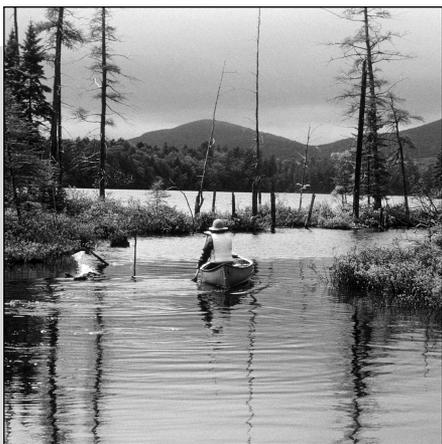


The purpose of this brochure is to inform waterway recreationists, owners of land along New York's waterways, law enforcement officials and other interested parties, about the longstanding common law right of the public to travel on New York's freshwater rivers, streams, lakes and other waterways that are navigable-in-fact.

In 1998 the State's highest court, the Court of Appeals, reaffirmed this public right in a landmark case, Adirondack League Club v. Sierra Club. Since the authority for the right is New York State common law, not statutory law, understanding the nature of the right requires knowledge of various court decisions that have affected the right over the years. The questions and answers are designed to illuminate the legal nature of this right and to provide information about the circumstances under which it may be exercised. ∞



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**The Association for the
Protection of the
Adirondacks**

—Since 1901

897 St Davids Lane
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Public Navigation Rights in New York State:

Questions & Answers



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Protection of the
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About this brochure...

This brochure is an educational project of The Association for the Protection of the Adirondacks. It is derived from a longer paper on this subject with a lengthy appendix. Copies of the complete paper may be downloaded from the Association's website, www.protectadks.org.

Founded in 1901, The Association for the Protection of the Adirondacks is the oldest organized nonprofit advocate and membership organization for the Adirondack Park. It is dedicated to sustaining the ecological integrity and mutual well being of natural and human communities of the Adirondack Park. The Association has a 100+ year history of vigilance and stewardship, a vision for the future and leverages resources through collaboration with others. Its programs focus on wildland conservation, private land stewardship and human communities in the Adirondacks. It is the only advocacy organization with its own Adirondack Research Library, based at the newly opened Center for the Forest Preserve in Niskayuna, New York.

For information about the Association, its Center and library, please visit the website. To join as a member, please log on to www.protectadks.org.

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Public Navigation Rights in New York State: Questions & Answers

by John A. Humbach and Charles C. Morrison

with John W. Caffry, Janice K. Corr, Marc S. Gerstman, Phillip H. Gitlen,
Paul F. Jamieson, Robert J. Kafin, Thomas R. Kligerman,
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Nathaniel P. Wardwell, and Val Washington

The public right of navigation has existed in New York as a common law right ever since New York became a state. This right allows vessels of all kinds, including small boats and canoes, to navigate for commercial and recreational purposes on New York's freshwater rivers, streams, lakes, ponds and other waterways that are navigable-in-fact. Legally, the courts have said that the State of New York, in accordance with public trust doctrine, holds an easement on such waterways in trust for the people of the state, making them public highways for navigational purposes. The privately-owned bed and banks of such waterways are subject to this easement or servitude when used for purposes of navigation.

In order to be navigable-in-fact, a waterway must provide practical utility to the public as a means for transportation and travel. However, over the years, court decisions have further detailed and described aspects of the right. Thus, the courts have recently recognized utility for recreational use as an important factor in determining navigability.

This brochure describes and explains this public right, covering such matters as the meaning of "navigable-in-fact," portaging on private land, responsibilities of landowners and paddlers, access to waterways that are navigable-in-fact, the Court of Appeals decision on the South Branch of the Moose River case, appropriate recourse for paddlers if waterways have been blocked or posted illegally, and access to remote ponds. ☺

See pages 14-15 for information about the authors.

Questions & Answers

1. What is the "public right of navigation" and how was it established?

This right allows vessels of all kinds, including small boats and canoes, to navigate for commercial and recreational purposes on New York's freshwater rivers, streams, lakes, ponds and other waterways that are navigable-in-fact. The courts have said that the State of New York, in accordance with the public trust doctrine, holds an easement on such waterways in trust for the people of the state, making these waterways public highways for navigational purposes. The privately-owned bed and banks of such waterways are automatically subject to this easement or servitude when used for purposes of navigation, without need of any special judicial declaration or finding about the particular waterway. This right has existed in New York since it became a state.

2. Has this public right changed over time?

No, the basic right has remained the same: In order to be navigable-in-fact, a waterway must provide practical utility to the public as a means for transportation and travel. However, over the years, court decisions have further detailed and described aspects of the right. Thus, the courts have recognized recently that utility for log drives has become a largely anachronistic form of commercial use test for determining whether a waterway is navigable in fact, whereas recreational use has become an important contemporary factor in the determination. Water-based tourism in small boats, kayaks and canoes is a major commercial activity now and a major contributor to the State and local economies of New York State.

3. Is there any State statutory law that sets forth this common law right?

There is no State statutory law that embodies and describes the public right of navigation. A bill to enact such a law was introduced in the State Legislature in 1989, two years before the start of the Adirondack League Club v. Sierra Club case concerning the navigability of the South Branch of the Moose River. It passed in the Assembly in 1990 and was re-introduced in the Senate and the Assembly in 1991, but it was not enacted into law and has not been re-introduced since the Court of Appeals issued its landmark decision in 1998 on the Moose River case.

4. What does “navigable-in-fact” really mean?

According to the Court of Appeals in the seminal case on this subject, a waterway is navigable-in-fact “if it is so far navigable or floatable in its natural state and its ordinary capacity, as to be of public use in the transportation of property (Morgan v. King, 35 N.Y. 454, 458-59; (1866).” “[T]he public claim to such use” the court added, “ought to be liberally supported.” To determine whether a particular stream is navigable-in-fact requires a consideration of the conditions or facts that would make it navigable, i.e., primarily whether the water levels are high enough to support navigation for a reasonable length of time under natural conditions of flow. Also relevant is the extent to which the waterway has obstacles to passage (such as shallows, rapids or waterfalls) and, if so, whether portages are feasible so as to allow passage of vessels for commercial or recreational purposes.

For a waterway to be open to public use, it just has to be navigable-in-fact. It doesn’t have to be declared navigable-in-fact by a court. In other words, if a waterway is in fact navigable for a significant part of the year and for a substantial distance, it is ordinarily safe to assume that it is legally “navigable-in-fact.”

5. Is there a specific length of time each year during which water levels must support navigation for a waterway to be considered navigable-in-fact?

No. As established by the Court of Appeals in Morgan v. King, it is not necessary “that the capacity of the stream... should be continuous” or “that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodic fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement.”

6. Does this public right allow paddlers and other waterway travelers to portage around natural obstacles, such as falls and rapids, even if that means walking on private land?

Yes. The Court of Appeals has made clear that, “to circumvent... occasional obstacles, the right to navigate carries with it the incidental privilege to make use, when

absolutely necessary, of the bed and banks, including the right to portage on riparian lands....On the other hand, any use of private river beds or banks that is not strictly incidental to the right to navigate gives rise to an action for trespass.” (Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 706 N.E2d 1192, 684 N.Y.S.2d168 [1998]). It is, of course, a matter of interpretation as to when use of the bed and banks would be “absolutely” necessary, varying with the particular physical circumstances of the case. However, it may be observed that, when, in general, a paddler takes a boat out of water and puts it on his or her back to portage, it’s because there’s no other choice—and it would be common sense to conclude that it was “absolutely” necessary. Also, scouting ahead for obstacles, as necessary, usually is considered to be a part of safe boating.

In confirming the right to make use of the bed or banks of a waterway that is navigable-in-fact, the Court of Appeals did not limit such use to the area within the high water line, but rather it limited such use to that which is “strictly incidental” to the right to navigate.

7. Is this public right applicable to waterways in all parts of the state in the same way?

Yes. This right applies to freshwater waterways in every part and every region of the state in the same way, to waterways of all sizes, whether they are called rivers, streams, creeks, lakes, ponds or by some other generic name, whether they flow on public land or on private land, whether they flow through cities, towns or villages, whether they are inside or outside the boundaries of the Catskill and Adirondack Parks and whether the land on one bank is in one ownership and that on the opposite bank is in a different ownership or both banks and the underwater land between the banks are in the same ownership, as long as the waterways are navigable-in-fact.

As stated, this brochure pertains to freshwater waterways. With regard to waters and lands affected by the ebb and flow of the tides, they are generally in public ownership up to the mean high water line and therefore publicly accessible. Also, the beds of certain large lakes, such as Lake George, are owned by the State below the mean low water line, as are the beds of the Hudson, Mohawk and St. Lawrence Rivers.

8. Does the public right of navigation allow access to remote ponds surrounded by private land via their navigable inlets or outlets?

The answer to this question varies with the facts of each specific situation. Although an inlet or outlet may be capable of providing access to the pond, this does not necessarily make the inlet or outlet stream or the pond itself, navigable-in-fact. As noted above, a waterway is navigable-in-fact if it has practical utility to the public as a means for transportation and travel. Small ponds with no significant feeder or draining streams have no such practical utility and are therefore not likely to be navigable-in-fact. However, small ponds which do have significant feeder or draining streams may be navigable-in-fact, especially if the pond and connecting streams, in turn, are part of a large system of interconnected waterways.

9. If a waterway is known to be navigable-in-fact, yet there are no formal access sites where a vessel (canoe or kayak) can be put into or taken out of the waterway, what are the options for paddlers?

The public right of navigation does not give the public the right to traverse private property in order to access waterways that are navigable-in-fact. The usual recourse in these circumstances would be for the paddlers to try to find informal access points for putting in or taking out, such as where a bridge crosses the waterway, being certain to pull their vehicle safely off the roadway while still parking within the public right-of-way and not on private land. To reiterate, crossing private land without permission in order to access a waterway is a trespass.

Apart from issues about where to park and leave a car safely while paddling, it is generally allowable to access a waterway from any public bridge or roadway, as long as one does not trespass on adjacent private land. In situations where there is no formal or informal access site, paddlers or paddlers' organizations also should approach private landowners for permission to access the waterway through their land. If that doesn't work out, State agencies or nonprofit land trust organizations should be requested to evaluate public access needs with a view towards acquiring and developing formal public access sites, including safe off-road parking areas.

Most public fishing access sites administered by the State Department of Environmental Conservation have been

purchased with public funds to meet the needs of fishermen. They are subject to the rules and regulations of the Department for that purpose. The same is true of easements purchased along the banks of streams for use by fishermen. They were not obtained to provide access for paddlers.

10. What was the Court of Appeals decision in the case involving the Adirondack League Club and the Sierra Club?

This important case began on June 15, 1991 when members of the Atlantic Chapter of the Sierra Club and a reporter, in two canoes and a kayak, paddled 27 miles on the South Branch of the Moose River, from the Moose River Plains Wild Forest to the public highway bridge on NY Route 28 at McKeever. Part of the trip included a 12-mile segment of the South Branch of the Moose River that flows through private land owned by the Adirondack League Club (ALC). For 100 years this part of the river had been posted by the Club as being "closed" to river travel. Two weeks after the canoe trip, the ALC sued each paddler, individually, and the Sierra Club, in State Supreme Court, charging civil trespass and asking for five million dollars in punitive damages. Thus began a series of arguments and motions that ultimately led to a decision by the highest court in the state and a settlement between the parties on the issue of access to the river.

The State of New York, represented by the Attorney General, intervened on behalf of the paddlers and in support of the public right of navigation, as did the Adirondack Mountain Club.

On December 17, 1998, the Court of Appeals ruled that the usefulness of a stream for recreational travel, not just traditional commercial use, is an important factor in deciding whether the stream is "navigable-in-fact" and, therefore, open for public recreational use. The court declined, however, to issue a final ruling that the South Branch of the Moose River is "navigable-in-fact" because there were issues of fact that were required to be decided at the trial court level. (The decision is on-line at the web site for the Cornell Legal Information Institute.) Subsequently, rather than go through an expensive trial about the facts in the Supreme Court with a potentially uncertain outcome, in June, 2000, the parties settled by means of a judicially-approved agreement. Although the agreement is silent on the issue of whether the river is navigable-in-fact, it provides that the river is open for public navigation from May 1 to October 15 (or the opening of the Big Game Season, whichever is later), provided that the water level at the

McKeever gauge has been at least 2.65 feet during the 24 hours prior to a canoe trip. The put-in is at the Moose River Plains launching site, where paddlers must fill out a registration form.

Although by its very existence and nature the agreement seems to recognize that the Moose River is navigable-in-fact, paddlers would be best advised (at least for the present) use the relevant segments of the river within the limitations that the agreement prescribes.

11. Does this public right allow paddlers and other waterway travelers to enter upon private land? What are paddlers' responsibilities to landowners?

Yes, but, as stated in Question 7 above, only for purposes "incidental" to navigation, such as portaging, scouting the waterway, lining or poling a vessel, and seeking temporary refuge from passing storms, and then only when "absolutely necessary." Apart from such absolutely necessary incidental uses, waterway travelers have no right to beach their vessel or to walk on or enter upon private land in any way, including the banks and bed of the stream.

Ownership of the bed and banks of a waterway is difficult to determine without a review of relevant deeds. Ownership of the beds and banks of rivers, lakes and ponds in New York varies from waterway to waterway. Most are privately owned, but some are owned by the State of New York. Where the banks and bed of a river are in private ownership and there are different owners on each side of the navigable river, each usually owns to the centerline, although deeds may specify otherwise. With regard to lakes or ponds having multiple owners, ownership usually is to the center point of the waterbody in a pie-shaped arrangement, although deeds may again specify otherwise.

Paddlers should be respectful of the rights of private property owners at all times as they travel on a waterway that is navigable-in-fact, particularly when scouting the waterway or portaging. Care also should be taken to avoid littering, excessive noise or damaging property (private or public) and to respect the privacy of landowners in every way. Camping, picnicking, hiking or engaging in other activities on private land which are not essential to and directly related to navigation, constitute trespassing unless done with the permission of the owner.

12. What are a landowner's responsibilities to paddlers? Can landowners prevent paddlers from using waterways that are navigable in fact?

Landowners on waterways that are navigable-in-fact should recognize that they have no legal right to impede paddlers who are availing themselves of the public easement on the waterway in order to exercise their right of navigation. Such landowners acquired their property subject to the public's pre-existing right to navigate on any waterways on the property that are navigable-in-fact, much as a property owners acquire title subject to the right of the public to continue to use any pre-existing public highways which might cross their property.

A landowner's attempt to restrict the public's right of navigation on navigable-in-fact waterways would be illegal because it would constitute interference with a property right, i.e., the easement that the State holds in trust for the public for use as a public highway. Riparian landowners also should recognize that it is the State's common law, not their permission, that confers on the public the right to travel on navigable waterways. Landowners and enforcement officers who interfere with this public right or try to arrest paddlers who are lawfully exercising it, are opening themselves to the possibility of a law suit for false arrest.

If a landowner has questions about the navigability of a waterway flowing on his/her property, he or she should not attempt to make that determination alone but, rather, should seek advice and assistance from others with first hand knowledge of such matters, particularly from paddlers' organizations.

13. If a freshwater river, pond or lake is navigable-in-fact, but has been posted with "No Trespassing" or other such signs or has been physically blocked with a cable or some other man-made obstruction, what should paddlers do?

The Court of Appeals has said that a person who "honestly believes" that he is permitted to enter another's property is not guilty of any degree of criminal trespass. (People v. Basch, 36 NY2d 154 (1975). Also, under NY Penal Law, Section 140.05, "a person is not guilty of trespass unless he knowingly enters or remains unlawfully" on the property in question.

Nevertheless, the prudent paddler, if possible, will avoid confrontation and will talk with the landowner to ascertain the reasons for “closing” the waterway. If it seems that the landowner has taken an illegal action in closing what appears to be a public right-of-way, i.e., a waterway that is navigable-in-fact, and the landowner will not reconsider his/her action, the paddler should inform local, county and State (including the district DEC ranger and Environmental Conservation Officer) enforcement authorities about the landowner’s abrogation of the public’s right of passage. The closing should be documented, preferably with photos, as to how travel on a public right-of-way has been impeded or prohibited, and a description of the facts of navigability should be included, including historic use of the waterway. Remedial action should be requested.

If the matter is not resolved with the landowner in due time, the Commissioner of Environmental Conservation should be informed, because that agency is responsible for management of water resources in the state, and the Attorney General also should be informed about the situation. They should be asked to defend the public’s right of passage on a State-owned easement. Again, if possible, it would be beneficial to work with established paddling groups and conservation organizations, not just as an individual.

As a last resort, it may be necessary to present evidence of navigability in the proper court and request a declaratory judgment stating that the waterway is navigable-in-fact and subject to the public easement. This also is something that is best done in concert with paddling and conservation organizations rather than as an individual, because of the potential for cost sharing and the opportunity to draw on their expert knowledge, if for no other reasons.

14. Are landowners liable for injuries suffered if paddlers have an accident while portaging on their property?

Under Section 9-103 of the State General Obligations Law, landowners are generally not liable for injuries sustained by recreational users of private property while engaging in certain recreational activities, including canoeing, unless the landowner has created some sort of unusual or purposeful hazard on the land.

15. Is fishing allowed on waterways that are navigable-in-fact, and if so, under what conditions?

The Court of Appeals has held that, although the public right of navigation is protected by law, private owners of stream banks and beds may have “exclusive” fishing rights in non-tidal, navigable-in-fact waterways. Although the answer to this question may depend to some extent upon the specific language of the landowner’s deed and the specific facts of the situation, it appears that as a general rule fishing is not included within the public right of navigation and, therefore, fishing without the permission of the landowner is not allowed on navigable waterways that cross private property. Where the riparian land is publicly owned, fishing is allowed, of course.

16. Where can paddlers obtain a list or maps or guidebooks showing and describing waterways that are navigable-in-fact, including access points?

Several regional canoeing guidebooks, pamphlets and canoeing maps have been published and, together, they cover most of the state. Some are out of print, but may be found through used bookstores. Paddlers should be aware that older guidebooks may have erroneous information about which rivers are “closed” and which are “open.”

Numerous articles describing various canoe routes have appeared in periodicals such as *Adirondack Life*, *Adirondack Explorer*, the Adirondack Mountain Club’s magazine titled *Adirondac* and others. The NYS Department of Environmental Conservation publishes several pamphlets/maps for Adirondack canoe routes. The American Whitewater Affiliation lists, on-line on their website, the main “runnable” rivers, by canoe or kayak, in NYS. An indication of the level of difficulty is assigned to each river in accordance with AWA’s familiar classification scheme. AWA’s website also includes a separate page showing real-time information on water levels for each listed river. This information is also available on the U.S. Geological Survey’s website. ☺

About the Authors and Co-authors

John W. Caffry is a partner in the law firm of Caffry and Flower in Glens Falls, specializing in environmental and land use law. He was co-counsel, with Neil Woodworth, for the Adirondack Mountain Club in the recent landmark Moose River case.

Janice K. Corr, as General Counsel and Deputy Commissioner for Legal Affairs for the NYS Department of Environmental Conservation from 1984 to 1988 she managed DEC's legal work on public navigation rights during that period. As a Special Counsel for DEC from 1988 to 1995, she managed DEC's program for State legislation, including proposed legislation for public navigation rights.

Marc S. Gerstman, as General Counsel and Deputy Commissioner for Legal Affairs for the NYS Department of Environmental Conservation managed DEC's legal work on public navigation rights from 1988 to 1995. In 1991 he issued a policy memorandum to DEC enforcement personnel throughout the state concerning the public right of navigation.

Phillip H. Gitlen is a partner in the Albany law firm of Whiteman, Osterman and Hanna (WOH) and, formerly, was General Counsel and Deputy Commissioner for Legal Affairs of the NYS Department of Environmental Conservation. He represented the Sierra Club for WOH in the Moose River case.

John A. Humbach, Professor of Law at Pace University Law School, is the author of "Public Rights in the Navigable Streams of New York," 6 Pace Law Review 461 (1989) and has specialized in property rights.

Paul F. Jamieson, Professor of English Emeritus at St. Lawrence University, is the original author, later co-author, of the well-known guidebook *Adirondack Canoe Waters-North Flow*. Long recognized as the dean of Adirondack canoeing, he is credited with re-awakening interest in the public right of navigation, beginning in the 1970s, as documented in his 1992 autobiography, *Uneven Ground*.

Nancy E. Jones is an attorney from Troy who represented all of the canoeists in the Moose River case.

Robert J. Kafin is a partner in the Proskauer, Rose LLP law firm in New York City. He represented the kayaker in the Moose River case.

Thomas R. Kligerman, canoeist and co-chairman of the Sierra Club's Adirondack Committee from 1986 to 1995, organized and led the June 15, 1991 paddle down the South Branch of the Moose River which resulted in the Adirondack League Club's lawsuit and a nine-year court case that ultimately reached the NYS Court of Appeals.

More about the Authors and Co-authors

G. Oliver Koppell was a prime cosponsor of the bill that passed the NYS Assembly in 1990 to codify the public right of navigation and as Attorney General in 1994 he represented the State of New York as an intervenor on the side of the defendants in the Moose River case.

Langdon Marsh served with the NYS Department of Environmental Conservation from 1973 to 1978 first as civil counsel, then as General Counsel. Returning to DEC in 1983 he was Executive Deputy Commissioner until 1994 and Commissioner during 1994-1995. He made the major decisions that resulted in the agency's significant actions in the late 1980s and early 1990s in support of the public right of navigation.

Per O. Moberg, as co-chairman of the Sierra Club's Adirondack Committee with Tom Kligerman planned the paddle on the Moose River with him, including by running several test rivers. As a staff member of the NYS Department of Environmental Conservation, he worked on several land acquisitions involving canoeable waterways and was DEC's principal coordinator for the State's acquisition of the Bog River Flow.

Charles C. Morrison, as Director of Natural Resources Planning in the Executive Division of the NYS Department of Environmental Conservation, provided staff leadership and coordination for the agency's work on the public right of navigation during the 1980s and 1990s.

Nathaniel P. Wardwell, a member of the bars of New York and New Mexico, served for many years as an attorney for the NYS Department of Environmental Conservation. He was directly responsible for DEC's legal work on public navigation rights from 1988 to 1995.

Val Washington, as Assistant Attorney General and Deputy Bureau Chief of the Environmental Protection Bureau, represented the State of New York as an intervenor in support of the defendants in the Moose River case during the administrations of former Attorneys General Robert M. Abrams and G. Oliver Koppell, from 1991 to 1995.