

“Current Status of the Public Trust Doctrine in Virginia”

Carl Josephson,
Senior Assistant Attorney General, Environmental Section, Virginia

Contrary to many other states, Virginia uses Mean Low Water (MLW) to delineate the boundary between upland private property and State-owned submerged lands. Mr. Josephson reviewed an early Virginia case addressing the PTD, *Commonwealth v. City of Newport News*, 158 Va. 521 (1932). The case involved a proposed longer sewage treatment pipe and the impact of the discharge of raw sewage from the pipe on oyster grounds.

In essence, the Virginia Supreme Court analysis says that the PTD “Does not help us in our thinking.” According to its analysis, in order for a trust to exist it must be created by the State, itself, or a power with dominion over the State. The Court determined that the part of Virginia’s sovereignty that it relinquished to the federal government by virtue of agreeing to the U.S. Constitution gave rise to what may be considered an implied trust for protection of navigation.

The Court viewed fisheries as part of the State’s *jus privatum* (right of private property), subject to State regulation. The State could take away the right of fishery, except for natural oyster grounds (referred to as Baylor Grounds in Virginia), which are specifically protected for the benefit of the people in Virginia’s State Constitution. However, the Court said the legislature can also authorize “public use” of Baylor Grounds. Considering the use of tidal waters for discharge of sewage to be a public use, the Court held that Newport News could discharge untreated sewage into Hampton Roads, notwithstanding the harm to fisheries that may occur.

In 1971 the Virginia Constitution was amended and included a new provision, Article XI, Section 1, relating to conservation of natural resources. Some commentators, such as Professor A.E. Dick Howard of the University of Virginia, view that provision as creating a PTD in Virginia. However, in a 1985 case, the Virginia Supreme Court held that Article XI, Section 1 is “not self executing.” In other words, that Constitutional provision needs to be implemented by the legislature enacting a statute to make the provision effective for particular purposes.

Virginia Code § 28.2-1205 includes many matters which MRC shall consider and be guided by when determining whether to grant a permit for the use of State-owned bottomland. The legislature amended the section to say that MRC shall be guided in its deliberations by the provisions of Article XI, Section 1 of the Virginia Constitution.” In this way Article XI, Section 1 has been “executed” by the legislature and is applicable as guidance for MRC habitat decisions.

In 1999 Virginia Code § 28.2-1205 was further amended to include two specific references to the PTD. In the first reference, MRC is required to exercise its authority

consistent with the PTD as defined by the common law that Virginia adopted from England as of the time of our independence. At that time, it is fairly well recognized that the PTD only extended to protection of navigation, fisheries and commerce on the waters. In the second reference, relating to judicial review of MRC decisions, if MRC's decision is consistent with the PTD it is deemed not to be pursuant to the police power. Mr. Josephson has argued to several Virginia Courts that this second reference qualifies the scope of judicial review of MRC decisions. If an MRC decision is consistent with the PTD, then it is a proprietary decision of the Commonwealth. The Court's review should be limited if MRC's decision is proprietary, i.e. when MRC, on behalf of the Commonwealth, is determining what use can be made of the Commonwealth's own property.

He then reviewed two recent appellate court cases in which it was argued that the scope of judicial review has been altered by the 1999 amendment, but the Courts chose not to address the argument. *Evelyn v. MRC*, 46 Va. App. 618 (2005) and *Palmer v. MRC*, 48 Va. App. 78 (2006), involved, respectively, a roof structure and a large storage shed on private piers. In both cases, MRC told the owners to take the structures down. The Cases were appealed and in each the judges agreed with and upheld the original MRC decision, without addressing whether the 1999 amendment qualified judicial review of MRC decisions that are consistent with the PTD.

A more recent case was cited, *Harrison v. MRC*, (Norfolk Circuit Court 2007)—involving a rebuilt pier that had been destroyed by Hurricane Isabel. A neighbor challenged a rooftop bar structure and took the MRC to court. The Circuit Court ruled that MRC's granting of an after-the-fact permit for a rooftop bar on top of the restaurant/bar of the public fishing pier was redundant and violated the PTD. The Circuit Court considered MRC's permit, in light of the potential noise and view impacts of the rooftop bar on the neighbors, to be inconsistent with the PTD.

The MRC is now appealing that decision, arguing that noise and view issues were decided by the City in the exercise of its zoning authority and the Circuit Court improperly expanded protections of the PTD beyond that which the legislature specified for MRC decisions, i.e. navigation, fisheries and commerce.

Concluding remarks:

The PTD is specifically mentioned in Code § 28.2-1205, but its scope for MRC decisions remains to be determined by the Courts. Because the General Assembly has defined it by reference to a specific period of time (i.e. our independence) the PTD for purposes of Code § 28.2-1205 MRC decisions should not be amenable to expansion beyond navigation, fisheries and commerce.

For other purposes, Article XI, Section 1 of the Virginia Constitution may be argued to provide PTD protection. However, because Virginia Courts consider that section not to be self-executing, it needs to be "executed" by implementing legislation for specific purposes.

For example, Article XI, Section 1 of the Virginia Constitution is “executed” by specific reference thereto in Virginia Code § 30-73.3.A.2. By that Code section the Joint Commission on Administrative Rules is authorized to review the impact of a rule or regulation on the protection of the Commonwealth’s natural resources.

Although not specifically cited by Article and Section number, the thrust of the language of Article XI, Section 1 of the Virginia Constitution is also included in statutory language pertaining to Virginia’s Department of Environmental Quality. Virginia Code § 10.1-1183(1) identifies, among the purposes of the Department, assisting “in the effective implementation of the Constitution of Virginia by carrying out state policies aimed at conserving the Commonwealth’s natural resources and protecting its atmosphere, land and waters from pollution.”