

Vermont Navigability Report

Summary

In Vermont, the public has the right to boat and fish in navigable waters.¹ Although public use of such waters was originally limited to purposes of commerce and passage, Vermont has recognized that the public’s right extends to recreational uses as well.² Accordingly, Vermont’s navigable waters are subject to public use for the purposes of commerce, boating, fishing, and other reasonable and normal recreational uses, subject to regulation by the Vermont Natural Resources Board.

State Test of Navigability

Navigable waters are defined by statute as “Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes . . . and all [watercourses] that are boatable under the laws of this State.”³ Vermont’s test for navigability was derived from the standpoint of using a waterway for commerce. Accordingly, in Vermont, “if a waterway is capable in its natural state of being used for purposes of commerce, carried on in any mode, it is navigable in fact, and therefore . . . [under] law, a public river or highway.”⁴

The test for navigability is factual by nature and the state cannot declare that a waterway is navigable-at-law when it is not in fact so.⁵ A waterway may be navigable even if “subject to periodical fluctuations in the volume and heights of the water, attributable to natural causes and recurring with the seasons . . . [but as long as] its periods of high water ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement.”⁶ The public easement at common law did not initially include recreational use, as it focused on use that was “beneficial to trade or agriculture.”⁷ As further discussed below, the right to hunt and fish in such waters (subject to certain restrictions) was added by the Vermont legislature.

Vermont’s test for navigability is a factual one, and is applied on a case-by-case basis. Vermont’s test for navigability is derived from a multitude of sources, including Massachusetts and Maine common law,⁸ current Vermont case law, and the Vermont constitution.⁹ In a given case, whether such waters are “inherently capable of use as a common passage for the public is a question of fact” and the party asserting that they are has the burden of proving it, “unless the court can take judicial notice that they are as perhaps [the court] can in some cases.”¹⁰

¹ *New England Trout & Salmon Club v. Mather*, 35 A. 323, 326 (Vt. 1896).

² *Id.* (citing *Att’y Gen. v. Woods*, 108 Mass. 436 (Mass. 1871)).

³ Vt. Stat. Ann. tit. 10, § 1422 (West 2021).

⁴ *Boutwell v. Champlain Realty Co.*, 94 A. 108, 111 (Vt. 1915).

⁵ *Boutwell*, 94 A. at 112.

⁶ *Mather*, 35 A. at 326 (citing *Woods*, 108 Mass. at 436); *see also Cabot v. Thomas*, 514 A.2d 1034, 1039 (Vt. 1986) (quoting *Mather*, 35 A. at 326)).

⁷ *Id.*

⁸ *Id.*

⁹ *Cabot*, 514 A.2d at 1037.

¹⁰ *Mather*, 35 A. at 326.

Vermont courts have not imposed actual use requirements; on the contrary, they seem to endorse other jurisdictions' position that "it is not necessary to the [public's] right that the stream should have been used as a highway; it is enough if it is capable of such use."¹¹

Extent of Public Rights in Navigable and Non-Navigable Rivers

Vermont follows the public trust doctrine for navigable waters and the land underlying those waters.¹² Statute defines public waters as navigable waters.¹³ Though earlier case law has held, and has not been explicitly overruled, that navigable waters above tidal forces may be held privately and subject to an easement if navigable,¹⁴ subsequent court decisions have since invoked "the public trust doctrine[, which] means that navigable waters and the land below them are held in common by the people of this state."¹⁵ And the boatable standard encompassed in the Constitution¹⁶ and statute¹⁷ seem to greatly discount the applicability of tides on whether waters are private. But case law still supports the position that non-navigable waters, *i.e.*, "little streams and rivers as are not floatable . . . in their natural state . . . are wholly and absolutely private, not subject to the servitude of the public . . . because they are not susceptible of use as a common passage for the public."¹⁸

As a general principle, the public has a broad right to use public waterways. The Vermont legislature has empowered the Water Resources Panel of the Vermont Natural Resources Board to evaluate uses for which a particular public body of water is adaptable on a case-by-case basis. The Panel has specifically identified "fishing, swimming, boating, waterskiing, fish and wildlife habitat, wildlife observation, the enjoyment of aesthetic values, quiet solitude of the water body, and other water-based activities" as "normal recreational uses" to be considered.¹⁹ "Normal use" means any lawful use of any specific body of public water that occurred on a regular, frequent, and consistent basis prior to Jan. 1, 1993.²⁰ But in response to an argument that Vermont's common law should be interpreted to accommodate a general public easement for "water-related recreational activities," the Vermont Supreme Court specifically deferred to the state's constitution, which only mentions the right to "hunt and fish in all *boatable* waters."²¹

Owners of land adjacent to waterways have private rights up to the discernible low water mark.²² "The bed or soil underlying [public waters] is held by the people in their character as sovereign in trust for public uses for which they are adapted."²³ The state "is required to preserve such

¹¹ *Id.* (internal citations omitted).

¹² *E.g.*, *City of Montpelier v. Barnett*, 49 A.3d 120, 128 (Vt. 2012); *State of Vermont v. Central Vermont Ry.*, 571 A.2d 1128, 1132-33 (Vt. 1989). *But see Cabot*, 514 A.2d at 1039 (suggesting that a navigation easement exists on waters over private land, thus suggesting private ownership of navigable waters).

¹³ Vt. Stat. Ann. tit. 10, § 1422(4) (2021) (defining navigability).

¹⁴ *Mather*, 35 A. at 326.

¹⁵ *Barnett*, 49 A.3d at 128.

¹⁶ Vt. Const. Ch. II, § 67.

¹⁷ Vt. Stat. Ann. tit. 10, § 1422(4) (defining navigability).

¹⁸ *Mather*, 35 A. at 326.

¹⁹ 16-5 Vt. Code R. § 102:2 (2020).

²⁰ *Id.* § 102:5.

²¹ *Cabot*, 514 A.2d at 1034, 1037 (quoting Vt. Const. Ch. II, § 67) (italics added).

²² *Central Vermont Ry.*, 571 A.2d at 1131.

²³ *Id.*

waters for the common and public use of all” pursuant to the public trust doctrine.²⁴ Accordingly, a property owner’s riparian rights in adjacent streambeds are not absolute, but subject to the reasonable regulation by the state in its exercise of the public trust doctrine for the benefit of the public’s use.

Vermont case law makes no mention of the right to portage. However, given the apparently broadly interpreted public use right in navigable waters, it reasonable to argue that portage incidental to “normal, recreational uses” would be permitted.

Streamside landowners have the exclusive ownership right up to the low water line.²⁵ As the Vermont Supreme Court noted, if the owners of the land underlying such non-tidal waters takes efforts to “enclose” their lands (*e.g.*, by posting signs), a person found hunting, shooting or trapping on such waters may be guilty of poaching and criminal trespass.²⁶

Current case law does not support a public right to use non-navigable waters.²⁷

Miscellaneous

The Supreme Court of Vermont has made several determinations regarding specific bodies of water. The court observed in 1895 that Marlboro South Pond “does not appear” to be navigable” in 1895.²⁸ A 1967 decision found that Lake Champlain was “public, navigable waters” by the.²⁹ In 1986, another decision held that portions of the Charcoal Creek close to Lake Champlain were navigable.³⁰

Vermont’s Natural Resources Board has issued a more extensive list of public waterways, which can be found at:

https://dec.vermont.gov/sites/dec/files/documents/WSMD_Use_of_Public_Waters_Rules.pdf.

Although there appears to be a general prohibition against the obstruction of free navigation in navigable and non-navigable waters, private landowners may restrict activities that go beyond mere navigation on non-tidal waters overlying their lands.³¹

The Vermont Natural Resources Board provides important additional information regarding the use of the state’s navigable waters, including the information provided at: <https://dec.vermont.gov/content/vermont-use-public-waters-rules>.

²⁴ *Id.*

²⁵ *See Cabot*, 514 A.2d at 1036.

²⁶ *Id.* at 1038-39.

²⁷ *Cf. id.* at 1038-39 (finding that “private property becomes inviolate for fishing” when not boatable).

²⁸ *Smart*, 68 A. 527.

²⁹ *State of Vermont v. Cain*, 236 A.2d 501, 506 (Vt. 1967) (citing *McBurney v. Young*, 32 A. 492 (Vt. 1895)).

³⁰ *Cabot*, 514 A.2d at 1037.

³¹ *Id.* at 1038-39.