

# DRAFT OGC-9: Public Rights of Navigation and Fishing

New York State Department of Environmental Conservation

## DRAFT DEC Program Policy

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This Guidance replaces the December 7, 2011, Enforcement Guidance issued by then-General Counsel Steven Russo.

### I. Summary

This Policy provides guidance to New York State residents and visitors (including both waterway recreationists and landowners) regarding the complex issues of the public rights of navigation and fishing, on waterways<sup>1</sup> in New York State, in the context of private property ownership.

For purposes of this Policy, a “Navigable Water” can be a waterbody that: (1) is a “navigable water of the United States” (Federal standard) or (2) is “navigable-in-fact,” which means it has or had the capacity for trade or travel (State standard). Navigable Waters are subject to the public right of navigation even if those waters pass through privately-owned lands, including the right to portage around barriers or obstructions.<sup>2</sup> (See Sections II and III.A).

Whether a specific waterbody meets the criteria to be a Navigable Water, and what access rights apply, depends on whether the Federal or State standard of navigability applies.

#### The Federal Standard: Navigable Waters of the United States

“Navigable waters of the United States” are those waters that are subject to the ebb and flow of the tide and/or are: (1) presently used, or (2) have been used in the past, or (3) may be susceptible for use, to transport interstate or foreign commerce.<sup>3</sup> The public has a right to navigate on these waters pursuant to a federal public easement, regardless of who owns the bed and banks, and regardless of whether the waterway is posted against trespass. (See Section III.A.1)

<sup>1</sup> References to “waterway”, “waterbody” and simply “water”, in singular or plural form, share the same meaning and are used interchangeably throughout this policy.

<sup>2</sup> The Montello, 87 U.S. 430 (1874) and Adirondack League Club, Inc. v. Sierra Club, 92 N.Y. 2d 591 (1998).

<sup>3</sup> 33 C.F.R. Section 329.4.

### The New York State Standard: Navigable-in-Fact Waters

A waterway that is not a “navigable water of the United States” may still be “navigable-in-fact” if the waterway has or had the capacity for trade or travel within New York State. The public has a right to navigate on these waters pursuant to a public easement held by the State, regardless of who owns the bed and banks, and regardless of whether the waterway is posted against trespass. (See Section III.A.2)

### Public Right of Fishing in Navigable Waters

The public has a right to fish on Navigable Waters. This includes Navigable Waters that pass through privately-owned lands, except in certain circumstances where title to fishing rights has passed to the landowner and no fishing easement exists. (See Section III.B)

### The Federal Standard: Fishing on Navigable Waters of the United States

If a waterbody is a “navigable water of the United States,” then a public easement exists to navigate, fish, wade in the water, or walk along the banks up to the ordinary high-water mark pursuant to the federal public easement. This is true regardless of property ownership status or whether the land is posted against trespass. (See Section III.B.1)

### The New York State Standard: Fishing on Navigable-in-Fact Waters

The public has a general right to fish on publicly owned “navigable-in-fact” waterways in New York State. However, the public’s right to fish on privately owned “navigable-in-fact” waterways in New York State necessitates a review of applicable land grants and deeds, as well as a determination as to whether any deeded or prescriptive easements exist. (See Section III.B.2)

## **II. Policy**

It is the policy of the New York State Department of Environmental Conservation (NYS DEC) Office of General Counsel (OGC) that:

A “Navigable Water” is defined as a waterbody that: (1) is a “navigable water of the United States” or (2) is “navigable-in-fact”, which means it has or had the capacity for trade or travel for either commercial or recreational purposes.

Navigable Waters are subject to the public right of navigation for any commercial or recreational purpose. Pursuant to applicable case law, the public also has the right to fish<sup>4</sup> on Navigable Waters, except under extremely limited circumstances. Attempts by private landowners to interfere with the public's right to navigate or fish on Navigable Waters violates Federal and/or State public trust interests in the waterway. Where a

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<sup>4</sup> Which rights apply to a given situation are distinguished through either the federal or state standard and associated case law. Explained in more detail below in those sections.

Navigable Water runs across or adjacent to private lands, private landowners do not have a right to close the Navigable Water to the public or otherwise harass the public for using those waters for navigation or recreational purposes, and may only close it to fishing in the rare circumstances where title to fishing rights has been formally passed to the landowner and no fishing easement exists, described more completely in Section III.B.2. The presence of barriers, "no trespassing" or "posted" signs, signs that threaten criminal prosecution, or verbal statements by private landowners discouraging navigation by the public do not affect whether a waterway is a Navigable Water.

### **III. Purpose and Background**

The NYS DEC often receives inquiries from the public regarding the public right of navigation and recreational access, most often involving fishing, on various waterways of the State. This Policy provides guidance to the public (including both waterway recreationists and landowners) regarding the complex issues of the public rights of navigation and fishing, on waterways in New York State, in the context of private property ownership.

This Policy is not intended to create any substantive or procedural rights and is not enforceable by any party in administrative or judicial litigation. The NYS DEC reserves the right to deviate from this Policy when, in its judgment, doing so would result in a net benefit to the people of the State of New York. The information herein is also not legal advice, and specific questions about the public right of navigation at specific locations should be directed to private legal counsel.

#### **A. Public Right of Navigation**

The public right of navigation is rooted in English common law and has consistently been recognized by both Federal and State courts throughout history. This right of navigation is often described by the courts as an easement or right-of-way for travel or passage "as on a public highway." The public right of navigation on Navigable Waters is superior to the rights of the private owners of the banks or beds of Navigable Waters. However, this does not grant the public the right to trespass on or across private lands beyond the waterbody's ordinary high-water mark for other purposes (e.g., picnicking, hiking, camping, or to gain access or egress to Navigable Waters), with limited exceptions such as when necessary to safely portage around an obstruction or to otherwise continue walking along the banks for safe water passage.<sup>5</sup>

Conflicts between landowners and the public can arise on Navigable Waters due to a lack of awareness or understanding of (1) the public right of navigation and (2) existing public easements, which are not commonly and expressly acknowledged, in real property deeds. In many cases, buyers pay a premium to purchase waterfront property, which often comes with a deed description of the property that includes ownership of lands to the low water mark or centerline for some distance along a waterway. Thus, private landowners along Navigable Waters may have an expectation of complete control and exclusivity of access and use over

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<sup>5</sup> The Montello, 87 U.S. 430 (1874); United States v. Appalachian Electric, 311 U.S. 377 (1940).

their lands and waters that is not entirely consistent with applicable law. Ownership of those lands and waters remains subject to the public easements that exist along Navigable Waters pursuant to both Federal and State case law, regardless of whether such easements are acknowledged in a deed.<sup>6</sup>

#### 1. The Federal Standard: Navigable Waters of the United States

While official designations of “navigable waters of the United States” ultimately depend upon judicial interpretation by the Federal courts,<sup>7</sup> the United States Congress delegated authority to commercially regulate such waters to the United States Army Corps of Engineers (USACE).<sup>8</sup> The USACE applies relevant Federal case law to make initial determinations regarding “navigable waters of the United States” on behalf of the federal government and defines them as those waters that are subject to the ebb and flow of the tide and/or are: (1) presently used, or (2) have been used in the past, or (3) may be susceptible for use, to transport interstate or foreign commerce.<sup>9</sup> Where a question arises regarding the navigability of a particular waterbody, the appropriate USACE Division or District office may issue a determination.<sup>10</sup> Additionally, each USACE District office is required to keep a tabulated list of final determinations of navigability and update that list as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.<sup>11</sup>

The Buffalo and New York districts of the USACE share primary regulatory jurisdiction over New York State. For further information, including district maps and listings of federally designated navigable waterways, please contact the appropriate USACE district office or visit its website. Links including listings of federally designated navigable waters in the Buffalo and New York districts can be found below in the Related References section of this Policy.

According to federal case law clarifying the federal standard of navigability, navigable waterways are held in the public trust and open for public use up to the ordinary high-water mark, regardless of ownership status of the waterway or its bed and banks.<sup>12</sup> Private ownership of the beds and banks of such waters is “a bare technical title, always subject to public rights to use the [water].”<sup>13</sup>

Over the years, federal courts have expanded upon the public right of navigation to include other related rights as well. As long as a member of the public has legal means to

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<sup>6</sup> Federal: Montana v. United States, 450 U.S. 544 (1981); Scranton v. Wheeler, 179 U.S. 141 (1900). *See also*, 33 CFR 329.11(a)(2): “Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.” New York State: Morgan v. King, 35 NY 454 (1866); Adirondack League Club, Inc. v. Sierra Club, 92 N.Y. 2d 591 (1998).

<sup>7</sup> 33 C.F.R. Section 329.3; 329.14(a).

<sup>8</sup> 33 U.S.C. Section 403; Section 10, Rivers and Harbors Appropriation Act of 1899.

<sup>9</sup> 33 C.F.R. Section 329.4.

<sup>10</sup> 33 C.F.R. Section 329.15.

<sup>11</sup> 33 C.F.R. Section 329.16.

<sup>12</sup> Montana v. United States, 450 U.S. at 555.

<sup>13</sup> Scranton v. Wheeler, 179 U.S. 141 (1900).

initially access the waterway, federal case law provides that the public may use “navigable waters of the United States” up to the ordinary high-water mark for navigation by boats, canoes, kayaks and rafts,<sup>14</sup> walking along the bed (wading) and banks,<sup>15</sup> to portage around obstructions,<sup>16</sup> as well as for swimming,<sup>17</sup> fishing,<sup>18</sup> and waterfowl hunting.<sup>19</sup> Thus, regardless of who owns the bed and banks, or whether the waterway is posted against trespass, the public has a right to navigate, fish, wade in the water, or walk along the banks up to the ordinary high-water mark,<sup>20</sup> pursuant to the federal public easement.

## 2. The New York State Standard: Navigable-in-Fact Waters

A waterway that is not a “navigable water of the United States” may still be “navigable-in-fact” if the waterway has or had the capacity for trade or travel.<sup>21</sup> The public has a right to navigate on these waters, pursuant to a public easement held by the State, regardless of who owns the bed and banks, and regardless of whether the waterway is posted against trespass. This principle is true even if the waterway passes through privately-owned lands and does not amount to a taking or otherwise impact the rights of private landowners, since they never owned the public easement.<sup>22</sup>

Courts have the ultimate authority to make final determinations regarding a waterbody’s navigability status. Previous cases decided in New York State courts have established the characteristics of “navigable-in-fact” waters in New York State that interested parties can use in making initial determinations regarding whether a waterbody is “navigable-in-fact.” Historically, the New York State Court of Appeals has held that the public right of navigation should be liberally supported, and that a waterbody is navigable if it is capable of transporting even single logs or sticks of timber to market, in addition to whether boats

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<sup>14</sup> The Daniel Ball, 77 U.S. 557 (1870); The Montello, 87 U.S. 430 (1874); Economy Light v. United States, 256 U.S. 113 (1921); Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469 (N.D.Ga. 1997); United States v. Appalachian Electric, 311 U.S. 377 (1940); Alaska v. Ahtna, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989).

<sup>15</sup> The Montello, 87 U.S. 430 (1874); United States v. Appalachian Electric, 311 U.S. 377 (1940).

<sup>16</sup> The Montello, 87 U.S. 430 (1874).

<sup>17</sup> Martin v. Waddell, 41 U.S. 367 (1842).

<sup>18</sup> Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).

<sup>19</sup> Montana v. United States, 450 U.S. 544 (1981). Federal caselaw expressly recognizes waterfowl hunting as part of the public right of navigation on “navigable waters of the United States”, including those waters that are located within New York State (see Section VI below for web links to more information on such waters). Even if waterfowl hunting is legally permitted on federally designated navigable waters within the State, this right is not absolute and without limitation, as hunters must still comply with all legal requirements, use discretion and be aware of their surroundings to avoid conflicts, hunt safely and not endanger others that may be in the area. However, New York courts have not recognized waterfowl hunting as part of the public right of navigation under State law, so this right does not apply to all other waters located in New York State that are not “navigable waters of the United States.”

<sup>20</sup> The Montello, 87 U.S. 430 (1874); United States v. Appalachian Electric, 311 U.S. 377 (1940); Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).

<sup>21</sup> Morgan v. King, 35 NY 454 (1866); Adirondack League Club, Inc. v. Sierra Club, 92 N.Y. 2d 591 (1998). *See also: e.g., Dale v. Chisholm*, 67 AD3d 626 (2d Dept. 2009) (“Recreational use alone is insufficient to establish that a body of water is navigable in fact, as there must be some evidence that it has the capacity for transport, whether for trade or travel.”)

<sup>22</sup> Adirondack League Club, Inc., 92 N.Y. 2d at 604.

or rafts can be floated on it.<sup>23</sup> In addition to a waterbody's susceptibility for traditional commercial use, evidence of its capacity for recreational travel can also be an important factor in determining whether a waterway satisfies the test of whether it is "navigable-in-fact" under New York law.<sup>24</sup>

Determining whether a specific waterway is "navigable in-fact" requires a factual investigation to confirm whether there are periods of regularly occurring navigable capacity during a sufficient length of time to make a waterway useful as a public highway. Waters that are navigable for more than a brief period during the year under normal conditions of flow are likely to be considered "navigable-in-fact."<sup>25</sup>

If a waterway satisfies all the criteria for being navigable-in-fact, it is open to public navigation for any purpose, whether commercial or recreational, even if the waterway cannot be navigated against the current. Moreover, a waterway, once navigable, remains navigable even if navigability subsequently diminishes or ceases.<sup>26</sup>

Furthermore, the public right of navigation on a navigable-in-fact water includes all incidental uses that are reasonably necessary to enjoy the right (e.g., portaging over private property to avoid rapids, falls or obstructions) so long as this occurs by the shortest, most direct safe route. The public also has the right to walk on the bed of the waterway to guide a boat through shallow areas, to go on privately-owned shoreline to scout for the best route, and to otherwise touch the streambed incident to navigation.<sup>27</sup>

## **B. Public Right of Fishing in Navigable Waters**

### **1. The Federal Standard: Fishing on Navigable Waters of the United States**

If a waterbody is a "navigable water of the United States," then a public easement exists to navigate, fish, wade in the water, or walk along the banks up to the ordinary high-water mark pursuant to the federal public easement. This is true regardless of property ownership status or whether the land is posted against trespass. Generally, the public may fish on any "navigable water of the United States," as well as on any other publicly owned waterway within New York State, provided they have the proper license or permit, and are otherwise in compliance with relevant laws and regulations.

### **2. The New York State Standard: Fishing on Navigable-in-Fact Waters**

The public has a general right to fish on publicly owned "navigable-in-fact" waterways in New York State. However, the public's right to fish on privately owned "navigable-in-fact" waterways in New York State necessitates a review of applicable land grants and deeds, as well as a determination as to whether any deeded or prescriptive easements

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<sup>23</sup> Morgan v. King, 35 NY at 459.

<sup>24</sup> Adirondack League Club, Inc., 92 N.Y. 2d at 603, 604.

<sup>25</sup> Morgan v. King, 35 NY at 459.

<sup>26</sup> People v. System Properties, Inc., 120 N.Y.S. 2d 269, 278 (3d Dep't 1953).

<sup>27</sup> Adirondack League Club, Inc., 92 N.Y. 2d at 607.

exist. Specifically, in the 1997 decision in *Douglaston Manor v. Bahrakis*, the New York State Court of Appeals ruled that the public does not have the right to wade in the water to fish or anchor a vessel in the water to fish without the permission of the property owner in cases where: (1) the bed of a navigable-in-fact waterway is privately owned; (2) the owner has an exclusive deeded right to the fishery deriving from a conveyance from New York State; and (3) there is no assertion that either one or more individual anglers, or the public-at-large, hold a prescriptive right to fish. Absent the facts of a given situation meeting this criterion the public has the right to wade in the water to fish or anchor a vessel in the water to fish in a “navigable-in-fact” water that is privately owned, as long as there is a legal means for public access to the water.

#### **IV. Responsibility**

It is the responsibility of OGC to maintain and interpret this Policy.

#### **V. Procedure**

When faced with situations involving legal and evidentiary issues of navigability and fishing rights, Office of Public Protection officers should collect sufficient information about controversies arising in the field and consult with their supervisor and Regional Attorney for advice regarding specific statutory and regulatory program authority or other legal authority prior to taking any enforcement action.

The NYS DEC cannot provide legal advice to the public regarding the interpretation or application of private deeds or conveyances, nor can it adjudicate disputes between private parties on such matters. Parties involved in such a conflict should seek the guidance of private counsel to advise them on their legal rights and options.

#### **VI. Related References:**

All weblinks listed below are current as of April 25, 2024.

For a map depicting the USACE’s jurisdictional coverage of the United States, see <https://www.usace.army.mil/Locations.aspx>.

Tabulated lists of navigable waters of the United States located in New York State are kept by the USACE’s Buffalo and New York district offices and are available at the following sites:

Buffalo District (Great Lakes and Ohio River Division):

<https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll9/id/2776>

New York District (including Delaware River Watershed and North Atlantic Division):

<https://www.nan.usace.army.mil/Missions/Regulatory/Navigable-Waters-List-for-New-York-State/>

Additional information on public recreational access to waterways in New York State can be found on the NYS DEC's webpage "Accessing and Navigating Waterways" located at: <https://dec.ny.gov/things-to-do/boating/accessing-navigating-waterways>.

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