The Law of Water

An Introduction to Vermont Water Law

As happens in other places, water in Vermont runs, falls, floods, percolates up from the earth, freezes in the winter, and on quiet ponds lies still in the late evening. Wherever it is found, there is the law, ready and adaptable to every human conflict, to delineate the rights of competing interests and resolve the disputes of neighbors and other affected people.

This pamphlet attempts to do something dangerously optimistic: to provide the landowner, neighbor, recreationist, and entrepreneur with a look at the laws affecting water in Vermont. It might be of interest to you if you own land on a brook, river, lake, or pond, live downslope of anybody else, or just want to fish in peace on a Saturday morning. It would be foolish to promise this brochure will say everything you want or need to know or substitute for the careful advice of an attorney, as so much depends on the facts of a case.

The source of the material described here includes the statutes and common law of Vermont. It is principally an indigenous creation of generations of legislators and judges and the troubled landowners who brought their water problems to be heard before a legislative hearing or a trial. Much of Vermont's common law is grounded on the work of old English judges, which is part of our common inheritance from Britain, even though Vermont itself was ruled by English law for only a handful of troubled years, when many Vermonters refused to acknowledge its authority. English law is based on Roman law, and that on earlier precedents, established back before history. Water has been around longer than law, but no culture ever lasted long without some well-established laws on the subject.

The brook that burbles so sweetly in September took out my garage last spring. Salt from the town plow ruined my artesian well. The river is oily and filled with sawdust and trash. The storm drain backed up and filled my basement with ugliness. My neighbor built a peninsula of rocks and dirt out into the pond next to our beach. I want to drain that wet part of my field to build a new home there.

You might be interested in knowing what the law has to say in these situations. Obviously you can't just do something with a backhoe or a shovel, an angry phone call or a lot of harsh words, before thinking it through. You'll need to know what the law is.

A Fluid Theory

Who owns water? If it flows past or through your land, or you share a water boundary with others, on a pond or lake, it doesn't really belong to you, the way land belongs to you, or the trees. You can use it. You can use the water under the land, and the water that rises in a spring.

Even without owning shorefront property, you can fish and boat in many streams and lakes of Vermont. These are public waters, but defining precisely when waters are public is not always easy.

There are limits. On some small lakes and ponds, for instance, jet skis are forbidden. You can't fish for some species in all seasons. In some places you can't swim or fish, because a body of water is a public drinking supply. You can't use water as a way of ridding your land of waste or fill in a wetland (without a permit). Water has a public quality to it, and you need to respect that.

In Vermont, all waters are classified. Class A water is everything above 2,500 feet as well as water used for drinking purposes. It gets the highest protections. Class B water is suitable for bathing and recreation. Everything else is Class C. Knowing the classification of the water on or near your land is essential in what you can try to do with it.

The Natural Resources Board classifies waters and regulates the use of all public waters. The Agency of Natural Resources issues permits, and appeals are heard by the board, which itself and through its predecessor the Water Resources Board, has issued a body of decisions that form an important canon of water law in Vermont. The Vermont Supreme Court has also decided dozens of important cases on the water rights and responsibilities of landowners.

The Army Corps of Engineers is active in enforcing the law of water in Vermont, whenever a wetland is threatened, when fill is added or removed from a streambed, or

when a project has an impact on rivers and lakes. Federal laws, including those guaranteeing clean water, also affect water use in Vermont.

If you looked for an overriding principle of the law of water, it might come down to this: that you can't use water if by doing so you injure others. You have rights—rivers and streams give rise to "riparian" rights; lakes and ponds give rise to "littoral" rights—but they are circumscribed by the public interest. As with everything, reasonableness is the right attitude, and caution a good companion in any conflict.

Stream Boundaries

If your deed describes a boundary of your land as along a brook or river and is not more specific than that, the law presumes you own to the middle, or thread, of the stream. If the river jumps its banks and shifts its course, your boundary may move as well, along the new thread.

If your deed describes your property line as along the shore of the stream, however, you own only to the water's edge. The particular words of the deed are definitive of your rights.

Don't try to change the thread. If you attempt to dredge the channel on your side of the stream, you may be in trouble. Your neighbor may sue you for damages, and the state and federal government may come after you for unauthorized work in the streambed.

Accretion, Avulsion and Erosion

"Accretion" is the gradual and imperceptible accumulation of land by natural causes—"alluvion" is what the deposits are called—along the banks of a body of water. "Avulsion" is the sudden removal of soil from the land of one owner and its deposit on land of another. "Erosion" is the gradual eating away of soil. Erosion on one side of the stream often leads to accretion of alluvion on the other bank.

Grains of sand add up. The general rule is that land lost and land gained due to accretion is a kind of natural conveyance and that title shifts from the one landowner to the other as this happens without the need for deeds or claims of adverse possession or acquiescence.

An early Vermont case recognized the right of a landowner to the wood that drifted down a stream past his property, when a third party tried to collect the logs. The landowner's claim was superior to the intruder's but inferior to the original owner of the logs, if identified.

Flowage

Early Vermonters attempted to use water power to grind their grist or cut their logs. Industrious settlers would dam a stream and channel the runoff to move a water wheel, buying easements to use abutting land for containment. Dozens of court cases followed by those who suffered from too little or too much water. Then came hydroelectric dams, and water became Vermont's "white coal." Today the battle line is drawn differently, with citizen groups attempting to remove dams to restore fisheries and power companies opposing their efforts. How fast water comes down, how much can be contained, are issues still with us today.

Upland residents may not increase or decrease the flow of a stream if this creates substantial injury to anyone, including the public. Government is not exempt from this rule. A few years ago, a court found a town liable when a plugged culvert backed up water onto private property (outside the public right-of-way). A town has a duty to maintain culverts on all Class 3 and 4 town highways. Adjacent landowners may not fill in swales or ditches along a road without permission of the selectboard.

Ski areas need water for snowmaking. In recent years, there have been colossal struggles between developers and citizens over how this can be accomplished. State government has regulated changes in stream flow and encouraged the use of reservoirs and artificial ponds for snowmaking.

Lake Boundaries

Vermont has no tidal waters, not for the last 10,000 years at least, but it has plenty of ponds and lakes, including one lake we regard as great—Lake Champlain—and these waters also have their rules of conduct.

A boundary described as along the bank, shore, or margin of a private lake or pond goes only to the water's edge, and the landowner has no claim to any land under water. Owners of shoreland along Lake Champlain or other public waters usually own to the average low water mark, although finding that mark may not be easy, as it is a number that changes over time, as any average does.

The location of the average low water mark became important to a few duck hunters a few years ago. During high water they floated their boat into a wetland in Swanton past signs prohibiting trespassing. The Vermont Supreme Court decided they were in the wrong because they were hunting on enclosed lands.

Section 67 of the Vermont Constitution promises, "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly." "Boatable waters" is unique to Vermont; if you look in legal dictionaries, you'll find only Vermont cases cited for the definition.

So why weren't those hunters allowed to float into that wetland, if the waters were boatable (even in a few inches of water)? Because the hunters were hunting on enclosed private property. They were also beyond the average low water mark. Had high water continued for a sufficient time, the average low water mark might change and the waters might be suitable for highways as public easements.

Shoreland property is dear, and some think they might extend their beach or domain by filling. Be careful with this project. Filled land belongs to the public, as a railway company discovered a few years ago at the Burlington waterfront. As public land, its users are bound to treat it as a public trust.

Nature knows best, of course, but common sense can help.

Law of the Sea

A sailboat docked at an island in Lake Champlain during rough seas. The caretaker untied the ropes, and the boat was wrecked. The landowner who had ordered the caretaker to keep all intruders off the island paid damages following a lawsuit. The usual laws of trespass are suspended during emergencies.

The state licenses motorboats, and the Coast Guard and the State Police enforce rules on safety on the larger bodies of water in Vermont, including a prohibition against boating while intoxicated. Regattas also need special permits from the state.

In Vermont, you can be held liable for a fine for failing to stop to help people in need, on land or on the water. The rule is to help to the extent it can be rendered without danger or peril to yourself or without interference with important duties owed to others. If you do help, you can't be sued for ordinary negligence if damage occurs during your attempt to help.

Springs

Percolating waters are ours to use and appropriate, as at least one large bottling company has done in Vermont. Often one neighbor owns spring rights on the lands of another. Even if unused for years, this right continues to benefit one landowner and burden another until it is expressly abandoned or quitclaimed, because this is a right in the land itself.

Just as land, a water source can be condemned by a municipality and appropriated for public use over the objections of the landowner, who is due reasonable compensation for the taking. A municipality may not, however, condemn water outside its boundaries.

Permits

When public interests are involved, as they are with most changes to the land that affect water, there is government to protect the public interest. From the siting of a dam to the paving of a field for parking (creating artificial channels for runoff), it may seem that nearly everything you do with water beyond hosing your garden requires a permit. Don't take this lightly. If you want to change the moving or still waters on your property, call

somebody first. Checking with the right office is essential to avoid penalties and ensure the change is done properly.

At the local level, there is the zoning permit, required for any change of use of land, movement of earth or water, or erection of structures. Don't build a bridge over a stream, reroute a swale, or place a dock in the lake without checking with the zoning administrator first.

Then call the regional office of the Agency of Natural Resources. Imagining what permits you need isn't the right policy. Call them before you think about draining a wetland (or even what you think is a wet field) or relining a ditch that has been eroded by spring runoff. Let the state officials tell you in writing you don't need a permit before you act, just to be sure.

You know how it works. The law is full of don'ts. Don't put algaecides or pesticides in water to kill plants you find offensive. Don't scuba dive down to ancient vessels in the lake and collect artifacts for your home museum. Don't open the flashboard on the pond to lower the level to repair your dock. Don't empty your swimming pool so that the water runs onto your neighbor's lawn. Don't drive your old car into the quarry to see how fast it sinks. Don't pull out the beaver dam that threatens to flood your basement.

Drilling your own well doesn't require a permit, but sharing the water you take from the ground with others, whether you charge for it or not, may require a public water supply permit from the Agency of Natural Resources.

Nature knows best, of course, but common sense can help. You may object to land use controls on your land or reel from the news that you need an Act 250 permit, a water discharge permit, a stream alteration permit, a permit for algaecides, or a wetlands permit, but if the law requires it, you proceed at your peril (and maybe also emperil those living downstream from you) if you act first and ask questions of officials later.

Public Easements

A few years ago a landowner tried to prevent people in Newfane from using a dam as a swimming hole that had been popular for decades. He closed down the path to the water. The Vermont Supreme Court ruled this a public easement, a common law dedication of the land and water for public recreational purposes, and the landowner had to take down the gate. A few years later the dam washed away during a spring freshet and the landowner announced the public easement had ended, only to be told again by the high court that people still had a right to use the path.

By this time, you should be getting the idea that water isn't private property except in very limited circumstances. If it flows through or borders your land, then you are sharing it with others, and the public itself may have a right to it.

Last Thoughts

We didn't succeed in telling you everything about the law of water, but we tried. Every idea expressed here demands further research before you start to act in reliance on it, and no court will find this pamphlet authority for a contrary conclusion. These cases turn on their facts, on the intentions of the parties and their behavior, but the basic ideas are sound.

What are you going to do with water? It just doesn't want to obey the human will. The riprap doesn't hold, the fields are flooded, the bridges wash out. A river changes course. Sometimes there's too much of it; sometimes there's a drought and even deep wells give out. Law is different. It flows on, year after year, rarely jumping its banks, observing the ancient rules, discerning the rights of landowners and the public. You can enjoy the water and never think of the law, but it's there, waiting until you need it.

The Vermont Institute for Government

The Vermont Institute for Government (VIG) is a nonprofit organization dedicated to ensuring that government remains responsive, accessible, and competent, by improving educational opportunities for local officials and the public regarding how government works. Since 1989, VIG has been creating educational materials, offering workshops, and collaborating on a variety of trainings and educational events for Vermont's town officers and citizens.

This pamphlet is one in a series of VIG publications on Vermont local issues. For more information and additional resources, please visit the Vermont Institute for Government website: **vtinstituteforgovt.org**.

Please note: This pamphlet was revised and updated in the spring of 2020. Changes in the law subsequent to that date may make some of what is written here no longer valid. Always check the latest versions of the law before proceeding.