

3666

2009-2010 Regular Sessions

I N S E N A T E

March 27, 2009

Introduced by Sens. FLANAGAN, MORAHAN, RANZENHOFER, VOLKER -- read twice
and ordered printed, and when printed to be committed to the Committee
on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to the
public right of passage upon the navigable waterways of the state and
the rights of private property owners over which such waterways pass

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. Article 15 of the environmental conservation law is amended
2 by adding a new title 33 to read as follows:

3 TITLE 33

4 NAVIGABLE WATERWAYS

5 SECTION 15-3301. STATEMENT OF LEGISLATIVE FINDINGS, POLICY AND INTENT.

6 15-3303. DEFINITIONS.

7 15-3305. PUBLIC RIGHT OF PASSAGE.

8 15-3307. COMMON LAW REMEDIES PRESERVED.

9 15-3309. INTERPRETATION; SEVERABILITY.

10 S 15-3301. STATEMENT OF LEGISLATIVE FINDINGS, POLICY AND INTENT.

11 1. THE LEGISLATURE HEREBY FINDS THAT WATERWAYS IN THE STATE THAT ARE
12 SUBJECT TO THE PUBLIC RIGHT OF NAVIGATION AS THIS RIGHT IS DEFINED IN
13 COMMON LAW CONSTITUTE A VALUABLE COMMERCIAL AND RECREATIONAL RESOURCE OF
14 THE STATE AND, AS SUCH, THEY PROVIDE IMPORTANT HEALTH BENEFITS AND LOCAL
15 AND STATEWIDE ECONOMIC BENEFITS. THE LEGISLATURE FURTHER FINDS THAT THE
16 COURTS OF THE STATE HAVE HISTORICALLY APPLIED A COMMON LAW TEST TO
17 DETERMINE WHETHER PARTICULAR WATERWAYS ARE NAVIGABLE IN FACT AND ARE
18 THEREFORE SUBJECT TO THE PUBLIC RIGHT OF NAVIGATION, AND THAT ON WATER-
19 WAYS FOR WHICH SUCH DETERMINATIONS HAVE NOT BEEN MADE BOTH THE PUBLIC
20 AND THE AFFECTED PRIVATE PROPERTY OWNERS MAY BE UNCERTAIN AS TO WHETHER
21 SUCH WATERWAYS ARE SUBJECT TO SUCH RIGHT. THE LEGISLATURE FURTHER FINDS
22 THAT WATERWAYS THAT SATISFY THE COMMON LAW TEST ARE NAVIGABLE IN FACT
23 AND THAT THE BED AND BANKS OF SUCH WATERWAYS ARE SUBJECT TO A SERVITUDE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 OR EASEMENT FOR THE PURPOSE OF NAVIGATION THAT IS HELD IN TRUST BY THE
2 STATE FOR THE PEOPLE OF THE STATE AND HAS BEEN SO HELD FROM THE TIME OF
3 THE ORIGINAL GRANTS FROM THE STATE OR SOVEREIGN. THE LEGISLATURE FURTHER
4 FINDS THAT THIS NAVIGATIONAL EASEMENT PROVIDES A PUBLIC RIGHT OF PASSAGE
5 AND THAT WATERWAYS THAT ARE SUBJECT TO SUCH EASEMENTS ARE CONSIDERED TO
6 BE PUBLIC HIGHWAYS FOR NAVIGATIONAL PURPOSES, INCLUDING WHERE SUCH
7 WATERWAYS ARE SITUATED ON PRIVATE PROPERTY. THE LEGISLATURE ALSO FINDS
8 THAT THE PUBLIC RIGHT OF NAVIGATION INCLUDES SEVERAL ESSENTIAL INCI-
9 DENTAL RIGHTS THAT MAY BE EXERCISED BY THE PUBLIC AS NECESSARY TO ACCOM-
10 PLISH SAFE PASSAGE. ALSO, THE LEGISLATURE FINDS THAT IN EXERCISING THE
11 PUBLIC RIGHT OF NAVIGATION THE PUBLIC IS REQUIRED BY LAW TO RESPECT THE
12 RIGHTS OF PRIVATE PROPERTY OWNERS AND MAY NOT ENTER ON PRIVATE PROPERTY
13 FOR PURPOSES OTHER THAN TO EXERCISE THE LAWFUL RIGHT OF SAFE PASSAGE AND
14 THEN ONLY TO THE MOST MINIMALLY INTRUSIVE EXTENT POSSIBLE.

15 2. THE LEGISLATURE HEREBY DECLARES ITS INTENT TO ENSURE THAT THE
16 PUBLIC SHALL BE ABLE TO FREELY NAVIGATE ON WATERWAYS THAT ARE NAVIGABLE
17 IN FACT AND TO ENSURE THAT THE RIGHTS OF PRIVATE PROPERTY OWNERS ARE NOT
18 VIOLATED OR INFRINGED UPON BY THOSE WHO ENGAGE IN THE PUBLIC RIGHT OF
19 NAVIGATION. THE LEGISLATURE FURTHER DECLARES ITS INTENT TO DETERMINE
20 WHICH WATERWAYS IN THE STATE ARE NAVIGABLE IN FACT UNDER THE COMMON LAW.

21 3. THE LEGISLATURE HEREBY DECLARES IT TO BE THE POLICY OF THE STATE TO
22 PROTECT THE COMMERCIAL AND RECREATIONAL USES OF ALL WATERWAYS IN THE
23 STATE THAT ARE NAVIGABLE IN FACT UNDER THE COMMON LAW, TO PRESERVE AND
24 PROTECT THE PUBLIC RIGHT OF PASSAGE UPON THESE WATERWAYS, AND TO
25 PRESERVE AND PROTECT THE RIGHTS OF OWNERS OF PRIVATE PROPERTY THROUGH
26 WHICH THESE WATERWAYS PASS.

27 S 15-3303. DEFINITIONS.

28 THE FOLLOWING TERMS WHEN USED IN THIS TITLE SHALL BE DEEMED TO MEAN
29 AND INCLUDE:

30 1. "COMMERCE" SHALL MEAN ANY REMUNERATIVE ACTIVITY INCLUDING, WITHOUT
31 LIMITATION, USE OF A WATERWAY FOR THE TRANSPORT OF GOODS OR MINERALS IN
32 VESSELS, FLOATING LOGS TO MILLS OR MARKET AND TRANSPORTING PEOPLE OR
33 GUIDING PEOPLE FOR HIRE IN VESSELS.

34 2. "LINING" SHALL MEAN REGULATING THE PASSAGE OF A VESSEL ALONG AN
35 OBSTRUCTED STREAM SEGMENT BY MEANS OF LINES CONTROLLED FROM THE BED AND
36 BANKS OF THE STREAM, PROVIDED THAT USE OF THE BED AND BANKS OF A STREAM
37 FOR SUCH PURPOSE SHALL BE TO THE MINIMUM AND LEAST INTRUSIVE EXTENT THAT
38 IS REASONABLY NECESSARY TO ACCOMPLISH SAFE PASSAGE.

39 3. "NAVIGABLE IN FACT" SHALL MEAN ANY WATERWAY WHICH SATISFIES THE
40 COMMON LAW TEST THAT THE WATERWAY, IN ITS NATURAL STATE AND ORDINARY
41 VOLUME OF WATER, HAS PRACTICAL UTILITY TO THE PUBLIC AS A HIGHWAY FOR
42 TRADE, TRAVEL OR TRANSPORT. BOTH UTILITY FOR COMMERCIAL USE AND CAPACITY
43 FOR RECREATIONAL USE CAN BE CONSIDERED IN DETERMINING WHETHER A WATERWAY
44 HAS PRACTICAL UTILITY TO THE PUBLIC AS A HIGHWAY FOR TRADE, TRAVEL OR
45 TRANSPORT. A WATERWAY MAY BE NAVIGABLE IN FACT EVEN IF IT IS NOT CAPABLE
46 OF BEING NAVIGATED AGAINST ITS CURRENT AND EVEN IF THE CAPACITY OF THE
47 STREAM FOR SUPPORTING NAVIGATION IS NOT CONTINUOUS OVER TIME, AS LONG AS
48 THE CAPACITY NECESSARY TO SUPPORT NAVIGATION CONTINUES FOR A SUFFICIENT
49 LENGTH OF TIME TO MAKE THE STREAM USEFUL AS A HIGHWAY FOR TRADE, TRAVEL
50 OR TRANSPORT. A WATERWAY MAY ALSO BE NAVIGABLE IN FACT EVEN THOUGH IT
51 CONTAINS OCCASIONAL RAPIDS, FALLS, DAMS OR OTHER NATURAL OR MANMADE
52 OBSTRUCTIONS.

53 4. "PASSAGE" SHALL MEAN THE ACT OF NAVIGATION, INCLUDING THE RIGHT TO
54 ENGAGE IN INCIDENTAL ACTIVITIES WHICH ARE, UNDER THE CIRCUMSTANCES, AN
55 INSEPARABLE AND INDISPENSABLE PART OF SAFE NAVIGATION, INCLUDING BUT NOT

1 LIMITED TO SCRAPING OR PUSHING OFF THE BED OF THE WATERWAY, POLING,
2 LINING, PORTAGING AND SCOUTING.

3 5. "POLING" SHALL MEAN PROPELLING A VESSEL BY USING A POLE TO PUSH OFF
4 THE BED OR BANKS OF A WATERWAY.

5 6. "PORTAGING" SHALL MEAN TRANSPORTING OR CARRYING A VESSEL UPON THE
6 BED OR BANKS OF AN OBSTRUCTED STREAM SEGMENT, PROVIDED THAT USE OF THE
7 BED OR BANKS OF A STREAM FOR SUCH PURPOSES SHALL BE TO THE MINIMUM AND
8 LEAST INTRUSIVE EXTENT THAT IS REASONABLY NECESSARY TO ACCOMPLISH SAFE
9 PASSAGE.

10 7. "RECREATION" SHALL MEAN ANY ACTIVITY WHICH IS NOT COMMERCE, AS
11 DEFINED IN THIS SECTION, INCLUDING BUT NOT LIMITED TO PERSONAL TRAVEL
12 FOR PLEASURE OR TO TRANSPORT GOODS OVER A WATERWAY AS A MEANS OF ACCESS
13 TO A PRIMARY OR SECONDARY RESIDENCE.

14 8. "SCOUTING" SHALL MEAN INSPECTION OF RAPIDS OR OTHER POTENTIAL
15 NATURAL OR MANMADE OBSTRUCTIONS TO SAFE PASSAGE IN ORDER TO DETERMINE
16 WHETHER AND BY WHAT ROUTE SAFE PASSAGE IS POSSIBLE, PROVIDED THAT USE OF
17 THE BED AND BANKS OF A STREAM FOR SUCH PURPOSE SHALL BE TO THE MINIMUM
18 AND LEAST INTRUSIVE EXTENT THAT IS REASONABLY NECESSARY TO ACCOMPLISH
19 SAFE PASSAGE.

20 9. "VESSEL" SHALL MEAN ANY WATERCRAFT DESIGNED FOR NAVIGATION, INCLUD-
21 ING SKIFFS, ROW BOATS, CANOES, RAFTS AND OTHER SMALL CRAFT.

22 10. "WATERWAY" SHALL MEAN ANY NON-TIDAL WATERBODY, INCLUDING LAKES,
23 PONDS, RIVERS, CREEKS OR STREAMS, REGARDLESS OF WHETHER THE WATERBODY
24 HAS BEEN DETERMINED TO BE NAVIGABLE IN FACT AT COMMON LAW.

25 S 15-3305. PUBLIC RIGHT OF PASSAGE.

26 1. THE PUBLIC HAS A RIGHT OF PASSAGE FOR ANY LAWFUL PURPOSE, INCLUDING
27 COMMERCE, TRAVEL AND RECREATION, ON ALL WATERWAYS OF THE STATE THAT ARE
28 NAVIGABLE IN FACT.

29 2. THE PUBLIC RIGHT OF PASSAGE ON WATERWAYS THAT ARE NAVIGABLE IN FACT
30 DOES NOT INCLUDE THE RIGHT TO ENTER PRIVATE PROPERTY FOR HIKING,
31 PICNICKING, NATURE OBSERVATION, CAMPING, EGRESSING FROM OR ACCESSING A
32 WATERWAY, OR ANY OTHER PURPOSE NOT RELATED TO PASSAGE.

33 3. THE COMMISSIONER SHALL HAVE THE AUTHORITY TO PROMULGATE RULES AND
34 REGULATIONS TO IMPLEMENT THIS SECTION, INCLUDING BUT NOT LIMITED TO
35 RULES AND REGULATIONS WHICH IDENTIFY AND DESIGNATE WATERWAYS THAT ARE
36 NAVIGABLE IN FACT, USING THE COMMON LAW TEST SET FORTH IN SUBDIVISION 3
37 OF SECTION 15-3303 OF THIS TITLE, AND WHICH ADDRESS ISSUES OF PUBLIC
38 SAFETY OR NATURAL RESOURCE PROTECTION. THE COMMISSIONER MAY AMEND ANY
39 SUCH RULES AND REGULATIONS AS MAY BE APPROPRIATE FROM TIME TO TIME. THE
40 COMMISSIONER SHALL NOT HAVE THE POWER TO DETERMINE THAT WATERWAYS WHICH
41 SATISFY THE COMMON LAW TEST ARE NOT NAVIGABLE IN FACT AND SHALL NOT HAVE
42 THE POWER TO DETERMINE THAT WATERWAYS WHICH DO NOT SATISFY THE COMMON
43 LAW TEST ARE NAVIGABLE IN FACT.

44 4. THE PUBLIC RIGHT OF PASSAGE ON THE WATERWAYS THAT ARE NAVIGABLE IN
45 FACT IS SUBJECT TO ALL OTHER APPLICABLE PROVISIONS OF LAW AND RULES AND
46 REGULATIONS THAT REGULATE OR LIMIT THE USE OF VESSELS.

47 S 15-3307. COMMON LAW REMEDIES PRESERVED.

48 NOTHING IN THIS TITLE SHALL BE CONSTRUED TO LIMIT ANY REMEDY AVAILABLE
49 IN COMMON LAW, STATUTE OR RULE OR REGULATION FOR OBSTRUCTING, HINDERING,
50 HARASSING OR OTHERWISE INTERFERING WITH THE PUBLIC RIGHT OF PASSAGE BY
51 PERSONS LAWFULLY EXERCISING THE RIGHT OF PASSAGE ON WATERWAYS THAT ARE
52 NAVIGABLE IN FACT. WARNING OF A DANGEROUS CONDITION SHALL NOT IN ITSELF
53 BE DEEMED AN INTERFERENCE WITH THE PUBLIC RIGHT OF NAVIGATION. FURTHER-
54 MORE, NOTHING IN THIS TITLE SHALL BE CONSTRUED TO LIMIT ANY REMEDY
55 AVAILABLE IN COMMON LAW, STATUTE OR RULE AND REGULATION FOR TRESPASS ON
56 PRIVATE PROPERTY FOR ACTIVITIES OTHER THAN PASSAGE.

1 S 15-3309. INTERPRETATION; SEVERABILITY.

2 1. THIS TITLE SHALL BE INTERPRETED TO PRESERVE AND PROTECT THE COMMON
3 LAW RIGHT OF PASSAGE ON WATERWAYS THAT ARE NAVIGABLE IN FACT AND ALSO
4 SHALL BE INTERPRETED TO PRESERVE AND PROTECT THE RIGHTS OF PROPERTY
5 OWNERS WHO OWN PROPERTY THROUGH WHICH NAVIGABLE IN FACT WATERWAYS FLOW.

6 2. THE PROVISIONS OF THIS TITLE SHALL BE SEVERABLE, AND IF ANY CLAUSE,
7 SENTENCE, PARAGRAPH, SUBDIVISION, SECTION OR PART OF THIS TITLE SHALL BE
8 ADJUDGED BY ANY COURT OF COMPETENT JURISDICTION TO BE INVALID, SUCH
9 JUDGMENT SHALL NOT AFFECT, IMPAIR OR INVALIDATE THE REMAINDER THEREOF
10 BUT SHALL BE CONFINED IN ITS OPERATION TO THE CLAUSE, SENTENCE, PARA-
11 GRAPH, SUBDIVISION, SECTION OR PART THEREOF DIRECTLY INVOLVED IN THE
12 CONTROVERSY IN WHICH SUCH JUDGMENT SHALL HAVE BEEN RENDERED.

13 S 2. This act shall take effect April 1, 2010.