

February 11, 1998

Wayne E. Vetter, Executive Director
New Hampshire Fish and Game Department
2 Hazen Drive
Concord, New Hampshire 03301

Dear Mr. Vetter:

You have inquired as to the legal standard for determining whether or not a particular river is a public water. The request arises out of an application for an aquaculture license to conduct a fee fishing operation in the North Branch River in Stoddard, New Hampshire. The Department's administrative rules, Fis 807.02, prohibit aquaculture operations in public waters.

For the reasons set forth below, I conclude that a river which can be traversed by canoe or kayak under ordinary conditions for some portion of each year, or which is capable in its natural state of providing some other useful service to the public, is a public water. The Department of Environmental Services is the appropriate agency to conduct a factual inquiry into whether the North Branch River meets this test.

Under the public trust doctrine, all public waters are held in trust by the State for the benefit of the public. *Opinion of Justices*, 139 N.H. 82 (1994); *Concord Mfg. Co. v. Robertson*, 66 N.H. 1 (1889). Public waters may be used to boat, bathe, fish, fowl, skate, cut ice, and other lawful and useful purposes. *Hartford v. Gilmanton*, 101 N.H. 424 (1958); *State v. Sunapee Dam Co.*, 70 N.H. 458, 460 (1900). Public waters include tidal waters, great ponds of 10 acres or more, and certain rivers. RSA 271:20; *Opinion of Justices*, 139 N.H. 82; *St. Regis Paper Co. v. New Hampshire Water Resources Board*, 92 N.H. 164 (1942). Rivers are distinguished from other public waters by the fact that the submerged land below the river may be privately owned, even when the water itself is held in trust by the State. *New Hampshire Water Resources Bd. v. Lebanon Sand and Gravel*, 108 N.H. 254 (1967).

All navigable rivers, as well as "useful" non-navigable rivers, are classified as public waters under New Hampshire law. RSA 271:9, enacted in 1911 and never amended, defines "[n]avigable streams or waters" as those which are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade or travel is or may be conducted in the present customary modes of trade or travel on water, and such term shall not apply to streams or waters which are used merely as public highways for floating logs.

RSA 271:9.

In 1942, the New Hampshire Supreme Court concluded that navigability is not the sole criterion for determining whether a stream is a public water. The inquiry under the common law is factual in nature, focusing on whether the river in question is capable of "useful service" to the public within the context of the public trust doctrine:

When a river or stream is capable in its natural state of some useful service to the public because of its existence as such, it is public. Navigability is not a sole test, although an important one. Although the line between public and private ponds has been drawn on the basis of acreage, that between

public and private streams has not been and is to be determined as a question of fact under the test stated.

St. Regis Paper Co. v. New Hampshire Water Resources Board, 92 N.H. 164 (1942). In the St. Regis case, the Court implied that a stream's suitability for transporting floating logs could qualify the stream as a public water, despite RSA 271:9's exclusion of such streams from the definition of "navigable." Suitability for fishing, by itself, does not suffice to make a water public; however, there is a public right to free passage by migratory fish up and down even nonpublic waters. Beach v. Morgan, 67 N.H. 529 (1893)(owner of nonpublic stream has right to exclude public from fishing there); State v. Roberts, 59 N.H. 256 (1879).

A river which can be traversed by canoe or kayak under ordinary conditions for some portion of each year is a public water. Canoeing and kayaking are "customary modes of trade or travel on water" encompassed within the statutory definition of navigability. RSA 271:9; cf. RSA 210:11, I. In addition, recreation is an accepted public use under the public trust doctrine. Hartford v. Gilmanton, 101 N.H. 424 (1958). Thus, recreational boating should be understood to be a "useful service to the public" within the Court's meaning in St. Regis.

The New Hampshire Department of Environmental Services ("DES") is the appropriate state agency to make a factual determination as to the navigability and usefulness of the North Branch River. By statute, DES is responsible for preparing, maintaining, and publishing a list of public waters. RSA 271:20, II. DES' list currently includes great ponds and impoundments, but not rivers and streams. In light of the application pending with your Department, and the fact that certain rivers and streams do qualify as public waters, DES should conduct a case-specific factual inquiry to determine whether the North Branch River qualifies as a public water. DES' inquiry should be guided by the test set forth in the St. Regis decision, looking first to the river's navigability by recreational watercraft, then, if necessary, to other public uses such as floating logs. DES should not, however, conclude that the river is a public water based solely on its suitability for fishing.

I trust this is responsive to your inquiry. Please do not hesitate to contact me if the Department has further questions.

Sincerely,

Jennifer J. Patterson
Assistant Attorney General Environmental Protection Bureau
(603) 271-3679

JJP/sed
cc: Robert W. Varney, Commissioner, NHDES

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§ 210:11. Setting Traps.

I. No person shall set, arrange or tend any trap upon any land or from the shores of any waters of which he is not the owner or occupant, except such traps as may be placed under water from a boat or canoe or through the ice on any public body of water as defined in RSA 271:20 or on the following named rivers, Androscoggin, Ammonoosuc, Ashuelot, Bear Camp, Contoocook, Connecticut, Cocheco, Exeter, Lamprey, Mascoma, Merrimack, Merrymeeting, Islinglass, Pemigewasset, Pine, Saco, Soucook, Suncook, Winnipisaukee and their navigable tributaries, until he has secured from the owner or occupant a permit in writing signed by said owner or occupant, and until he shall have filed with the conservation officer in whose district said person is going to trap, a copy thereof, together with a description of the land on which trapping is to be done. Navigable tributary as used in this section shall be defined as those waters from the mouth of said tributary to a point upstream where a person can row a boat or paddle a canoe when the water in the stream is in its ordinary condition.

As already set out in our answer to your first question, New Hampshire has long recognized that lands subject to the ebb and flow of the tide are held in public trust. "Land covered by public water is capable of many uses." *Concord Co. v. Robertson*, 66 N.H. at 7, 25 A. at 721. "Rights of navigation and fishery are not the whole estate" but rather the public trust lands are held "for the use and benefit of all the [public], for all useful purposes . . ." *Id.* at 7-8, 25 A. at 721 (quotation omitted); see *St. Regis Co. v. Board*, { *90 } 92 N.H. 164, 170, 26 A.2d 832, 837-38 (1942) (public trust encompasses "all useful and lawful purposes"); *State v. Sunapee Dam Co.*, 70 N.H. 458, 463, 50 A. 108, 110 (1900) ("in this state the law of public waters is what justice and reason require"). These uses include recreational uses. See *Hartford v. Gilmanon*, 101 N.H. 424, 425-26, 146 A.2d 851, 853 (1958) (public waters may be used to boat bathe, fish, fowl, skate, and cut ice).

139 N.H. 82, 89-90 IN RE OPINION OF JUSTICES (S. Ct. 1994)