

Delaware Navigability Report

Summary

Delaware's right of passage on waterways turns on a state test of navigability that requires usability as a highway for commerce. The Delaware Administrative Code has defined such usability broadly to include recreational transport. Where navigable, the public may boat and fish.

State Test of Navigability

The Delaware Administrative Code defines "navigable water" as a "waterway capable of having been or being used for transport of useful commerce, including waterways which become navigable as the result of alteration such as dredging."¹ While a Delaware had court expressly rejected a pleasure boating test,² Delaware regulations interpreted the "transport of useful commerce" to include "the transportation of goods or persons by water including, but not limited to, recreational transport, such as canoeing, rafting, sailing, tubing, water-skiing, motor boating or windsurfing."³

Extent of Public Rights in Navigable and Non-Navigable Rivers

The owner of a streambed may not have an exclusive right in the fishery.⁴ Even where a navigable stream has a privately owned bottom, the public may both fish and boat.⁵ Since fishing is included in the navigation easement, the easement may well include other incidents of navigation, such as scouting and portaging. Indeed, the Delaware Chancery Court, citing a 1851 Delaware Supreme Court decision, found that the public has a right of navigation, including the right to fish, in extensions of navigable waters, such as those covering privately owned shores on navigable streams.⁶

Miscellaneous

Delaware claims jurisdiction over subaqueous lands (*i.e.*, submerged lands and tidelands), even if privately-owned.⁷ Additionally, Delaware requires permission and sometimes a permit for projects that make use of privately-owned subaqueous lands if the project might infringe upon

¹ 7 Del. Admin. Code § 7504-1.0 (2020); *see also* Hagan v. Delaware Anglers & Gunners Club, 655 A.2d 292, 293-94 (1995).

² Tolou v. Anderson, Civ. A. No. 1483, 1994 WL 374311 (Del. Ch. June 20, 1994). The Subaqueous Lands Act upon which the *Tolou* court based its decision has subsequently been amended and provisions regarding navigability now appear in Chapter 7504 of the Delaware Administrative Code and not Title 7 of the Delaware Code.

³ 7 Del. Admin. Code § 7504-1.0.

⁴ Hagan v. Delaware Anglers & Gunners Club, Civ. A. No. 7989, 1992 WL 82369, at *2 (Del. Ch. Apr. 22, 1992) (citing *Bickel v. Polk*, Del. Supr., 5 Harr. 325 (1851)).

⁵ *Id.*

⁶ *Id.*

⁷ *See* Del. Code Ann. Tit. 7, §§ 7203, 7205 (West 2020); *see also* 7 Del. Admin. Code § 7504-2.0

the rights of the public to make use of the waterway or if the project would connect to public waters.⁸

Additional information on boating and fishing in Delaware can be found at <https://alpha.delaware.gov/guides/recreation/>.

⁸ See 7 Del. Admin. Code §§ 7504 -2.3.1, -2.7, -2.8.