

NAVIGABLE WATERWAYS

Information Sheet

One characteristic that affects the use and enjoyment of each waterway in our Commonwealth is whether or not that waterway is considered to be “navigable”. The purpose of this information sheet is to provide you with some information regarding the distinction between a navigable waterway and one that is non-navigable and what rights the public has to use such waterways as well as what rights an individual property owner has to the waterway abutting the land.

Why is this an important distinction?

The land underlying a navigable waterway is publicly owned and therefore only the Commonwealth has a right to control its use. Subject to any such governmental restrictions, the public is free to use such a waterway.

Conversely, if the waterway is not navigable, the land underneath the water and therefore the right to control the use of the water belongs to the individual property owner holding the deed to that land. On non-navigable waterways, the private property owner has the right to restrict others from using the waterway.

What makes a waterway navigable?

The standards for what makes a waterway navigable are somewhat hard to pin down. The determination cannot be made with a simple measurement of a stream's width or its depth. The basic standard that the courts have applied is that a waterway is navigable in law if it is navigable in fact. To determine if the waterway is navigable in fact, the courts have looked to the use of a waterway for commercial purposes. If a waterway has been used or could be used as a “highway for commerce” then it is considered to be navigable.

What part of a navigable waterway is publicly owned?

If a waterway is navigable, the public owns the land between the normal low water marks on either side of the waterway. The land owner owns from his land down to the low water mark. The land between the normal low and high water marks is owned by the private land owner, but that land is subject to the public's right to navigation on the water.

A waterway is either navigable or it is not. There is no distinction between different parts of the waterway that may or may not be navigable unto themselves. If a waterway is navigable, it is considered to be navigable and therefore public throughout its entire length.

Can the government declare a waterway to be navigable by legislation?

No. Either a waterway is naturally navigable or it is not. A legislative act by the government cannot turn a non-navigable waterway into a navigable one. Each land owner has a constitutional right not to have his or her land taken away by the government without just compensation. If the General Assembly or the Federal Government could legislatively turn a waterway that was not navigable into one that is, it would, in effect, be taking land from the private citizens that would otherwise own the land without compensation.

Is the Yellow Breeches a navigable waterway?

There has not been any official determination on the navigability of the Yellow Breeches and no government agency maintains a complete list of navigable and non-navigable waterways. For more information on local streams and creeks, you can try contacting your local representative.