

Pennsylvania Navigability Report

Summary

A body of water is navigable if it can be used for commercial shipping purposes at any stages of water. The public can use navigable waterways for recreational purposes regardless of the ownership of the land beneath. On the other hand, if a body of water is non-navigable, those who own the lands beneath it and abutting it can exclude the public.

State Test of Navigability

The common law ebb and flow doctrine (i.e., waters subject to the tides) has been rejected in Pennsylvania as the test for navigability¹ as it has in most of the states. Pennsylvania deems a body of water as navigable-in-law if it is navigable-in-fact.² However, navigability for mere recreational purposes, e.g., floating a canoe, does not suffice to show that a body is navigable-in-fact.³ To be navigable-in-fact, a body of water must be “used or usable as a broad highroad for commerce and the transport in quantity of goods and people.”⁴ Bodies of water not usable for commercial shipping purposes are deemed “non-navigable.”⁵ The courts have distinguished bodies of water that are itself is the focus of attraction from those that form trade routes; deeming only those forming trade routes as navigable⁶ and expressly rejecting a recreational boating test for navigability.⁷

Navigability of rivers is not determined on a piecemeal basis; once a river is held to be navigable, its entire length is deemed navigable.⁸

The state legislature has declared various streams public highways and, therefore, navigable.⁹ However, state courts have held that a stream that is not navigable-in-fact cannot be made navigable by the mere passage of a statute.¹⁰ Hence, the most reliable test for determining

¹ *Flanagan v. City of Philadelphia*, 42 Pa. 219, 229 (1862); *Barclay R.R. & Coal Co. v. Ingham*, 36 Pa. 194 (1860)

² *Flanagan*, 42 Pa. at 229; see also *Pennsylvania Power & Light Co. v. Maritime Mgmt.*, 693 A.2d 592, 594 (Pa. Super. Ct. 1997) (stating that only streams navigable-in-fact are navigable-in-law).

³ *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1100 (Pa. Super. Ct. 2001), appeal denied, 782 A.2d 547 (Pa. 2001); see also *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 489 (Pa. 1959) (“Navigation and navigability are portentous words [that] 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.”).

⁴ *Mountain Props.*, 767 A.2d at 1100 (quoting *Lakeside Park*, 153 A.2d at 489).

⁵ *Id.* (citing *Lakeside Park*, 153 A.2d at 489).

⁶ *Id.* (citing *Lakeside Park*, 153 A.2d at 489).

⁷ *Id.* (rejecting the “invitation to expand the definition of navigability” based on the ability to travel and from a lake “on a canoe or raft”).

⁸ *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 722 (Pa. Super. Ct. 1999), appeal denied, 761 A.2d 550 (Pa. 1999).

⁹ See, e.g., *R. Timothy Weston, Public Rights in Pennsylvania Waters*, 49 Temple L. Quart. 518 (1976).

¹⁰ *Pennsylvania Power & Light*, 693 A.2d 592, 595 (“If navigable in fact, it is so in law; it is public and no [] statute need be considered. If not navigable in fact, it is not so in law and no statute can make it public, for the owners had title to the center of the waterway that cannot be divested by mere legislation.”); *Ingham*, 36 Pa. at 202.

navigability of a body of water remains whether it is navigable-in-fact, *i.e.*, it is or can be used for commercial shipping in its ordinary condition.

Courts have declared certain rivers as public rivers and, therefore, open to the public. These rivers include Ohio, Monongahela, Youhiogeny, Alleghany, Susquehanna, and its branches, Juniata, Schuylkill, Lehigh, and Delaware.¹¹

Extent of Public Rights in Navigable and Non-Navigable Rivers

In Pennsylvania, navigability is central to determining whether waters are privately owned or the property of the public at-large.¹² A navigable body of water in Pennsylvania “is publicly owned and may only be regulated by the Commonwealth,” and is held in trust for the public.¹³ On navigable waters, the state has title to land below the low-water mark, though has the right to regulate up to the high-water mark¹⁴ and courts have found a public easement exists up to the high-water mark.¹⁵

On public (*i.e.*, navigable) waters, the public may, in boat and fish.¹⁶ State court decisions have not expressly discussed other rights, though because waters up to the low water mark are owned by the state and waters to the high water mark subject to a public easement, the public should be able to make all lawful uses of the waters and beds up to the high-water mark.¹⁷ Portage rights of the public along the banks of navigable waters likely extend to high-water mark.¹⁸ Crossing above the high-water mark would likely be a trespass, even if incidental to navigation (*e.g.*, to portage around obstacles).¹⁹ The public does not have a right to cross on private property to gain access to public waters.

On non-navigable waters, the riparian owner owns to the center of the body of water.²⁰ Non-navigable waters are “privately owned by those who own the land beneath the water’s surface and the lands abutting it, and may be regulated by them.”²¹ That is, riparian or littoral owners of non-navigable waters may exclude the public.

¹¹ *Lehigh Falls Fishing Club*, 735 A.2d at 719 (citing *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle 71 (1826)).

¹² *Beishline v. Dep’t of Env’tl. Protection*, 234 A.3d 878, 881 (Pa. Commw. Ct 2020).

¹³ *Mountain Properties*, 767 A.2d at 1099 (citing *City of Philadelphia v. Pennsylvania Sugar Co.*, 36 A.2d 653, 655-56 (PA. 1944) and *Pennsylvania Power & Light*, 693 A.2d at 594); *Lehigh Falls Fishing Club*, 735 A.2d at 719.

¹⁴ *Pennsylvania Sugar*, 36 A.2d at 655-56.

¹⁵ *Pursell v. Stover*, 20 A. 403, 404 (Pa. 1885).

¹⁶ *Lehigh Falls Fishing Club*, 735 A.2d at 719, 722.

¹⁷ *See, e.g., Mountain Properties*, 767 A.2d at 1100 (stating that “ownership of land beneath does not have any right superior to that of the public to use the waterway”); *Lehigh Falls Fishing Club*, 735 A.2d at 719 (stating that owners of the land abutting navigable rivers do not have the exclusive right to fish in those rivers and that that right is open to the public).

¹⁸ *Pursell*, 20 A. at 404 (“[B]etween high and low water the public have a right of way for the purposes of navigation, which includes all that is reasonably necessary for that purpose.”).

¹⁹ *Id.* at 403-04.

²⁰ *Pennsylvania Sugar*, 36 A.2d at 655-56.

²¹ *Mountain Properties*, 767 A.2d at 1100 (citing *Lakeside Park*, 153 A.2d at 489); *Pennsylvania Power & Light*, 693 A.2d at 594.

Miscellaneous

The Fish and Boat Commission regulates fishing and boating in Pennsylvania.²² The Department of Conservation and Natural Resources regulates fishing, swimming, boating, and whitewater boating in state park waters.²³

For additional information on boating and fishing in Pennsylvania, visit the state's Fish and Boat Commission at <https://www.fishandboat.com/Pages/default.aspx> and the Department of Conservation and Natural Resources website at <https://www.dcnr.pa.gov/Recreation/WhatToDo/Pages/default.aspx>.

²² 58 Pa. Code pt. II.

²³ See 17 Pa. Code §§ 11.202, 11.203, 11.204, 11.217, 11.219, 11.220.