.S.2d 58, 59-60 (N.Y. App. Div. 2009).

If a waterway is, in fact, substantially navigable for a considerable part of the year, one can ordinarily assume that it qualifies as legally “navigable-in-fact.” Moreover, the presence of some natural obstructions will not jeopardize a waterway’s status as navigable.¹⁵ Furthermore, because the presence of some obstructions is contemplated, the right to navigate includes the incidental privilege to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands.¹⁶ Any use of private banks or riverbeds that is not strictly incidental to the right to navigate, however, can give rise to an action for trespass.¹⁷

Those seeking to use a waterway need not have it declared navigable-in-fact by a court.

Extent of Public Rights in Navigable and Non-Navigable Streams

The public maintains different sets of rights depending on whether the stream is (1) navigable-in-law; (2) navigable-in-fact; and (3) non-navigable.

Navigable-in-law waters are those in which the tide ebbs and flows, such as tidal waters, boundary waters, and the Great Lakes. The public has a right to use these navigable tidal waters “for all purposes, as well for navigation as for fishing.”¹⁸

Navigable-in-fact waters are navigable but non-tidal, where the tide does not ebb and flow. “A waterway that is navigable-in-fact, however, ‘is considered a public highway, notwithstanding the fact that its banks and bed are in private hands.’”¹⁹ Here, the public has an easement to navigate the waters, but may not use them for other purposes.²⁰ The riparian landowners generally retain the “exclusive rights to the fisheries therein.”²¹ “As a general rule, non-tidal waters, with the exception of those that courts have deemed to be owned by the State in its sovereign capacity, are owned in a proprietary capacity by the riparian owners, whether such owners be the State, individuals or other entities.”²²

In a navigable waterway, the public has the right to portage around obstacles, even where the beds and banks are held privately,²³ so long as the portage is by the most direct, least-intrusive, safe route possible. The right to navigation does not authorize entrance onto private property to access or leave the navigable waterway, or to use the land for other purposes, such as camping, hunting, hiking, or picnicking. Any use of private riverbeds or banks that is not strictly incidental to the right to navigate gives rise to an action for trespass.²⁴

¹⁵ *E.g.*, *Adirondack League Club*, 706 N.E.2d at 1197.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Douglaston Manor v. Bahrakis*, 678 N.E.2d 201, 203 (N.Y. 1997).

¹⁹ *Friends of Thayer Lake*, 53 N.E.3d at 732 (quoting *Adirondack League Club*, 706 N.E.2d at 1194).

²⁰ *Adirondack League Club*, 706 N.E.2d at 1195; *Douglaston Manor*, 678 N.E.2d at 204.

²¹ *Douglaston Manor*, 678 N.E.2d at 204; *accord Adirondack League Club*, 706 N.E.2d at 1195.

²² *Town of North Elba v. Grimditch*, 948 N.Y.S.2d 137, 143 (N.Y. App. Div. 2012).

²³ *Adirondack League Club*, 706 N.E.2d at 1197.

²⁴ *Id.* at 1197-98

“If a waterway is not navigable-in-fact [or law], ‘it is the private property of the adjacent landowner.’”²⁵ No public rights attach.

Only a court can determine whether a waterway is “navigable-in-fact.” Use of a waterway that appears navigable-in-fact even without a court decision creates the risk of having a conflict with the landowner or being charged or sued for trespass. Therefore, in cases where the status of a waterway is uncertain, the New York State Department of Environmental Conservation encourages the public to seek permission from landowners in order to avoid these problems.

Miscellaneous

Protect the Adirondacks prints a brochure discussing the common law right of public travel on New York’s freshwater rivers, streams, lakes and other waterways that are navigable-in-fact. A copy of that brochure is available at <https://www.protectadks.org/wp-content/uploads/2011/01/Navigation-Rights.pdf>.

For additional information on boating in New York, visit the State’s Parks, Recreation, and Historic Preservation Agency at <https://parks.ny.gov/recreation/boating/>.

²⁵ *Friends of Thayer Lake*, 53 N.E.3d at 732 (quoting *Adirondack League Club*, 706 N.E.2d at 1194).