



CONNECTICUT LEAGUE OF
CONSERVATION VOTERS

April 16, 2018

To: The Honorable Chairs and Members of the Public Health Committee, Energy and Technology Committee, Environment Committee, and Planning and Development Committee

From: Lori Brown, Executive Director, CT League of Conservation Voters

Re: Joint Public Hearing Testimony IN FAVOR of the CT State Water Plan as drafted

Thank you for considering this testimony from the CT League of Conservation Voters in support of the State Water Plan as presented to you by the Water Planning Council. It is a document that represents more than a year of effort and a million dollars' worth of in-depth work by multiple expert stakeholders and consultants. It also reflects many concessions that were made on all sides to reach this point.

Unlike other legislation, ANY changes to the plan at this stage KILLS THE BILL and delays the plan for another year, possibly longer.

This long overdue platform for better water management is a testament to how well our system can work when the public is involved in the decisions impacting our natural resources. People just want what is best for our water, the environment and our future. We urge you to push back against any last-minute effort by special interests to undermine the public's control of our most precious resource.

"PUBLIC TRUST RESOURCE" means that water belongs to the public, is held in trust by the State, and should be managed sustainably and to the benefit of the public.

CT residents overwhelmingly requested that the plan include a reference to water as a public trust resource in comments submitted to the Water Planning Council. More than 2,300 hand written letters and 4,600 petition signatures were submitted asking for this very thing. Despite this overwhelming public support, special interests are suddenly arguing that the "public trust doctrine" was a new concept and should not be in the plan.

Our state's Council on Environmental Quality has prepared a detailed statement explaining the importance of the public trust doctrine, which is included with this testimony. Also included below is a statement by many of the groups who have been working on this water plan to clarify why the document should be approved by the Joint Committees as it is currently drafted.

The plan is a platform for making informed decisions which balance "in-stream needs" for the environment with "out of stream needs" for humans and the economy, and one which provides only guidance, not statutory mandates

We urge legislators to take this critical step towards maintaining CT's high-quality drinking water, protection of watershed lands, increased conservation, updated drought planning, safe levels of water for our streams and rivers, and improved scientific data collection.

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Connecticut Residents and the Public Trust in Air, Water, Wildlife and Other Resources

A Summary from the Council on Environmental Quality

March 14, 2018

Connecticut residents have long embraced the idea that their air, water, wildlife and other natural resources transcend property boundaries and private ownership, and that therefore a *public trust* exists in those resources which can be defended by the state or any citizen.

Because of the public trust, which is established by state statutes, common law and the courts, the public has expectations and rights to the life-sustaining benefits provided by common natural resources and is empowered to protect those resources from degradation.

Though it influences the lives of Connecticut residents every day, the public trust in air, water and wildlife seldom is discussed outside of the occasional courtroom.¹ In early 2018, the Water Planning Council (WPC) engaged in a rare discussion of the topic after the editing of its draft report² added a reference to an existing statute that declares a public trust in water. Several parties urged the WPC to remove references to the public trust, which they said was a complex legal concept and could have serious unknown consequences for water utilities and water users.³ While the public trust is indeed a legal concept that can be complicated, the wording of the WPC's report could not alter the public trust. Connecticut's embrace of the public trust in natural resources is woven firmly into its laws and way of life where, the Council on Environmental Quality concludes, it must remain.

A Very Brief History

The public trust in air, water and other natural resources is declared in statute, as described below, but has existed in some forms for well more than a century. When Connecticut successfully prosecuted a man in 1889 for possessing legally-killed wild game birds because he intended to sell them out of state, which state law forbade, it led to a landmark U.S. Supreme Court decision⁴ that affirmed the public trust in wildlife. While some of the specific conclusions of that case have been superseded, it still is fact that no individual or company owns wildlife. If you have a yard or garden and are fortunate enough to have a robin build a nest in it and lay eggs, you do not own the bird, the nest or the eggs, and may not take any of them.⁵

The use of the "public trust" phrase that is most familiar to Connecticut residents – at least people on the shore – is connected to public trust lands, or the lands submerged by the tides of Long Island Sound and its tributaries. Someone fortunate enough to own waterfront land might be able to obtain a permit to build a dock but cannot own the land under the dock; that land is public trust land, held by the state in trust for all. This centuries-old principle is what gives everyone leave to fish, swim, clam, shoot geese or walk back and forth below the mean high tide line. (Some activities, such as hunting and fishing, require licenses, but the public trust principle guarantees everyone's access to the natural resources.)

In 1971, the General Assembly declared,

"there is a public trust in the air, water and other natural resources of the state of Connecticut and that 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.”⁶

Numerous other statutes authorize the Commissioner of Energy and Environmental Protection to consider the injury to the public trust – in all resources or, depending on the statute, in water specifically – when assessing penalties for violating environmental laws.⁷ Statutes also authorize the courts to consider the same in assessing a violator’s liability.

In the current century, the General Assembly has referred to public trust resources when adopting laws to protect Long Island Sound.⁸

The General Assembly’s 1971 declaration of the public trust in natural resources displayed a foresightful understanding of the dynamic nature of such resources. In the intervening 47 years, scientists have advanced dramatically the study of the movement and interaction of air, water, vegetation and wildlife; their research across many scientific fields has revealed how those resources are utterly inseparable from the public’s welfare.

What Resources are Included in the Public Trust?

The answer clearly includes air and water, from the language of CGS Section 22a-15 (quoted above), and wildlife pursuant to long tradition and court decisions. Courts have determined that trees and forests can be included.⁹ In 2005, the General Assembly elaborated on the nature of public trust resources in and near Long Island Sound:

“For the purposes of this section [25-140], “public trust resources” shall include, but not be limited to,

- the historic and broad boating use of said sound by the public,
- the right of the public to enjoy and explore the natural beauty of said sound by boat,
- the rights of the public and commercial fishermen to harvest fish and shellfish from said sound,
- the protection of all natural resources of said sound that are held in trust by the state for the public,
- the stewardship and restoration of sites along the coast of said sound that contain important habitat or natural resources,
- and the protection of sites that provide opportunities for public enjoyment of said sound.”¹⁰

The Public Trust as Bedrock

The consistent actions of the Connecticut General Assembly have been deliberate. As noted in a legal reference book, “... by creating a ‘public trust’ in these natural resources, the General Assembly afforded increased protection for these resources. [The 1971 law] could well have been drafted to protect the state’s natural resources without declaring that a ‘public trust’ in them exists for future generations.”¹¹

The appearance of the public trust principle in any agency’s reports and recommendations should not surprise Connecticut residents. Rather, people should be surprised if the public trust were to be ignored or challenged. The public trust is present in our laws whether mentioned or not in any specific report.¹²

Objections have been raised at times to inserting the public trust concept into laws or documents because of potential uncertainties that could confront businesses and users of natural resources. It is certainly true that public trust arguments make their way to court on occasion, but is there a realistic alternative? Would Connecticut residents prefer environmental laws that say there is no public trust in

air, water, wildlife or other natural resources and that such resources shall be treated only as commodities to be bought, sold or disposed of by private interests? The CEQ is confident that the public supports the current structure, whereby the public has a share and a voice in resources that are essential to life and that confound property boundaries.

To elaborate on the potential impediment to business development, the CEQ does not find it likely that the public trust would block any development that was not a serious threat to residents' health or their environment. As described in one of the many scholarly articles about the public trust,

“1. The public trust doctrine is a legal concept related to how we treat resources that are difficult or problematic to hold in private ownership.

2. The core ideas of the public trust doctrine are that a government can only hold such resources in trust for citizens and that, as a trustee of these resources, *government has the obligation to balance reasonable consumptive use of the trust with protecting the trust for present and future generations.*”¹³ [emphasis added]

Going further, some scholars suggest that any potential development that threatened public trust resources could not truly be considered beneficial. For example:

“Pursuant to the public trust doctrine, our government has a fundamental obligation to protect the resources that are central to our society – land, water, wildlife, and air. This obligation predates the Constitution and actually underlies the very purpose of the Constitution. When government fails to protect the essential natural resources central to our society – resources that belong to all of us, including future generations – the fundamental ability of civilization to reproduce itself is threatened.”¹⁴

Over the decades, people have raised the potential problem of harassment; that is, people will use the public trust argument to sue someone who is doing no harm. This potential problem was debated in 1971 when the General Assembly adopted the statutes allowing individuals to take legal action to protect the public trust in their environment. The majority of legislators were confident – and correct, time has shown – that harassment would not become widespread or problematic, and that the benefits would outweigh any such risk.¹⁵

The CEQ and the Public Trust

The Council prepared this memorandum to summarize and guide its own discussions and recommendations on matters that affect the public trust. As just one example of its possible application, the Water Planning Council included the public trust concept in its final report as a matter for further discussion.¹⁶ The CEQ views more frequent public discussion of the public trust as a positive development and stands ready to participate as appropriate.

Footnotes

1. Between 2013 and 2018, the Connecticut General Assembly did not discuss any bills mentioning the public trust in natural resources except for the land beneath lighthouses and “traditional public trust uses” in Long Island Sound.
2. Connecticut Water Planning Council (WPC), Connecticut State Water Plan, Final Report, January 2018.
3. Letter from representatives of six organizations (Connecticut Water Works Association, National Federation of Independent Business (NFIB/Connecticut), Home Builders & Remodelers Association of CT,

Inc., Connecticut Business & Industry Association, Connecticut Conference of Municipalities, Connecticut Council of Small Towns) to Water Planning Council, January 18, 2018.

4. *Geer v. Connecticut*, 161 U.S. 519, 529, 535 (1896). Excerpt: “While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power 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.” Later, in 1918, the Migratory Bird Treaty Act codified this concept; that federal law allows hunting of waterfowl and certain other migratory birds for personal consumption in accordance with state and federal regulations and licensing requirements.
5. Migratory Bird Treaty Act (16 U.S.C. 703-712; Ch. 128; July 13, 1918; 40 Stat. 755)
6. CGS Section 22a-15.
7. CGS Sections 22a-6a, 22a-6b, 22a-6e, 22a-16, 22a-18, 22a-19, 22a-19a.
8. PA 05-137, PA 15-66.
9. For example: *Rocquev. Mellon*, 275 C 161 (2005).
10. CGS Section 25-140; amended by PA 05-137 to include public trust language.
11. Sherwood, D. and J. Brooks, 15 Connecticut Practice Series: Connecticut Environmental Protection Act (2006), § 4:3, pp. 55-56.
12. Using the 2018 WPC report as an example, the outcome of that Council’s deliberations probably would have been the same even if public trust laws were not mentioned. Some observed, in advance of the WPC’s approval of its report, that the law directing the WPC to develop the state water plan “does not reference in any way the concept of ‘public trust’.” [Letter from Senators Len Fasano and Kevin Witkos to Water Planning Council, January 17, 2018.] That statement is true but, again, the public trust in water is present regardless. Put another way, if the WPC had been directed explicitly to prepare a plan that balanced competing water uses in a manner consistent with the public trust, would the outcome have been any different? The CEQ does not see how.
13. Sagarin, R. D. and M. Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, *Annual Review of Environment and Resources*. 2012. 37:473–96.
14. Torres, G. and N. Bellinger, "The Public Trust: The Law's DNA" (2014). *Cornell Law Faculty Publications. Paper 1213*, p. 316.
15. Ranelli, M., Associate Attorney, Office of Legislative Research, Connecticut General Assembly, Research Report [97-R-1481](#), RE: Legislative History of CGS §§ 22a-19 and 19a.
16. Connecticut Water Planning Council, *State Water Plan, Final Report*, January 2018, p. 6-24.





Memorandum of Support Water as a Public Trust Resource in the Final CT State Water Plan

Background on Water as a Public Trust in Connecticut

This “public trust” doctrine establishes the foundational values of air, water, and natural resource management and policy in our state, making it clear that all CT residents have an inherent right to clean air, clean water, and a healthy environment. Additionally, it recognizes the public’s right to participate, and if necessary, to intervene in actions that put the state’s natural resources at risk of undue harm.

CT General Statutes title 22a-15 states “It is hereby declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further 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.”

CT State Water Plan Must Recognize Water as a Public Trust

The State Water Plan (SWP) was crafted as a guidance document to help policy makers make informed water management decisions that are consistent across a set of agreed-upon, stakeholder defined principles and sound scientific data. The final plan does not establish enforceable water management regulations, but instead offers a series of consensus-based recommendations to the legislature for longterm water management planning in CT.

It is critical that the SWP recognize long-standing, foundational values of natural resource management in CT, including, but not limited to, the recognition of water as a public trust. While there is no analysis or in-depth discussion of the Public Trust Doctrine in the final SWP, the SWP plainly states that the doctrine exists as a matter of policy, and highlights the overwhelming public support demonstrated for this concept when residents had the opportunity to participate in the development of the SWP.

The language recognizing the public trust doctrine is appropriate and does not “delegate the interpretation, application, and evolution of this doctrine in Connecticut to the WPC or the final water plan,” as erroneously asserted by the January 2018 memo prepared for CWWA¹. In fact, a March 2018 memo by Kirk Westphal, Program Director and Senior Principal Planner for the CT State Water Plan intended to clarify the role of the SWP by stating “it is neither the role or authority of the SWP to interpret, endorse or establish the

¹ Day Pitney, LLP. (2018). “State Water Plan and The Public Trust Doctrine in Connecticut”

legal definition of this concept²,” and added that the only actions WPC took in response to this prevalent concern included in the public comments:

- 1) Acknowledge the existence of the public trust doctrine in existing statute;
- 2) Agree that it was a topic worthy of future discussion;
- 3) Note a similarity in language between the SWP's concept of balanced water uses and the statute's reference to "each person" and "all persons".

The SWP took more than a year to develop and cost over \$1 million to complete. Dozens of stakeholders from diverse constituencies (e.g. water utilities, state agencies and conservation groups) served on the Water Planning Council's (WPC's) various committees and advisory groups. *While many stakeholder groups were actively represented and involved in shaping the SWP throughout this process, the main avenue for the general public to have its voice heard during the SWP's development was either in-person at the various WPC public meetings, or during the official 120 day public comment period.*

The vast majority of comments received by the WPC during the public comment period emphasized the concept of water as a public trust resource. The overwhelming request from the public was that the WPC acknowledge that Connecticut has an *existing* statement of policy recognizing water as a public trust resource, and that it is the duty of state government and the right of our citizens to protect their water resources from unreasonable harm. **Over 2,300 hand written letters over 4,600 petition signatures were sent to members of the WPC urging inclusion of water as a public trust resource in the final SWP.**

Our organizations respectfully urge Connecticut legislators to approve the State Water Plan as presented—it is a detailed, consensus driven guide that attempts to identify the state's priority water supply management challenges of the future. It helps strike a thorough balance so that Connecticut can move forward on the critical issue of planning for all of our state's future water needs, and should be enacted into law as soon as possible.

Louis W. Burch, Citizens Campaign for the Environment
Melissa Schlag, Connecticut Fund for the Environment/Save the Sound
Lori Brown, Connecticut League of Conservation Voters
Alicea Charamut, Connecticut River Conservancy
Leenert DeJong, Pomperaug River Watershed Coalition
Margaret Miner, Rivers Alliance of Connecticut
Dr. Valerie Rossetti, **Save Our Water CT**

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² Westphal, Kirk (2018). "What the State Water Plan Can and Cannot do with 'Water as a Public Tru