

STATEMENT IN SUPPORT OF
HOUSE BILL 993

MARYLAND CITIZENS' RIGHT TO RECREATIONALLY
USE AND ENJOY MARYLAND'S PUBLIC WATERS

An Ancient Public Trust Right In Jeopardy

Since time immemorial, citizens of Maryland have treasured the bounty and beauty of Chesapeake Bay, and indeed, all of the public waters of Maryland. The public's right to fully use and enjoy Maryland's public waters is a legacy of the English common law that the colonialists brought with them from England, and, after the Revolution, became the law of the State. In fact, how the public holds these rights today is an important part of Maryland's history, economy and quality of life. Unfortunately this traditional and historic right is under attack by the Attorney General of Maryland.

English Common Law from 1632 to the Revolution.

Since the first colonial days, the public has been endowed with protected rights to fish, navigate, and bathe in the tide waters. These rights were part of the English common law brought to the new colony of Maryland. The King Charles charter of 1632 expressly preserved the "free liberty of fishing for Sea-fish, as well in the Sea, Bayes, Inletts and navigable Rivers, as in the Harbours, Bayes, and Creekes of the Province."¹

The English common law viewed public waters, the land beneath these waters (bottomlands or submerged land) and the shores and beaches below the high water mark, as being "incapable of ordinary and private occupation, cultivation and improvement." For these reasons, they were "public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." These public lands and waters, according to the English common law, were held for the benefit of both the Crown and the subjects – the people. Each had a legal interest in these lands and waters, based on the common law's distinction between "the title and the dominion" of tide waters, the bottomlands and beaches. The **title**, known then and now as the *jus privatum*, was held by the King as the sovereign. The **dominion**, the *jus publicum*, was also held by the King, but *in trust for*

*the benefit of the people, and future generations.*² This distinction of two titles is as relevant today as in the colonial time. This is the essence of what is now known as the Public Trust Doctrine.

During the colonial era, the common law advanced to recognized rights in addition to navigation, fishing and bathing, holding that “all public waters are open to all persons for all lawful purposes.”³ One of those “lawful” purposes was recreation, whether it be boating, fishing, bathing or merely enjoying the beauty of Maryland’s waters. This body of English common law, as developed through the colonial period, has come to be known today as the Public Trust Doctrine. This was the common law of the colony up to its final days.

Statehood.

Then, upon the Revolution and American independence, all of these English common law rights became vested in the people of Maryland.⁴ And other rights were added to the list when Maryland’s Carroll, Stone, Chase and Paca added their signatures to the Declaration of Independence, which guaranteed all the people the right of “life, liberty, and the pursuit of happiness.” And no better pursuit of happiness can be found than a day on the bay with a tiller, or fishing pole in hand, or a stroll along the beach with a grandchild in hand. The liberty to enjoy recreation of all sorts on the public waters of Maryland is the highest order of pursuing happiness. Indeed, recreational use of Maryland’s public waters is the source of billions of dollars of revenue in today’s State economy.

It has been heralded that Chesapeake Bay is a not only a national treasure, but also “the deepest wellspring of Maryland’s history, economy, recreational life, and character.”⁵ In fact, the State legislature has recognized that recreation of the State’s public waters is of such high priority that it has instructed the Secretary of the Department of Natural Resources to develop public recreational facilities for Chesapeake Bay and other tidal waters, and to assist other State agencies to do the same.⁶

It is beyond argument that recreational fishing is of immense importance today, not only financially, but also for the wonderful lifestyle that Maryland has to offer. Over 150 years ago, the U.S. Supreme Court held, in a case that came up from Maryland, that the shores, bottomlands and waters below the high-water mark within the State of Maryland are “held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking

fish, as well shell-fish as floating fish.” The Court went on to note that the State of Maryland may regulate the modes of fishing to prevent damaging or destroying the fishery. “This *power* results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its *duty to preserve unimpaired those public uses for which the soil is held.*”⁷ In other words, the State Legislature has a **power**, with the concurrent **duty**, to *preserve unimpaired* all of the public’s rights to use and enjoy the public waters of Maryland – known today as the Trust Power.

10th Amendment Power.

This power, known today as the Trust Power⁸ where the State legislature holds title and dominion over its public waters, was so important to the new States that they reserved the power from, and did not relinquish it to, the new federal government when the U.S. Constitution was adopted. The sovereign right of property in, and dominion over, all public waters, the soil beneath these waters, and the living resources therein, within the jurisdictional limits of each of the 13 original States, was never relinquished to the federal government. It was not on the list of the limited, enumerated powers granted to the new federal government by the Constitution. In other words, this Trust Power held by each State’s legislature is a 10th Amendment power.⁹ This is why, when you go recreationally fishing in Maryland, you need a Maryland fishing license, not a federal fishing license. When you go recreational boating in Maryland, you need to register and license your boat in Maryland, not with the federal government.

An Ancient Public Trust Right In Jeopardy.

This trust power, and the concurrent public rights preserved under this sovereign power, is of immense importance today, financially, including tax revenue, as well as simply the quality of life in this great State. This is why it is so disappointing, indeed disturbing, that the Attorney General of the State of Maryland is taking the legal position today that the public has no right of recreation in the State’s public waters. In an administrative proceeding concerning a proposed aquaculture lease before the Maryland Office of Administrative Hearings, the Attorney General took the legal position that “On

Maryland's waters . . . Maryland law does not recognize a right to recreate." The Attorney General dismissed the public right to recreationally use the tide waters in question. The parties claim, he noted, that they "all own boats and navigate over the proposed leases, sometimes at night, and that they fish, jet ski, water ski, wake surf, and engage in other recreational activities. . . . Essentially they assert a right to recreate anywhere they would like on Chincoteague Bay. As stated, there is no right to recreate." ¹⁰ The only citation noted in support of his argument is another administrative hearing. ¹¹ No Circuit Court in the State, nor the Court of Special Appeals, nor the Court of Appeals of Maryland, has ever held such a holding.

Under what is now known as the Public Trust Doctrine, as it has been developed in Maryland since colonial times, and as is well established in every State of the Union, the Attorney General, along with the Governor and the State Legislature, are the trustees who are charged with the "*duty to preserve unimpaired those public uses for which the waters and soil is held.*" ¹² The Attorney General has the duty, under Maryland's well-established Public Trust Doctrine, to preserve unimpaired the public's trust rights, not to proclaim – without any Maryland court authority whatsoever – that they don't exist.

Some Questions:

If Marylanders do not have the right to use Maryland's public waters for recreation, just exactly what are they doing out on the waters in their sail boats, fishing boats, jet skis, and about every other imaginable water craft? What are they doing while strolling along the public beaches? Why are they buying recreational fishing licenses when they have no right to recreationally fish? Why is the Department of Natural Resources instructed by the Legislature to develop public recreational facilities for Chesapeake Bay and other public waters, and to assist other State agencies to do the same – if the citizens of Maryland have no right to recreationally enjoy Maryland's waters?

Conclusion.

The right to use and enjoy Maryland's waters for recreational purposes is an ancient right. It is a right that flows from the people; it is **not** a right bestowed upon the people by the government. The

right to use and enjoy Maryland's waters for recreational purposes is part and parcel of the Public Trust Doctrine's collection of rights for the people to use Maryland's waters for commerce, navigation, fishing, bathing – all lawful purposes. It is a right preserved by the people of Maryland and not relinquished to the federal government. To use and enjoy the waters of Maryland for recreational purposes is one of the primary blessings of living in this State.

For these reasons we respectfully request this Legislature to adopt and pass HOUSE BILL _____, concerning the public's traditional rights to use and enjoy Maryland's public waters for recreational purposes

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NOTES

1. “Saving always unto ourselves, Our heirs and Successors, and to all the Subjects (of our Kingdome of England and Ireland) of Ourselves, Our Heirs and Successors, free liberty of fishing for Sea-fish, as well in the Sea, Bayes, Inletts and navigable Rivers, as in the Harbours, Bayes, and Creekes of the Province aforesaid, and the privileges of salting and drying their fish on the shore of the said province, and for the same cause, to cut and take underwood, or twiggs there growing, and to build Cottages and Shedds necessary in this behalf, as they heretofore have, or might reasonably have used; . . .”. *Charter of Maryland, King Charles, June 20, 1632, page 17.*
2. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).
3. *Angell on Tide Waters* at 192.
4. Maryland Declaration of Rights, Article 5(a)(1): “That the Inhabitants of Maryland are entitled to the Common Law of England, . . . “.See also *Arnold v. Mundy*, 6 N.J.L. 1, 95 (1821)(Rossell, J. concurring opinion), as discussed in *The Public Trust Doctrine in Motion*, Slade, David, at 52. See also Maryland Declaration of Rights, Article 45. “This enumeration of Rights shall not be construed to impair or deny others retained by the People.”
5. EXECUTIVE ORDER 01.01.2007.02. “WHEREAS, The Chesapeake Bay is a national treasure and the deepest wellspring of Maryland’s history, economy, recreational life, and character . . .”.
6. NATURAL RESOURCES
TITLE 8. WATERS
SUBTITLE 2. CONSERVATION AND MANAGEMENT OF STATE WATERS --
IN GENERAL
Md. NATURAL RESOURCES Code Ann. § 8-202 (2012)
§ 8-202. Management and development of Chesapeake Bay and other tidal waters;
authority to acquire and maintain vessels and equipment; additional powers
(a) Management and development of Chesapeake Bay and other tidal waters. --
The Department shall be responsible for planning, development,
management, and conservation of the Chesapeake Bay and any other tidal

waters, including their shoreline and bottom, and any resources associated with these waters. Also, the -Department may:

- (1) Plan and develop public recreational facilities in or on the waters of the Chesapeake Bay and other tidal waters;
- (2) Assist other State units to plan public recreational facilities for the Chesapeake Bay and other tidal waters;

7. *Smith v. State of Maryland*, 59 U.S. 71, 74-75 (1855). Emphasis added.
8. See, *The Public Trust Doctrine In Motion*, Slade, David, at Chapter II, 47 -78.
9. Maryland Declaration of Rights, Article 3. “The powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively, or to the people thereof. . . .”

“First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively.” *Pollard v. Hagan*, 44 U.S. 212, 230 (1845).

See also *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891)(“[i]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States ...”); *State v. Gerbing*, 47 So. 353, 355 (Florida, 1908)(“The original 13 states, that formed the federal Union ..., were distinct and independent sovereignties, and as such severally owned and held in trust for the whole people ... the navigable waters in the states and the lands thereunder, including the shore or land between the high and low water marks. Proprietary rights in the lands of this character within the states were not passed to the United States by the federal constitution ... and no power to dispose of such lands was delegated to the United States. Therefor all proprietary rights in and power to dispose of lands under navigable waters in the states, including the shore between the high and low water marks, were reserved to the states severally or to the people thereof.”); *Cinque Bambini Partnership v. State*, 491 So.2d 508, 517 (Miss. 1986)(“[T]he original states withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution.”); *Corfield v. Coryell*, 4 Wash. (Cir. Ct) R. 378 - 384, as discussed in *Angell on Tide Waters*, 170 (“ . . . the power of the State governments to pass laws to regulate the fisheries within their respective limits remains as it stood before the [U.S.] constitution was adopted.); “ . . . a right that the states have never relinquished, the

sovereign right of property in, and dominion over, all tide waters and the soil under them, within their jurisdictional limits.” *Angell*, at 86, citing *Wilson v. Black Bird Creek Co.*, 2 Peters (US) R. 245, and *Piscataqua Bridge Co. V. New Hampshire Bridge Co.*, 7 New Hamp. R. 7. See also *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 474 (1988).

10. *Tunis et al v. Department of Natural Resources*, OAH case number DNR-FSA 092-12-38826 (2012).
11. *Weschler v. Department of Natural Resources*, OAH case number DNR-FSA-089-08-01604 (2008).
12. *Smith v. State of Maryland*, 59 U.S. 71, 74-75 (1855). Emphasis added.