

Maryland Navigability Report

Summary

Rivers or streams that are tidal and capable of being boated, including small rowboats and possibly kayaks, are defined as navigable and open to the public. What rights, if any, a boater has on streams that are not influenced by the tide has not been conclusively determined.

State Test of Navigability

Maryland adheres to the old common law rule that rivers or streams within the ebb and flow of tide, to high water mark, belong to the public, and in that sense are navigable waters.¹ “It is not necessary to a stream’s being navigable in fact that it be capable of carrying large vessels.”²

Maryland has not explicitly adopted the navigable-in-fact test, while noting in 1956 that the navigable-in-fact test was the generally prevailing view.³ In *Harve de Grace v. Harlow*, the Maryland Court of Appeal (the highest state court) opined that “any stream, though above tidewater, is a navigable water if of sufficient capacity to float the products of the mine, the forests, or the tillage of the country through which they float to market.”⁴ But, several decades later in *Wagner v. Baltimore*, the Court of Appeals opined that *Harve de Grace* did not overrule earlier cases holding navigability depending on tidal influences and expressly stated that the court would not address whether the prevailing navigability-in-fact rule applied in Maryland.⁵ It does not appear that any state court has since addressed the issue of navigable, non-tidal waters.

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state owns all the navigable waters and their bottoms and beds (with the exception of certain land grants through 1862), which it holds in trust for the people.⁶ Where the state has title to the beds, the riparian owner owns the land above the high-water mark.⁷ The public has the right to

¹ *E.g.*, *Department of Nat. Res. v. Mayor & Council of Ocean City*, 332 A.2d 630, 634 (Md. 1975); *Van Ruymbeke v. Patapsco Indus. Park*, 276 A.2d 61, 64 (Md. 1971).

² *E.g.*, *Van Ruymbeke*, 276 A.2d at 64; *Green v. Eldridge*, 187 A.2d 674, 677 (Md. 1963).

³ *Wagner v. Baltimore*, 124 A.2d 815, 820 (Md. 1956) (demurring on whether Maryland’s “ancient rule [regarding ebb and flow of the tide], which differs from that generally prevailing in this country[,], should be abandoned”).

⁴ *Harve de Grace v. Harlow*, 98 A. 852, 855 (Md. 1916).

⁵ *Wagner*, 124 A.2d at 820.

⁶ *Anne Arundel Cty v. Annapolis*, 721 A.2d 217, 224-25 (Md. 1998); *Harbor Island Marina, Inc. v. Bd. of Cty. Comm’rs of Calvert County*, 407 A.2d 738, 744 (1979). *Harbor Island Marina* discusses the specific instances where the land lying beneath the navigable waters is not owned by the state, which result because during the first couple of hundred years of Maryland history both “the Lord Proprietor and the State granted private individuals patents in fee to some of these lands.” *Harbor Island Marina*, 407 A.2d at 744 n.9. *See also, e.g., Wagner*, 124 A.2d at 819 (discussing land patents covering tidal waters); *Stansbury v. MDR Dev. L.L.C.*, 871 A.2d 612, 619-20 (Md. Ct. Spec. App. 2005) (same).

⁷ *Department of Nat. Res. v. France*, 357 A.2d 78, 88 (Md. 1976).

use the shore of navigable streams up to the ordinary high water mark.⁸ Where tidal waters are held privately, the public maintains the rights of navigation and fishing.⁹

Under the federal navigational servitude,¹⁰ the public has the right of navigation in waters navigable in fact that are not subject to the tide. Notwithstanding the right under federal law, Maryland courts have not explicitly recognized navigable-in-fact non-tidal waters as navigable or subject to any public easement.¹¹ What other rights the public has in navigable waters not subject to the tide, if any, has not yet been determined by state courts.

On non-navigable bodies of water, the riparian owner owns the bed to the middle of the stream.¹²

Miscellaneous

Trespassing from water vessels onto property that is conspicuously posted against trespassers is a misdemeanor subject to a fine of up to \$500 and 3 months in prison.¹³

The state maintains a recreational system of more than 750 miles of state designated water trails for kayaking and canoeing and state parks with navigable rivers that includes nontidal waters.¹⁴ For additional information on boating and fishing in Maryland, visit the state's Department of Natural Resources website at <https://dnr.maryland.gov/Boating/Pages/default.aspx> (boating) or <https://dnr.maryland.gov/fisheries/Pages/default.aspx> (fishing).

⁸ Board of Pub. Works v. Larmar Corp., 277 A.2d 427, 437 (Md. 1971).

⁹ E.g., *Wagner*, 124 A.2d at 819; *Stansbury*, 871 A.2d 620; see also *Delmarva Power & Light Co. of Maryland v. Eberhard*, 230 A.2d 644, 646 (Md. 1967) (noting, in dicta, that the public's easement "of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned" included "the similar right of fishing and hunting over navigable waters (sometimes restricted to waters publicly owned)").

¹⁰ See generally *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *United States v. Chicago, M., St. P. & P.R.R.*, 312 U.S. 592 (1941).

¹¹ E.g., *Wagner*, 124 A.2d at 820. See also *Becker v. Litty*, 566 A.2d 1101, 1104 (Md. 1989) (noting both tests but finding that the instant decision would not change regardless of the test applied and thus not deciding whether the navigable-in-fact test applied); *Wicks v. Howard*, 388 A.2d 1250, 1251 (Md. Ct. Spec. App. 1978) ("Waters are deemed navigable for these purposes if, and only if, they are subject to the ebb and flow of tides [and] is still the law of Maryland, to the extent that it has not been modified or abrogated by statute.") (citation omitted).

¹² *France*, 357 A.2d at 88.

¹³ Md. Code Ann., Crim Law, §§ 6-402, 6-403 (2018) (for a first offense).

¹⁴ Maryland Dep't of Nat. Res., Maryland Public Access, Water Trails and Recreation Planning, <https://dnr.maryland.gov/Boating/Pages/mdwatertrails.aspx> (last visited June 3, 2021).