

New Jersey Navigability Report

Summary

Tidal waters are public to the extent that the waters are sufficient for the purposes of navigation (i.e., sufficient for the passage of boats). Accordingly, the public can use such waters for traditional activities such as navigation and fishing, and also for recreational uses such as swimming, sunbathing, surfing, sport diving, bird watching, walking, and other legal shore activities. In contrast, non-tidal waters are private waters and generally may not be used by the public without the consent of the owners. Non-tidal waters that are navigable-in-fact may be used by the public only for navigation.

State Test of Navigability

New Jersey uses the common law ebb and flow doctrine to determine whether waters and the lands beneath them are public or private.¹ Accordingly, tidal waters (i.e., waters in which the tide ebbs and flows) and the lands beneath them, “so far only as the sea flows and reflows,” are deemed public regardless of the navigability of the water.² One state appellate court observed in 1867 that “there is nothing in topography or location [of New Jersey] that requires a departure from the rules of the common law [because unlike] some of our sister states, [New Jersey has] no large inland lakes, which are, in fact, inland seas, upon which an extensive commerce is carried on, or which are the boundaries with a foreign nation.”³

At least one state court case suggests that most tidal rivers in New Jersey are also navigable-in-fact, and navigable rivers are generally tidal with the exception of perhaps the Delaware River above Trenton.⁴

Extent of Public Rights in Navigable and Non-Navigable Rivers

Tidal waters and the lands beneath them are owned by the state up to the mean high-water mark, subject to a public trust.⁵ Public trust rights encompasses not only navigation but also fishing, swimming, and other lawful uses by the public.⁶

¹ *E.g.*, Newark v. Nat. Res. Council in Dep’t of Env’tl Protection, 414 A.2d 1304, 1311 (N.J. 1980); Cobb v. Davenport, 32 N.J.L. 369, 378 (N.J. Sup. Ct. 1867) (opining that the “principles of the common law are so well settled, that a citation of authorities on the subject is quite unnecessary”).

² *Cobb*, 32 N.J.L. at 378.

³ *Id.* at 380.

⁴ *Id.* at 382.

⁵ *E.g.*, Long Branch v. Jui Yung Liu, 4 A.3d 542, 549 (N.J. 2010); Panetta v. Equity One, Inc., 920 A.2d 638, 644-45 (N.J. 2007); Matthews v. Bay Head Imp. Ass’n, 471 A.2d 355, 358 (N.J. 1984); *Cobb*, 32 N.J.L. at 382; N.J. Admin. Code 7:7-1.5 (2021) (defining “Public Trust Doctrine”).

⁶ *E.g.*, Long Branch, 4 A.3d at 549; *Matthews*, 471 A.2d at 358; Neptune City v. Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); *Cobb*, 32 N.J.L. at 378-80; N.J. Admin. Code 7:7-1.5 (“The public rights to use these resources extend both to traditional activities such as navigation and fishing, but also to recreational uses such as swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating.”).

Private ownership extends to the high-water mark.⁷ The New Jersey Supreme Court also indicated that the public has a right to cross privately owned land in order to gain reasonable access to the ocean, although the extent of those rights can vary case by case.⁸ Factors to consider when determining “what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine” include the location of the dry sand area in relation to the foreshore, the extent and availability of publicly owned upland sand area, the nature and extent of public demand, and usage of the upland sand area by the owner.⁹ Court decisions have discussed reasonable access in the context of public access over private beaches (i.e., upland sand areas) to the ocean, and do not suggest that the public may cross private property to access navigable (tidal or in-fact) streams. State court cases also do not discuss whether the public may pass onto private property (i.e., above the high-water mark) incidental to navigation, such as to portage around obstacles.

Non-tidal waters (i.e., waters with no ebb and flow of the tide) and the lands beneath them are deemed private.¹⁰ The public's rights depend on whether these waters are navigable-in-fact. If the non-tidal waters are navigable-in-fact, the public may use the waters, but only for purposes of navigation.¹¹ The public may not use non-tidal waters for other purposes, such as fishing, without the owners' consent.¹² State cases do not appear to specify the extent to which the public may use navigable, non-tidal waters for navigation, i.e., whether public use is limited to commercial shipping or extends to recreational use, or whether the public may exercise any rights incident to navigation such as portage.

The public does not have any right to use non-navigable, non-tidal waters absent consent of the owner.¹³

Miscellaneous

Anyone who trespasses on private land for the purpose of hunting, fishing, trapping, or taking wildlife where the land is conspicuously posted with notices forbidding the trespass or after having been forbidden so to trespass are liable to a civil penalty of \$100.00 to \$200.00 for the

⁷ *E.g.*, *Long Branch*, 4 A.3d at 549.

⁸ *See* *Matthews*, 471 A.2d at 364-65 (“Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore . . . without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.”); *see also* *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 120 (N.J. 2005) (citing approvingly *Matthews*, 471 A.2d at 364-65, for its proposition about reasonable public access being inherent under the public trust doctrine).

⁹ *Raleigh Ave. Beach Ass'n*, 879 A.2d at 120-22 (the “*Matthew* factors”).

¹⁰ *E.g.*, *Baker v. Normanoch Ass'n*, 136 A.2d 645, 649-50 (N.J. 1957); *Cobb*, 32 N.J.L. at 378.

¹¹ *Schultz v. Wilson*, 131 A.2d 415, 420 (N.J. Super. Ct. App. Div. 1957); *Cobb*, 32 N.J.L. at 378.

¹² *Schultz*, 131 A.2d at 420.

¹³ *Cobb*, 32 N.J.L. at 378; *see also* *Baker*, 136 A.2d at 650 (“The rule in this jurisdiction is that the general public have no rights to the recreational use of a private lake, such rights being exclusive in the owner of the bed.”) (citing *Cobb*, 32 N.J.L. at 378).

first offense.¹⁴ Each subsequent offense is subject to \$200.00 to \$500.00 in fine and suspension of all licenses and privileges for five years.

For additional information on boating and fishing in New Jersey, visit Department of State, Division of Travel and Tourism at <https://www.visitnj.org/nj/outdoors-sport-recreation>.

¹⁴ N.J. Stat. Ann. 23:7-1 (West 2021).