THE PUBLIC TRUST DOCTRINE: A PRIMER
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March 9, 2019

(1) Summary

The public trust has been gradually expanded throughout the centuries from covering tidal submerged lands, to all natural resources. The current version, as codified in Connecticut law, is a strong tool for the members of the public to protect all water, or any other natural resource, without having to show traditional nuisance to establish a specific impacted property interest. The Connecticut Environmental Protection Act’s language in Conn. Gen. Stat. §22a-15, declares that “there is a public trust in the air, water and other natural resources.” This inclusion of all water and natural resources is most similar to Hawaii, Minnesota, and Michigan’s public trust doctrines as codified in constitutions and statutes. All of these states include water, without limitation, as one of the resources that is within the public trust. Other states, like California, limit their doctrine to tidal lands and navigable waters, but include all waters that impact those tidal or navigable waters. The clear and strong intent of CEPA is to provide a strong and effective remedy to allow any person to protect all of our natural resources from any unreasonable impairment, pollution or destruction.

(2) History of the Public Trust Doctrine (tidal & navigable waters and wildlife) - The fundamental notion of the public trust doctrine is a guarantee that “each person is entitled to the protection, preservation and enhancement” of natural resources. Conn. Gen. Stat. §22a-15.


b. The Supreme Court of the United States borrowed this concept from English common law and held that navigable waters, meaning waters up to the mean high tide mark, belong to the state in public trust. Martin v. Waddell 1842. Fifty years later, the Supreme Court extended “navigable waters” to mean all waters sustaining commerce—“so far as may be necessary for the regulation of commerce with foreign nations and among the states.” Illinois Central Railroad Co. v. Illinois 1892.

c. A few years later, the Supreme Court of the United States decided that the states hold wildlife in the public trust, unless there is a federal statute in conflict. “[P]ower or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.” Geer v. Connecticut 1896.
In Connecticut, as in many other states, the modern form of the doctrine was codified and substantially expanded beyond navigable waters and wildlife to include, without limitation, “air, water and other natural resources of the state.”

a. **Language** - “[T]here is a public trust in the air, water and other natural resources of the state of Connecticut and . . . each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.” Conn. Gen. Stat. §22a-15. The state is also able to collect damages for harm to public trust resources pursuant to Conn. Gen. Stat. §22a-6a.

b. **Caselaw** - In *Waterbury v. Washington* the Connecticut Supreme Court applied the public trust doctrine to drinking water being diverted by the City of Waterbury. In this case, the issue was whether there was an unreasonable impairment of public trust by Waterbury’s drinking water diversion. To determine whether there was an unreasonable impairment of the flow of the Shepaug River, the Court looked to the CT streamflow standards that applied to water levels for stocked streams. The court found that this standard, along with provisions the Diversion Act, would necessarily inform any determination of the reasonableness of impairment to the public trust upon remand to the trial court. *City of Waterbury v. Town of Washington* 2002. The case was subsequently settled and the remand proceedings never occurred.

(4) Many other states have codified doctrines that expressly include or apply to all water and other natural resources.

a. **Hawaii Constitution art. XI, §1** - “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the state for the benefit of the people.”

   i. The Hawaii Constitution, like the Connecticut statute, applies to all water and courts have found it is unlimited by any surface-ground distinction. *In re Wai’ola O Moloka‘i*, Inc. 2004.

   ii. While private use for ‘economic development’ must figure into any balancing of competing interests in water, private commercial use is not a public trust purpose. *id.* The public trust doctrine prescribes a higher level of scrutiny for private commercial uses and the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust. *Id.*

   iii. The object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes “use.” *Id.*

b. **California Constitution art. X § 3** - “All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes
of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations. . . in order to protect the public interest.”

i. Unlike Connecticut, public trust waters in California are limited, by the constitutional language above, to tidal and navigable waters.

ii. The Supreme Court found that diversion of non-public trust drinking waters that impacted public trust waters (in this case Mono Lake) were subject to the public trust doctrine and that a historic permit or license did not justify a withdrawal that imperiled that trust when there had been no consideration at the time about the harm to the public trust resource. National Audubon Society v. Superior Court (Mono Lake) 1983.

iii. Parties acquiring rights in trust property hold these rights subject to the trust, and have no vested right to use those resources in a manner harmful to the trust. Id. Once the state has approved an appropriation of a public trust resource, it has a continuing duty to protect the public trust in light of current knowledge and needs. Id.

c. Minnesota Statute §116B.01- “The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.”

d. Michigan Constitution art. IV, §52- “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”

Mich. Comp. Laws Serv. § 324.1701 “The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”