

Connecticut Navigability Report

Summary

In Connecticut, the public has the right to boat, hunt, and fish in navigable waters.¹ Even in non-navigable waters, the public still retains the right to pass or repass upon the waters with any watercraft.² Navigable waters are those waters which are subject to the ebb and flow of the tide;³ however, more recent case law has also imposed the additional requirement that the waterway is used for some useful or valuable purpose such as commerce.⁴

State Test of Navigability

Early case law established that the navigable waters include waters “where the sea ebbs and flows.”⁵ Connecticut’s tidal ebb and flow test for navigability stems from English common law,⁶ which has been codified into the statutory definitions of “navigable waters” and “navigable waterways.”⁷ Thus, navigable waters consist of those waters between the mean-high and mean-low water marks where the tide ebbs and flows.⁸ Additionally, the General Statutes of Connecticut define “navigable waters” as “waters which are subject to the ebb and flow of the tide shoreward to their mean high-water mark.”⁹ Statute also defines “navigable waterways” as “waters which are physically capable of supporting waterborne traffic, and subject to the ebb and flow of the tide.”¹⁰

State courts, however, began imposed additional requirements upon the test for navigability. In one case, the state supreme court required that the water support “some commerce or navigation which is essentially valuable.”¹¹ The court emphasized that “[a] hunter or fisherman, by drawing his boat through the waters of a brook or shallow creek, does not create navigation.”¹² In another case, a state supreme court followed the federal test for navigability requiring that navigability entailed the waters “being used ‘or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.’”¹³

¹ State v. Brennan, 216 A.2d 294, 296 (Conn. Cir. Ct. 1965).

² Adams v. Pease, 2 Conn. 481, 484 (Conn. 1818).

³ Conn. Gen. Stat. § 15-3a (2021).

⁴ Edward Balf Co. v. Hartford Elec. Light Co., 138 A. 122, 125 (Conn. 1927); Towns of Wethersfield & Glastenbury v. Humphrey, 20 Conn. 218, 227 (Conn. 1850).

⁵ Adams, 2 Conn. 481, 1818 WL 20, at *2.

⁶ See Adams, 2 Conn. at 484; Chapman v. Kimball, 9 Conn. 38, 1818 WL 20, at *2 (Conn. 1831); Enfield Toll Bridge Co. v. Harford & New-Haven R.R. Co., 17 Conn. 40, 1845 WL 431, at *15 (Conn. 1845).

⁷ See Conn. Gen. Stat. § 15-3a.

⁸ See Rochester v. Barney, 169 A. 45, 47 (Conn. 1933).

⁹ Conn. Gen. Stat. § 15-3a(3).

¹⁰ Id. § 15-3a(4).

¹¹ Humphrey, 20 Conn. at 227.

¹² Id.

¹³ Edward Balf Co., 138 A. at 125-26 (quoting Oklahoma v. Texas, 258 U.S. 574, 586 (1922)); see also Nies v. Conn. River Bridge & Highway District, 132 A. 873 (Conn. 1926).

The test for navigability is applied on a case-by-case basis: “[W]hat waters are navigable is a question of fact.”¹⁴ State courts do not appear to have imposed actual use requirements. On the contrary, the language of the valuable purpose and commercial use test supports the notion that capability of use for commerce is sufficient. This test states that a river is navigable if it is “being used ‘or is susceptible of being used . . . as a highway for commerce . . .”¹⁵

Relevant considerations taken by courts have included any acts of authority by the federal government, which would tend to support the waterway’s navigability because “acts of authority of the national government over [a] river, [can] only be exercised lawfully over a navigable river.”¹⁶ Historical usage of the waterway is relevant as well, but the fact that the waterway “has not been recently used for the passage of boats” or that the waterway requires “some dredging to make it generally available for use for boats of a light draught, does not, . . . make the river lose its character as a navigable stream.”¹⁷

State courts have held that the following rivers are navigable at least in part: Blackhall River and Back River,¹⁸ Saugatuck River, Park River,¹⁹ and the Connecticut River.²⁰

Extent of Public Rights in Navigable and Non-Navigable Rivers

The Supreme Court of Connecticut has established that the state owns the soil below the mean high-water marks on behalf of the public under the public trust doctrine.²¹ The public’s right in navigable waters include the rights of “fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and of passing and repassing . . .”²²

However, even though the public owns the land between the high and low water marks, streamside owners still retain certain exclusive rights. State courts have established that the riparian owners of the streamside lands have certain exclusive rights in the streambeds and may modify the streambeds so long as navigation is not interfered with or obstructed.²³ Owners of adjoining upland have privileges such as digging out channels, building wharves, and erecting piers so that they may exercise their right to access the adjoining upland.²⁴ The only right that is paramount to these exclusive rights of the streamside owners is the public's right to navigation.

¹⁴ *Town of Orange v. Resnick*, 109 A. 864, 866 (Conn. 1920).

¹⁵ *Edward Balf Co.*, 138 A. at 125-26 (quoting *Oklahoma*, 258 U.S. at 586 and *Nies*, 132 A. at 874-75)).

¹⁶ *Id.* at 125.

¹⁷ *Id.* at 126.

¹⁸ *Delinks v. McGowan*, 173 A.2d 488, 489 (Conn. 1961).

¹⁹ *Edward Balf Co.*, 138 A. at 124.

²⁰ *Nies*, 132 A. at 875.

²¹ *E.g.*, *Shoreline Shellfish, LLC v. Town of Branford*, 246 A.3d 470, 476-77 (Conn. 2020); *Rochester v. Barney*, 169 A. 45, 47 (Conn. 1933).

²² *Resnick*, 109 A. at 866; *see also Brennan*, 216 A.2d at 296.

²³ *E.g.*, *Lawrence v. Dep’t of Energy & Env’tl. Protection*, 176 A.3d 608, 639-40 (Conn. 2017); *Lovejoy v. Van Emmenes*, 416 A.2d 1192, 1194 (Conn. 1979).

²⁴ *Lawrence v.* 176 A.3d at 639-40; *Lovejoy*, 416 A.2d at 1194.

Thus, the streamside owners may exercise their rights to access navigable waters so long as public navigation is not interfered with or obstructed.²⁵

The land beneath non-navigable waters may be privately owned.²⁶ If a privately owned pond or lake, the owners may exclude the public.²⁷ If a non-navigable stream, earlier law indicated that the public retained an easement to transit the waters,²⁸ but more recent case law may suggest that non-navigable streams are to be treated the same as non-navigable lakes and ponds,²⁹ though whether the owner may exclude others may depend on the description of the conveyance and not the character of the water.³⁰

State courts have not discussed the right to portage. However, the Connecticut Attorney General has opined that in addition to the public's right to pass upon non-navigable waters (which may be private property), a member of the public who "uses the tidal waters for hunting, fishing or other recreational uses [is not] trespassing upon private property so long as there is no physical touching of that privately-owned underlying soil."³¹ Because the ownership of the soil landward of the high water mark is generally not owned by the state,³² portage above the high-water mark onto private property would likely constitute trespass.

²⁵ *Lawrence v. 176 A.3d at 639-40; Lovejoy, 416 A.2d at 1194.*

²⁶ *Ace Equip. Sales, Inc. v. Buccino, 869 A.2d 626, 633 (Conn. 2005); Adams, 2 Conn. at 485.*

²⁷ *Ace Equip. Sales, 869 A.2d at 633.*

²⁸ *Adams, 2 Conn. at 485.*

²⁹ *Ace Equipment Sales* indicates that owners of non-navigable waters can exclude others. *Ace Equipment Sales* involved a non-navigable man-made pond, but the court noted that Connecticut has "not made such a distinction [between man-made and natural ponds]; instead, the navigability of a body of water is the critical factor in determining whether an owner of the land beneath the pond has exclusive rights to its use." *Id.* at 631 n.7. The court cited approvingly *Adams, 2 Conn. 481*, which, among other things, took the contrary position that the public retains a "right or easement in [non-navigable] rivers, as common highways, for passing and repassing with vessels, boats, or any watercraft." *Adams, 2 Conn. at 485.* The court in *Ace Equipment Sales* did not opine on the apparent distinction, though *Ace Equipment Sales* can be read as applying only to ponds or lakes as opposed to streams. *See Ace Equip. Sales, Inc. v. Buccino, 869 A.2d 631-33 nn. 7, 8, & 9.* But, *Ace Equipment Sales* also cited approvingly a portion of a legal text stating that "[t]he owner of the water if it is not navigable *whether it is a stream or a pond* has the absolute title to it and he may exclude strangers from it at his pleasure. His title is the same as that to any other portion of his real estate and any entry upon the land by strangers is a trespass." *Id.* at 631 (italics added). The court also noted that "[h]istorically, property rights in lakes were significantly different from property rights in streams," the many jurisdictions no longer differentiate between the two. *Id.* at 633 n.9. As of 2021, no state court has cited to *Adams* since *Ace Equip. Sales*. *Adams* noted further, however, that even if a public easement existed, streamside landowners have the exclusive right of fishery in the adjacent non-navigable waters which comprise waters where the tide does not ebb and flow. *Adams, 2 Conn. at 485.*

³⁰ *Ace Equip. Sales, 869 A.2d at 632 n.8* (explaining that when "a deed conveying property abutting a body of water specifically delineates and describes the boundaries of the property . . . and that description includes a portion of the land beneath the water, that portion is owned in severalty" and the owner may exclude others, but "when a deed generally describes the abutting property as bounded by the body of water, title to the bed is based on littoral ownership, and each littoral owner impliedly owns the land under the water to the center of the body and each abutting owner is entitled to common use of the entire body").

³¹ 11 Op. Conn. Att'y Gen. 13, 1983 WL 181107 (Jan. 31, 1983).

³² *Id.*

Miscellaneous

There is a general prohibition against the obstruction of free navigation in navigable waters.³³ Placing or causing “any marker, raft, dockslip, ski jump or similar structure upon the state's waters so as to create an obstruction or menace to navigation or a hindrance to the public use of such waters,” is prohibited.³⁴ The owner may be ordered to dismantle or remove the structure or take other measures to eliminate the danger.³⁵

Additionally, unless there is a legal right or permission of the person having title to the land on which the obstruction has been erected, obstructions upon lands bordering navigable waters are prohibited.³⁶

A person commits a misdemeanor and is guilty of criminal trespass in the third degree when he knowingly enters on private land that is fenced or posted against trespass, or where he knowingly enters and remains for the purpose of hunting, trapping, or fishing.³⁷

For additional information on boating in Connecticut, visit the Connecticut Department of Energy and Environment’s website at <https://portal.ct.gov/DEEP/Boating/Boating-and-Paddling>.

³³ See *Adams*, 2 Conn. at 485. And non-navigable waters if, notwithstanding the apparent rule in *Ace Equipment Sales*, the public retains an easement to transit non-navigable waters. *Id.*

³⁴ Conn. Gen. Stat. § 15-140d (2005).

³⁵ *Id.*

³⁶ *Id.* § 15-12.

³⁷ *Id.* § 53a-109 (2005).