

# A Survey of Fish Passage Laws

Informing Need, Use, and  
Effectiveness in Vermont

# What Are Fish Passage Laws?

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Fish passage laws protect the free upstream and downstream movement of **migratory** fish in waters of the state.

# What Is the Legal Authority for Fish Passage Laws?

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One legal authority may be the **public trust doctrine**.

In *Greer v. Connecticut*, the Supreme Court of the United States held that “in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common.”

The Court thus established the public trust doctrine which provides that fish and wildlife are owned as common property by the state and must be managed for the public benefit or “good” of the state’s citizens.

In *State v. Haskell*, the Vermont Supreme Court applied the public trust doctrine to uphold a law prohibiting persons from polluting the Lamoille River. It stated that:

“[S]uch owner of the land does not own the flowing water and only has the right properly to use it while on its passage; that he can use it in a reasonable manner for domestic purposes, for creating power, and for taking fish therefrom; that he cannot divert it from its course, nor pollute it, but leave it so the landowners on the stream above and below may enjoy a like use of the water, **including taking fish therefrom.**”

The Court held that under the public trust doctrine the “fish in the [Lamoille], however, are not [the property owners]” and therefore “[the property owner] cannot lawfully . . . obstruct the free passage of those which he does not take.”

# What Types of Fish Passage Law Exists?

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**Generally, these laws can be categorized into three different types.**

## **1) Requiring Fishways at Dams and Other Artificial Obstructions**

Provides that it is the affirmative responsibility of the owner of dams or artificial obstructions to construct and maintain fishways or fish ladders.

## **2) Providing Agencies with the Authority to Require Fishways**

Provides a state agency with the authority to decide whether a fishway should be required at dams or other artificial obstructions.

## **3) Prohibiting Anglers from Preventing Fish Passage**

Do not require fishways at dams and other artificial obstruction, but do prohibit anglers from preventing fish passage through unlawful means of taking fish.

# Where Have These Laws Been Enacted?

Statute Requiring Fishways at Dams and Artificial Obstructions (n=10)	Statutes Authorizing Agencies to Require Fishways at Dams and Artificial Obstructions (n=11)	Statutes Prohibiting Anglers from Preventing Fish Passage through Unlawful Means (n=11)	No Statutes Protecting Fish Passage (n=18)
<p>Arkansas Idaho Iowa Oregon Nevada New Hampshire North Carolina Virginia Washington West Virginia</p>	<p>Alaska California Connecticut Georgia Illinois Maine Massachusetts Pennsylvania Rhode Island South Carolina Wyoming</p>	<p>Alabama Florida Kansas Louisiana Michigan Minnesota Missouri New York Ohio Wisconsin Vermont</p>	<p>Arizona Colorado Delaware District of Columbia Hawaii Indiana Kentucky Mississippi Montana Nebraska New Jersey New Mexico North Dakota Oklahoma South Dakota Tennessee Texas Utah</p>

# Why Does this Matter for Vermont?

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**In Vermont there are both native migratory fish and dams.**

The types of migratory fish in Vermont include:

- Brook trout (state fish), American eel, and Sea Lamprey;

There are also an estimated 1,100 privately and publicly managed dams that still exist in the state.

# What Fish Passage Laws Exist in Vermont?

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## Prohibiting Anglers from Preventing Fish Passage

“A person shall not unless authorized by the Commissioner **prevent the passing of fish** in a stream or the outlet or inlet of a natural or artificial pond on a public stream, by means of a **rack, screen, weir, or other obstruction**, and shall comply with the terms of the notice provided in subsection (b) of this section.”

**10 V.S.A. § 4607**



## Requiring Fishways at Dams?

Upon application for the project involving the construction, repair, or removal of dams in Vermont, a hearing must be held to determine whether the project will serve the public good. The public good is defined as “the greatest benefit of the people of the State” as determined by consideration of 14 factors including “the effect the proposed project will have on . . . fish and wildlife.”

**10 V.S.A. § 1086(a)**

The Commissioner of Fish and Wildlife “**shall investigate the potential effects on fish and wildlife habitats** of any propos[ed]” project prior to the determination of public good.

**10 V.S.A. § 1084**

The order approving the proposed project **shall include** “conditions . . . necessary to protect any element of the public good.”

**10 V.S.A. § 1086(b)**

# What Effect Do These Laws Have?

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**Usually not requiring fishways or fish ladders at dams.**

For example, a recent application was submitted for the repair of Marble Mill Dam, a small, privately owned dam on the West Branch of the Batten Kill River.

The Batten Kill River is an [exceptional trout fishery] and that is one of the reasons it is listed as one of the only four “outstanding water resources.”

The VNRC and Trout Unlimited submitted comments in which we requested an explanation or determination of whether a fishway should be required.

In the final order approving the repair, the Agency of Natural Resources stated that such a determination was **“beyond the scope of review of the proposed project.”**

# Recommendations

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## 1. **Legislation to Protect Fish Passage - The 'Brook Trout Bill'**

- a. **Strategic Amendments:** Political opposition and legislative friction could be reduced by introducing legislation that proposes minimal, **yet strategic**, amendments to current statutes.
- b. **Regulatory study of Fish Passage Needs:** Proposed legislation could be strengthened with a study of migratory fish and the need (or not) to preserve and enhance fish passage. Commensurate funding would need to be provided to the agency conducting the study.

Look to other states for examples of language and structure.

## 2. **Consider Common Law Causes of Action**

# Thank You!

Please feel welcome to email me with any questions or to continue the discussion at:

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