

Riparian Rights and Public Trust: Enforcement Authority



Photo Credit: Middle Peninsula Planning District Commission

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About the Author



Reeana Keenen was born and raised in Dallas, Texas, and attended the University of Texas at Austin where she earned a bachelor's degree in Public Relations. During the summer of 2017, Reeana worked for International Bridges to Justice in Geneva, Switzerland, researching foreign and international law. Reeana is the Managing Editor of the *Environmental Law & Policy Review*, Vol. 43, and she joined the Practicum to learn about environmental policy and the issues affecting Virginia's coastal communities.

About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state's coastal resources, providing education and advice to a host of Virginia's decision-makers, from government officials and legal scholars to non-profit and business leaders.

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With two nationally prominent science partners – the Virginia Institute of Marine Science and Virginia Sea Grant – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the University and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant's national network of legal and science scholars, and to elected and

appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

VCPC grounds its pedagogical goals in the law school's philosophy of the citizen lawyer. VCPC students' highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation.

INTRODUCTION

In Virginia, private landowners own the land to the Mean Low Water mark (“MLW”), whereas in many coastal states private landowners only own to the high water mark. The bottomlands channelward of the MLW mark in Virginia are governed by the Public Trust Doctrine, meaning that the state holds this land in trust for use by the public.¹ However, use conflicts can arise where private landowners own property adjacent to publicly owned property or where public easements run through private property adjacent to public beach access points.

This Paper will provide a summary of the law regarding private and public use of property on Virginia’s coast, identify the entities with jurisdictional authority to resolve issues on such property, and analyze different types of conflicts that may arise.

¹ VA. CONST. art. XI, § 1.

I. SUMMARY OF THE LAW REGARDING PRIVATE AND PUBLIC USE OF PROPERTY

A. The Public Trust Doctrine

According to the Public Trust Doctrine, “lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce.”² Put more simply, states have a responsibility to preserve and protect public lands for the use of their citizens.³ This doctrine is rooted in both federal and state common law, as well as state and federal constitutional law.⁴

Generally, states hold title to the lands beneath navigable waters, meaning the bottomlands are subject to the public trust doctrine.⁵ These lands must be held “in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction of private parties.”⁶ In Virginia, the rights of landowners extend to the MLW mark,⁷ but the Virginia Marine Resources Commission may grant easements or leases over the bottomlands.⁸ The MLW mark is “[t]he average of all the low water heights.”⁹ It is also important to consider whether riparian landowners hold title under a king’s grant. A king’s grant, sometimes called a king’s patent, crown grant, or crown patent is a grant from the British Crown to a private individual.¹⁰ As discussed in Section II(B)(2)(a) of this Paper, Virginia case law has found within navigable waters, a king’s grant may convey exclusive fishing rights, as well as ownership of submerged lands.¹¹

The confluence of the Public Trust Doctrine and riparian owners’ rights up to the MLW mark present endless potential for use conflicts both on the land and in the water. To understand the legal interests at stake in each conflict, it is first necessary to have an understanding of the basic legal principles at work. Nuisance, trespass, and negligence law help to define these competing legal interests.

² Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 457 (1892).

³ See VA. CONST. art. XI.

⁴ J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 La. L. R. 69, 79 (2012).

⁵ See VA. CODE ANN. § 28.2-1200 (1998) (bottomlands are owned by the Commonwealth, but may be used by the people of the state for the purposes of “fishing, fowling, hunting, and taking and catching oysters and other shellfish”).

⁶ Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. Land Use & Envtl. L. 395, 403 (2011) (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892)).

⁷ VA. CODE ANN. § 28.2-1202 (2014).

⁸ VA. CODE ANN. § 28.2-1208 (2009).

⁹ U.S. Dep’t of Comm., Tide and Current Glossary 15 (2000), <https://tidesandcurrents.noaa.gov/publications/glossary2.pdf>.

¹⁰ James W. Jennings and Erin B. Ashwell, *English Common Law Grants under Virginia Law: Rivers, Tides, and the Takings Clause*, 5 SEA GRANT L. & POL’Y J. 29, 32 (2013).

¹¹ See *infra* notes 103-04 and accompanying text.

B. Nuisance

Nuisance, very generally, is “the use of one property to the injury of another.”¹² Nuisance occurs when the owner or occupant of a property is harmed or barred from using their own property because of someone else’s use of another property.¹³ There are two types of nuisance in tort law—public nuisance and private nuisance. A nuisance is deemed to be public if there is “an unreasonable interference with a right common to the general public.”¹⁴ This type of nuisance includes “interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”¹⁵ Some examples of public nuisances include: water pollution,¹⁶ loud noises,¹⁷ and prostitution houses.¹⁸ The Virginia Supreme Court, in *Virginia Beach v. Murphy*, described a public nuisance by noting:

If the annoyance is one that is common to the public generally, then it is a public nuisance. . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence.¹⁹

On the other hand, a private nuisance is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”²⁰ Virginia case law has provided three specific examples of instances that may constitute a private nuisance: (1) diminishing the value of someone else’s property; (2) continuously interfering with a landowner’s control or enjoyment of his property; and (3) causing the landowner disturbance or annoyance when he uses his property.²¹ Virginia courts have held that invasion by coal dust and noise from a coal mine;²² hitching noises from tractor trailers twenty-four hours a day, every day of the year;²³ and soliciting private residences for the sale of goods²⁴ are all private nuisances.

C. Trespass

The law of trespass protects property rights in a literal, conventional sense; it protects an owner’s interest in exclusive possession of his or her land.²⁵ Trespass is similar to nuisance, but rather than merely an interference, it requires actual entry onto the land.²⁶ A good means of distinguishing nuisance and trespass is that nuisance is an interference with the right of enjoyment

¹² *Nuisance*, BOUVIER LAW DICTIONARY (2012).

¹³ *Id.*

¹⁴ Restatement (Second) of Torts § 821B (1979).

¹⁵ *Id.*

¹⁶ *New York v. New Jersey*, 256 U.S. 296, 313 (1921).

¹⁷ *See* *Cty. of Va. Beach v. Murphy*, 239 Va. 353 (1990).

¹⁸ VA. CODE ANN. § 48-7 (2005).

¹⁹ *Cty. of Va. Beach*, 239 Va. at 356.

²⁰ Restatement (Second) of Torts § 821B (1979).

²¹ *Va. Railway Co. v. London*, 114 Va. 334 (1912), *see*, *Bowers v. Westvaco Corp.*, 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992).

²² *Nat’l Energy Corp. v. O’Quinn*, 223 Va. 83 (1982).

²³ *Bowers*, 244 Va. 139.

²⁴ *White v. Culpeper*, 172 Va. 630 (1939).

²⁵ *E.g. Kurpiel v. Hicks*, 284 Va. 347, 353 (2012) (citing *Tate v. Ogg*, 170 Va. 95, 99 (1938)).

²⁶ *Id.* at 353–54 (citing *Cooper v. Horn*, 248 Va. 417, 423 (1994)).

of land, whereas trespass is an invasion on the possession of land.²⁷ Trespass can be intentional²⁸ or reckless or negligent,²⁹ but cannot be accidental.³⁰ For example, if “A, against B’s will, forcibly carries B upon the land of C [,] A is a trespasser; B is not.”³¹ In addition to common law trespasses, Title 18.2, Article 5 of the Virginia Code forbids certain types of trespasses: one cannot enter the land of another after being forbidden from doing so,³² allow certain animals to run at large,³³ or hunt, fish, or trap on the land of another without his or her consent.³⁴

D. Negligence

A distinct legal claim is negligence, which can be related to both trespass and nuisance. A negligence claim is proven when five elements are met: (1) a duty to act in a certain way; (2) a breach of that duty; (3) proximate cause; (4) but-for cause; and (5) a harm.³⁵

Typically, the law imposes a “reasonable person” standard upon all people—everyone has a duty to behave as a reasonable person would under like circumstances.³⁶ A reasonable person considers the foreseeable risks and weighs them against the utility of the activity he intends to do.³⁷ However, this duty arises only with affirmative actions; usually, a person cannot be held liable for a failure to act, even if doing nothing causes harm to someone else.³⁸ There are also particular duties that are placed upon owners of land. As a general rule, the owner of land owes no duty to trespassers.³⁹ However, if the trespasser is a minor, the landowner is required to warn him of any dangers on the property.⁴⁰ In general, in Virginia, landowners owe no duty of care to anyone coming onto their land, with or without permission, for recreational purposes or to pass through

²⁷ *Whitehall Constr. Co. v. Washington Suburban Sanitary Com.*, 165 F. Supp. 730, 734 (D. Md. 1958).

²⁸ Restatement (Second) of Torts § 158 (1965). (“One is subject to liability to another for trespass . . . if he intentionally (a) enters land in the possession of another . . . , (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.”).

²⁹ *Id.* at § 165 (“One who recklessly or negligently . . . enters land in the possession of another . . . is subject to liability to the possessor if . . . his presence . . . causes harm to the land [or] to the possessor . . .”).

³⁰ *Id.* at § 166 (“[A]n unintentional and non-negligent entry on land in the possession of another . . . does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor . . .”).

³¹ *Id.* at § 158.

³² VA. CODE ANN. § 18.2-119 (2011).

³³ VA. CODE ANN. § 18.2-121 (2004).

³⁴ VA. CODE ANN. § 18.2-132 (1975).

³⁵ Bouvier Law Dictionary defines negligence as “[a] breach of a legal duty that harms another. Negligence is the tort of failing to perform a legal duty, which causes a distinct injury to another person, or to another person’s property, or to another person’s legal interests.” *Negligence*, BOUVIER LAW DICTIONARY.

³⁶ Restatement (Second) of Torts § 283 (1965).

³⁷ See *In re City of New York*, 475 F. Supp. 2d 235, 243 (E.D.N.Y. 2007) (positing that “the Hand Formula reflects a rational method of determining the reasonableness of the conduct of a party who foresees a risk of injury to another to whom he owes a duty of care.”). For the Hand Formula, see, *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

³⁸ See *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (holding that the law imposes no legal duty on a person to save another from a dangerous situation unless he was legally responsible for putting the other person in the dangerous situation in the first place).

³⁹ Restatement (Second) of Torts § 333 (1965).

⁴⁰ *Id.*; see also *Keffe v. Milwaukee & St. Paul R.R. Co.*, 21 Minn. 207 (1875) (holding a defendant liable for injuries to a 7-year-old sustained when he played on an unlocked, unguarded railroad turntable because the Railroad knew the turntable was dangerous to children).

the property to get to another property.⁴¹ Landowners do owe particular duties to social guests and to business guests if the landowner knows of dangerous conditions on the property.⁴² According to Title 29.1 Article 509 of the Virginia Code, however, when a landowner grants permission for someone to come onto his land, he does not thereby certify that the premise is safe or make said person an invitee or licensee to whom a duty is owed.⁴³ Similarly, a landowner who grants an easement or license to the Commonwealth, agencies thereof, or a locality, is immune from liability to any member of the public arising from that member's use of the easement.⁴⁴

There are two types of causation that a plaintiff must prove to have a successful negligence claim: but-for causation and proximate causation. But-for causation means that the harm would not have occurred if the defendant had used due care; "but for" the defendant's negligence, the plaintiff would not have been hurt.⁴⁵ Proximate cause, on the other hand, means the defendant's conduct was the legal cause of the harm that occurred.

The actor's negligent conduct is the *legal cause* of harm to another if

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.⁴⁶

Proving the legal cause of harm requires some element of foreseeability—was the harm that occurred foreseeable from the actions the defendant took? "To impose liability upon one person for damages to another, it must be shown that the negligent conduct was a necessary physical antecedent to the damages."⁴⁷

E. Local Ordinances

Additionally, these legal concepts may also be incorporated into local ordinances for enforcement by the locality or state. The power of a locality to criminalize these behaviors is sometimes limited. Regarding nuisance,

If an ordinance makes criminal that conduct which is a public nuisance, it is a presumptively valid exercise of the locality's police power. On the other hand, if the prohibited conduct is merely a private nuisance, it cannot be made criminal because a municipality has no authority under its police power to punish conduct which is a private nuisance.⁴⁸

⁴¹ VA. CODE ANN. § 29.1-509(B) (2017).

⁴² See Restatement (Second) of Torts §§ 332, 341 & 343 (1965).

⁴³ VA. CODE ANN. § 29.1-509(C) (2017).

⁴⁴ *Id.* at (D).

⁴⁵ Restatement (Second) of Torts § 430 (1965).

⁴⁶ *Id.* at § 431 (emphasis added).

⁴⁷ *Beale v. Jones*, 210 Va. 519, 511 (1970) (citing *Wells v. Whitaker*, 151 S.E.2d 422, 428 (Va. 1966)).

⁴⁸ *Cty. of Va. Beach*, 239 Va. at 355. The test for a public nuisance is not the number of people harmed, but potential of the annoyance to violate the rights of the public. *Nolan v. New Britain*, 69 Conn. 668, 678 (1897).

For an example of these legal principles applied in local code, the Gloucester County Code prohibits public nuisance⁴⁹ and excessive noise.⁵⁰ It also lists several non-exclusive examples of nuisances, such as, maintaining or keeping any substance that is dangerous to public health or safety; any buildings or other structures that are kept or maintained in an unsafe condition, or in a way that is dangerous, unhealthy, injurious, or annoying to the public; and any trash or other articles thrown or placed on any street, sidewalk, or other public places that cause any injury or annoyance to the public.⁵¹ The Gloucester County Code also provides restrictions on boating and watercraft and explicitly authorizes “every game warden, marine resources commission inspector, and every other law enforcement officer of this State and its subdivisions and of the United States Government” to enforce the provisions of Section 21, watercraft and water safety ordinances.⁵²

Gloucester is not the only locality in Virginia to have such provisions in its Code. For example, the City of Virginia Beach,⁵³ Middlesex County,⁵⁴ and Mathews County⁵⁵ each have their own code provisions that outline boating, noise, and other restrictions.

The common law legal concepts of the Public Trust Doctrine, nuisance, trespass, and negligence, as well as the local ordinances of each locality in Virginia, may play a role when user conflicts arise in the water and on waterfront properties. Before outlining these different conflicts and the different legal interests involved, it is important to first have an understanding of the enforcement agencies designated to resolve these conflicts.

II. WHEN CONFLICTS ARISE

A. Enforcement Agencies

The following law enforcement agencies generally have jurisdiction over property and use conflicts that may arise on the waters and coasts of Virginia. It is important to note that in some situations there may be concurrent jurisdiction among multiple enforcement agencies. For example, as discussed below, local law enforcement, the Department of State Police, the Virginia Marine Police, and the Department of Game and Inland Fisheries Conservation Police all have the authority to enforce the criminal laws of the Commonwealth. In such situations, the ultimate enforcement agency may be the one that is better equipped with the resources to handle the conflict or, simply, the first one that is at the scene.⁵⁶ Additionally, while some enforcement agencies may have primary responsibility for an issue, other enforcement agencies may assist with that issue during the course of their regular duties.⁵⁷

⁴⁹ GLOUCESTER COUNTY, VA., CODE § 12-2 (1987), https://library.municode.com/va/gloucester_county/codes/code_of_ordinances?nodeId=10843.

⁵⁰ *Id.* at § 11-3 (2017).

⁵¹ *Id.* at § 12-3 (1987).

⁵² *Id.* at § 21.10 (1983).

⁵³ VIRGINIA BEACH, VA., CODE ch. 6, https://library.municode.com/va/virginia_beach/codes/code_of_ordinances?nodeId=CO_CH6BEBOWA.

⁵⁴ *See*, MIDDLESEX COUNTY, VA., CODE §§ 43, 44, http://www.co.middlesex.va.us/index_ordinances.html.

⁵⁵ *See*, MATHEWS COUNTY, VA., CODE ch. 15, <https://ecode360.com/MA1886>.

⁵⁶ Email correspondence with Law Enforcement Divisions of DGIF and VMRC (on file with author).

⁵⁷ *Id.*

1. Local Law Enforcement – Sheriff’s Office and Local Police Force

At the local level, there may be two law enforcement agencies with jurisdiction in the locality – the sheriff’s office and the local police force. The sheriff is a locally-elected constitutional officer responsible for jail administration, service to the courts, and law enforcement.⁵⁸ The sheriff’s office has primary law enforcement responsibility for counties without a local police force.⁵⁹ For localities with a police force, the sheriff’s office primary responsibilities is jail administration and service to the courts. Where established,⁶⁰ the local police force “is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.”⁶¹ In addition to having jurisdiction within the physical boundaries of the locality, the local police force has jurisdiction over property owned by the locality that is physically located outside of its borders.⁶² The police power includes the power to bar individuals from trespassing on a property per a request for assistance from the property owner and is implied in the police’s express powers.⁶³

In certain specific instances, local law enforcement powers are not limited to land. Localities have the power, granted by the Commonwealth, to enact ordinances paralleling state laws regarding the operation of watercraft and the conduct of people operating them, including ordinances that provide for enforcement and penalties.⁶⁴ For example, the Gloucester County Code provides for enforcement of boating ordinances by all law enforcement officers of the state and its political subdivisions, as well as the federal government – meaning that officers within these entities would actually have power to go out on the water and enforce the ordinances.⁶⁵

2. Department of State Police

The Department of State Police provides statewide law enforcement services within the Commonwealth, as well as emergency preparedness planning, training, and promotion.⁶⁶ State police functions center on highway patrol, the police school, the state police communication system, supervision of inspection stations, a variety of tasks associated with motor vehicles, and the registration of machine guns.⁶⁷ State police also have authority to enforce all criminal laws of the Commonwealth and investigate aircraft accidents.⁶⁸ The state police department’s Bureau of Criminal Investigation conducts investigations for matters referred by the Governor, as well as requests to investigate potential felonies from the Attorney General, local law enforcement, or

⁵⁸ VA. CODE ANN. § 15.2-1609 (1997); Virginia Sheriffs’ Association, *Sheriffs’ Offices Responsibilities*, <https://vasheriff.org/sheriffs-resources/sheriffs-offices-responsibilities/>.

⁵⁹ Virginia Sheriffs’ Association, *supra* note 58.

⁶⁰ VA. CODE ANN. §§ 15.2-1700 to -1702.

⁶¹ VA. CODE ANN. § 15.2-1704 (2010).

⁶² VA. CODE ANN. § 15.2-1725 (1997).

⁶³ *Collins v. Commonwealth*, 517 S.E.2d 277 (Va. Ct. App. 1999).

⁶⁴ VA. CODE ANN. § 19.1-744 (2001).

⁶⁵ GLOUCESTER COUNTY, VA., CODE § 21.10.

⁶⁶ Virginia Department of State Police, *2014-16 Strategic Plan 1*, <http://www.vsp.state.va.us/downloads/VSP%20Strategic%20Plan%202014-2016.pdf>.

⁶⁷ VA. CODE ANN. § 52-4 (1989).

⁶⁸ VA. CODE ANN. § 52-8 (1968).

Commonwealth's attorneys.⁶⁹ The state police department also investigates and enforces laws related to drugs and drug paraphernalia.⁷⁰

3. Virginia Marine Police

The Virginia Marine Police (“VMP”) were created as a division of the Virginia Marine Resources Commission to protect tidal natural resources, first and foremost.⁷¹ The VMP have the power to enforce boating laws on tidal waters, including the power to stop, board, and inspect any vessel subject to the provisions of the Virginia Code.⁷² The VMP conduct search and rescue operations, enforce boating laws, respond to emergencies on the water, and investigate accidents and other criminal activity.⁷³ VMP also work in conjunction with the United States Coast Guard (USCG) to enforce federally designated safety and security zones.⁷⁴ In addition to having the authority to enforce all criminal laws of the Commonwealth,⁷⁵ the VMP also have unique jurisdiction to enforce state and federal commercial and recreational fishery laws and regulations.⁷⁶

3. Department of Game & Inland Fisheries Conservation Police

The Department of Game & Inland Fisheries (DGIF) created its own police force called the Conservation Police (“CP” or “game wardens”), per its express authority from the Virginia Code.⁷⁷ CP have jurisdiction throughout the Commonwealth to enforce hunting, inland fishing, and trapping laws.⁷⁸ Additionally, like the VMP, regular CP have the same authority as sheriffs and other law enforcement officers to enforce all criminal laws of the Commonwealth; and special CP officers have general police power while performing duties on properties owned or controlled by the DGIF Board.⁷⁹ The CP also have the authority to enforce boating laws⁸⁰ and stop, board, and inspect vessels subject to the boating laws.⁸¹ The primary goal of the CP is to protect Virginia's natural resources.⁸² The CP also frequently provide resources and expertise to local law enforcement.⁸³

4. United States Coast Guard

In addition to state and local law enforcement agencies, federal agencies such as the USCG may also resolve issues that arise on the water. The USCG is a federal law enforcement body that has jurisdiction on the “high seas, outer continental shelf, and inward from the U.S. Exclusive

⁶⁹ VA. CODE ANN. § 52-8.1 (1980).

⁷⁰ VA. CODE ANN. § 52-8.1:1 (2000).

⁷¹ Virginia Marine Resources Commission, *What We Do*, <http://www.mrc.virginia.gov/mp/leoverview.shtm>.

⁷² VA. CODE ANN. § 29.1-745 (2015).

⁷³ Virginia Marine Resources Commission, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ VA. CODE ANN. § 28.2-106(B) (2002).

⁷⁶ *Id.*

⁷⁷ VA. CODE ANN. § 29.1-200 (2009).

⁷⁸ *Id.* at § 29.1-203 (2003).

⁷⁹ *Id.* at § 29.1-205 (2007).

⁸⁰ VA. CODE ANN. tit. 29, ch. 7.

⁸¹ *Id.* at § 29.1-745 (1998).

⁸² Dep't of Game & Inland Fisheries, *Virginia Conservation Police*, <https://www.dgif.virginia.gov/conservation-police/>.

⁸³ *Id.*

Economic Zone to inland waters.”⁸⁴ The USCG enforces international and federal laws regarding marine resource regulation, border safety, immigration, and illegal drug activity.⁸⁵ Not only does the USCG prevent crimes and enforce criminal laws and regulations, the USCG also acts as a first responder, in that it serves search and rescue functions, provides aide to distressed boaters, and responds to environmental disasters.⁸⁶

All of the above law enforcement agencies have jurisdiction to enforce laws on the water, and most have the power to enforce laws on the lands of the Commonwealth to varying degrees. Thus, each of these enforcement agencies can assist in certain situations when conflicts arise in the water or on lands within their specified jurisdiction.

B. Conflicts on the Water

Virginia’s Public Trust Doctrine extends to the MLW mark.⁸⁷ The public, therefore, has the right to use the waters beyond the MLW mark.⁸⁸ However, the public’s right of use is not completely unrestricted. Conflicts may arise when both riparian owners and the public exercise their rights in the water and on public and private waterfront land.

1. On Navigable Waters

Two conflicts that may arise in the water include issues between boaters and oyster farmers, and issues between multiple boaters.

a) Boaters and Oyster Farmers

As oyster sales increase, the aquaculture industry in Virginia remains strong, and people continue to lease the bottomlands to grow their own oysters, whether to sell or for personal consumption.⁸⁹ As the tides ebb and flow, oyster cages may become closer or farther from the water’s surface. When the tide is low and the water is shallow, the cages may protrude from or lie just below the water’s surface, and may have the potential to cause damage to boats navigating the waters.⁹⁰ Here, the Commonwealth must balance the interests of different members of the public with other competing interests.

Suppose, for example, Farmer leases a one-acre tract of bottomland in the Bay on which she raises oysters to sell. To avoid damage to her oysters and comply with state regulations,⁹¹

⁸⁴ United States Coast Guard, *Maritime Law Enforcement*, U.S. DEP’T OF HOMELAND SECURITY (last visited Dec. 1, 2017), http://www.overview.uscg.mil/Missions/maritime_law/.

⁸⁵ *Id.*

⁸⁶ United States Coast Guard, *Maritime Responses*, U.S. DEP’T OF HOMELAND SECURITY (last visited Dec. 1, 2017), http://www.overview.uscg.mil/Missions/maritime_response/.

⁸⁷ VA. CODE ANN. § 28.2-1208 (2009).

⁸⁸ *Cent. R.R. Co.*, 146 U.S. at 457.

⁸⁹ Tamara Dietrich, *Virginia still tops in hard clam, oyster farming*, DAILY PRESS, July 31, 2017, <http://www.dailypress.com/news/science/dp-nws-clam-oyster-aquaculture-20170731-story.html>.

⁹⁰ See, e.g., Pamela D’Angelo, *State Regulators Try to Solve Oyster Farming Conflict in Virginia Beach*, WVTF, Sept. 26, 2016, <http://wvtf.org/post/state-regulators-try-solve-oyster-farming-conflict-virginia-beach>.

⁹¹ “When leased oyster planting ground is marked, the corners and boundary lines or the active works areas within the lease shall be marked with markers or buoys and shall be marked in a manner that does not create any unnecessary restriction to navigation”. 4 VA. ADMIN. CODE § 20-290-30.

Farmer has placed markers in the water to section off her tract. One day, Boater speeds through the water, ignoring the markers Farmer has set up. Boater hits some of Farmer's cages, causing damage to both the boat and the cages. Both Farmer and Boater have important interests at stake in this situation. Boater, as a member of the public, has an interest in being able to use the waters of the Commonwealth, per the Public Trust Doctrine.⁹² Boater also has an interest in fixing the damage to his boat. On the other hand, Farmer has an interest in using the waters of the Commonwealth for growing oysters, per her lease.⁹³ Farmer has an interest in using the tract in accordance with her lease, and she has a property interest in the cages and the oysters she raises.⁹⁴

Note that the Virginia Code states that the DGIF Board must adopt measures to ensure the prevention of property damage and collisions in the water.⁹⁵ The Board is responsible for adopting and enforcing these measures.⁹⁶ In fact, the Virginia Code provides for regulations against reckless and other improper boating practices.⁹⁷ Further, localities often adopt measures restricting the practices of boaters by imposing speed limits and no wake zones, among other measures.

In this type of conflict, where a boat collides with oyster cages, the VMP, CP, state police, and local law enforcement have jurisdiction to resolve the conflict and enforce state and local laws and regulations. The CP and VMP are able to ensure that Farmer was complying with the terms of her lease and with oyster farming regulations, as well as to impose penalties on Boater for boating at excessive or improper speed or violating any possible no wake zone limitations. State and local law enforcement also have jurisdiction in these areas, but, due to resources, may be more restricted than the VMP or CP in enforcing issues out on the water.

b) Between Boaters

Another type of conflict that could arise in navigable waters is between boaters. Boaters are restricted in the manner they operate their boats on navigable waters. Criminal penalties may be imposed for boaters who operate their boats in a reckless or improper way, and those who operate boats while intoxicated are also subject to criminal penalties.⁹⁸

Imagine that Boater A and his family are out on the water during a storm. Boater A does his best to steer clear of other watercraft and breakers that could damage his boat, but the waves are strong and visibility is low. Unbeknownst to Boater A, Boater B, whose vessel is smaller than that of A's, races dangerously close to A's boat in an attempt to get back to shore as fast as possible. In doing so, Boater B crashes into Boater A, causing one of A's family members to fall overboard and both boats to be damaged. In this case, both A and B have an interest in getting back to shore

⁹² *Cent. R.R. Co. v.*, 146 U.S. at 457.

⁹³ *Id.*

⁹⁴ For a related example of the rights of oyster farmers whose oysters are damaged by public use of the waters, *see Grant v. United States*, 192 F.2d 482, 484-86 (4th Cir. 1951) (holding that the lease acted as a limitation on the right of the public, in this case the government, to use the navigable waters, and as such, the government was liable for the damage it caused to plaintiff's oysters).

⁹⁵ VA. CODE ANN. § 29.1-735 (1987).

⁹⁶ *Id.*

⁹⁷ *See*, e.g., VA. CODE ANN. §§ 29.1-738.01 to -738.03.

⁹⁸ *See* VA. CODE ANN. §§ 29.1-738.01 to -738.03.

safely. After the collision, both have an interest in getting the damage to their boats fixed. Boater A also has an interest in ensuring the well-being of his family member who was thrown overboard.

Here, the USCG, acting as a first responder, can conduct the search and rescue for A's overboard family member as well as bring everyone else safely back to shore. VMP, CP, or local law enforcement with a boating/marine patrol unit could respond to the accident. Whichever entity – VMP, CP, or local law enforcement – responds would be responsible for seeing any resulting charges through the court process. Additionally, A and B can pursue civil remedies to try to get the damages to their boats fixed, and A may try to pursue a civil suit against B for any injuries his family member sustained in falling overboard as a result of the crash.

The above conflicts have so far only dealt with conflicts that occur in the open waters, but conflicts also arise in the water above the MLW mark at high tide. In these conflicts, similar interests are at stake, and parties can look to state, local, or federal agencies for enforcement.

2. Above the Mean Low Water Mark

Waterfront property owners have title to property landward of the MLW mark.⁹⁹ Ownership of waterfront land entitles the property owner to certain riparian rights, such as the right to wharf out to navigable water.¹⁰⁰ However, such wharf cannot be for a commercial purpose, obstruct navigation, or injure the private rights of other people.¹⁰¹ Conflicts may arise where a riparian owner wishes to construct a structure on their land that extends into the water for purposes of accessing navigable water. For example, a waterfront owner who also owns boats and other watercraft may wish to build a large wharf to moor her boats.¹⁰² Thus, the riparian owner's rights may conflict with the public's rights. The below situation outlines the legal interests of each party when these rights conflict.

a) Recreational Users & Riparian Owners

Suppose Landowner A lives on and owns riverfront property along a navigable water. Landowner A's property is adjacent to a public beach where there is frequent activity with kayakers and beachgoers who access the beach via a public access point. Now suppose that one day, as kayakers return from an excursion, they paddle at high tide close to the shore to get to the public access point, passing over land that is above the MLW mark on A's property. Here, A has an interest in excluding people from her property, while the kayakers have an interest in using the public access point and navigating in the waters of the Commonwealth.

Generally, the public has a right to float in navigable waters, whether the submerged lands beneath them are held in public trust by the Commonwealth or privately owned pursuant to a king's

⁹⁹ See VA. CODE ANN. § 28.2-1202 (2014).

¹⁰⁰ See *Taylor v. Commonwealth*, 102 Va. 759, 880-81 (1904).

¹⁰¹ VA. CODE ANN. § 62.1-164 (1972).

¹⁰² For an example of a Virginia case dealing with this issue, see *Evelyn v. Commonwealth Marine Res. Comm'n.*, 621 S.E.2d 130 (2005) (holding that riparian owners may build without permits only structures "necessary" to access navigable waters and affirming the lower court's order to the riparian owner to remove a structure not in compliance with this rule).

grant or privately owned in fee ownership.¹⁰³ The Fourth Circuit, citing the Virginia Supreme Court, found that while it is established that the surface of navigable waters may be used by the public, the use of the submerged lands and the water's banks are a matter of state law.¹⁰⁴ Additionally, the specific actions of the kayaker are important in this hypothetical. If the kayaker on the surface of the water simply passes over Landowner A's property, this should fall under the public's right to navigation. However, if the kayaker exits the kayak to stand on the bottom, there may be an issue if the property at that point is upland of the MLW mark.

In cases of trespass, state police and local law enforcement have jurisdiction to enforce a landowner's private rights, although it is more likely that an individual would contact local law enforcement. Note also that, depending on the behavior of the kayakers, local nuisances and noise ordinances may come into play. Therefore, the language of the local ordinance should be reviewed to determine the appropriate enforcement authority. VMP and CP would also have jurisdiction to enforce any violations of state law should they be at the scene.

C. Conflicts on Land

1. Adjacent Properties & Conflicts Above the MLW Mark

Just as trespasses may occur above the MLW mark in the water, they may also occur—and may do so more frequently—above the MLW mark on land. Conflicts on the land may also give rise to other issues, such as nuisance, where no intrusion is made onto the property of the riparian owner but the riparian owner's interests are still disturbed. Such issues may arise where beachgoers use public beaches or road endings in such a way that annoys or bothers the landowner or where riparian owners live next to publicly owned and maintained land that falls into disrepair.

a) Noisy Beachgoers

One of the most common types of conflicts that occurs on waterfronts is when individuals make use of the beach. Suppose that Beachgoers go to a public beach via a public access point that is adjacent to Landowner O's plot. O's land runs parallel to a road that dead ends into a parking lot leased or owned by the locality. The parking lot shares its western border with O's land and its eastern border with the public beach that also is leased or owned and maintained by the locality. Assume Beachgoers do not step onto or park on O's land. However, every night, Beachgoers stay there until 2:00 or 3:00 a.m., drinking alcohol, buying and selling drugs, making a lot of noise, and leaving trash on the beach.

Beachgoers have an interest in making use of the public beach, although they are still bound by the laws of the Commonwealth and of the locality in doing so. O has an interest in the quiet enjoyment of his property and an interest in the exclusion of others from his property. Beachgoers

¹⁰³ A king's grant, also called a crown's grant, refers to a conveyance made by the King of England or a Royal Governor while Virginia was still a colony. The Virginia Supreme Court has found that within navigable waters, a king's grant may convey exclusive fishing rights, as well as ownership of submerged lands. *Kraft v. Burr*, 252 Va. 273 (1996).

¹⁰⁴ *Loving v. Alexander*, 745 F.2d 861, 868 (1984).

may be liable for private nuisance, for which O could implement a civil suit.¹⁰⁵ However, Beachgoers may also be in violation of parks rules, a local noise ordinance, or a criminal ordinance over which the local law enforcement entity has jurisdiction. Furthermore, depending on the particularities of the actions of Beachgoers, Beachgoers may also be guilty of public nuisance, which is an interference with a community interest for which jurisdiction lies with local law enforcement.

b) Maintenance of Publicly Owned Land

Related issues may also come up when riparian owners own land adjacent to publicly owned and maintained land. Suppose that O owns the same tract of land as in the previous example that is adjacent to a public park that has a parking lot, beach, and wharf. O is unhappy because the parking lot is dilapidated and the wharf is falling apart. Furthermore, the beach is dirty and littered with trash and drug paraphernalia. O has an interest in seeing that the adjacent properties are maintained because their appearance may affect O's property value and enjoyment of his land. Likewise, O does not want the trash and other debris on the beach to encroach upon his land. The trash on the beach also could pose a health or safety threat to O, who lives nearby, because the trash includes drug paraphernalia.

O may contact the entity that is responsible for maintaining the properties concerned and request that they be properly maintained. Although this action is not a legal remedy, it could be an effective way to get the public entity to take action. Failing this, O may be able to enforce maintenance via a writ of mandamus or on a gross negligence theory in civil court.¹⁰⁶ Where the public properties become overrun by individuals who engage in criminal activity, a noise ordinance violation, or other civil violations on the properties, O can call local law enforcement to stop the criminal activity or nuisance each time it occurs.

VI. CONCLUSION

In Virginia, the confluence of the Public Trust Doctrine and the private ownership of waterfront property to the Mean Low Water mark, with associated riparian rights, can give rise to a number of complex legal conflicts involving the competing interests of riparian owners and the public. These issues can involve nuisance, trespass, and negligence law as well as criminal laws, as espoused by local ordinances and state laws and regulations. When issues arise, general and specialized law enforcement agencies have jurisdiction to help resolve conflicts and balance the rights of both riparian owners and members of the public. These law enforcement agencies can include the Sheriff's Office, local police force, Department of State Police, Virginia Marine Police, DGIF Conservation Police, and the USCG.

In the water, when conflicts arise, such as between boaters and riparian owners, the Virginia Marine Police and DGIF Conservation Police have jurisdiction and resources to enforce the governing laws. However, state police and local law enforcement also have jurisdiction in certain instances. When conflicts arise among boaters on the water, such as when a collision

¹⁰⁵ See generally *Cty. of Va. Beach*, 239 Va. 353 (noting that private nuisances cannot be made criminal because a municipality has no authority to punish such conduct).

¹⁰⁶ See VA. CODE ANN. § 15.2-1809 (1997).

occurs, the USCG, Virginia Marine Police, and DGIF Conservation Police have the power to enforce boating laws, as well as conduct search and rescue operations.

When problems arise on land, state police and local law enforcement have jurisdiction, but just as on the water, the Virginia Marine Police and the DGIF Conservation Police also have general authority to enforce the laws and regulations of the Commonwealth. Not only can individuals resolve conflicts through criminal proceedings, civil remedies are also available for negligence, trespass, and nuisance. Both civil and criminal remedies for these issues have as their core purpose balancing the rights of the public to use the bottomlands and the navigable waters of the Commonwealth with the rights of riparian owners to use and enjoy their properties.