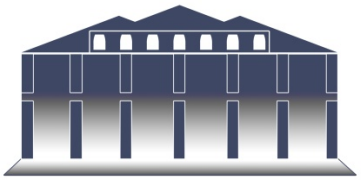
North Carolina Does Not Track Lands Submerged Under Navigable Rivers or Know the Extent of Private Claims

Final Report to the Joint Legislative Program Evaluation Oversight Committee

Report Number 2013-02

January 14, 2013



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January 14, 2013

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Representative Julia Howard, Chair, Joint Legislative Program Evaluation Oversight Committee

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Legislative Building
16 West Jones Street
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Honorable Co-Chairs:

Session Law 2012-194 directed the Program Evaluation Division to study, in conjunction with the Department of Administration, the inventory of all state-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State.

I am pleased to report that the Department of Administration cooperated with us fully during the evaluation.

Sincerely,

John W. Turcotte
Director

PROGRAM EVALUATION DIVISION
NORTH CAROLINA GENERAL ASSEMBLY

January 2013 Report No. 2013-02

North Carolina Does Not Track Lands Submerged under Navigable Rivers or Know the Extent of Private Claims

Summary

The General Assembly directed the Program Evaluation Division to study, in conjunction with the Department of Administration, the inventory of all state-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State. North Carolina gained ownership of lands submerged under navigable waters through the Declaration of Independence and victory in the Revolutionary War. Current state law prohibits the conveyance of title to submerged lands except by an act of the General Assembly, and does not allow for adverse possession of submerged lands. However, the State may have conveyed certain lands submerged under navigable rivers to private owners in the past.

The Department of Administration (DOA) is charged with managing and controlling the State's submerged lands, but its overall management approach is largely passive. DOA operates under the assumption that all lands beneath navigable rivers are sovereign lands of the State. Whereas DOA grants and tracks certain types of easements, it does not require easements for many structures built on lands submerged under navigable rivers for which it has the authority. In addition, DOA does not exercise its authority to lease or convey mineral deposits for most mining that takes place on riverbeds.

North Carolina does not have a comprehensive inventory of lands submerged under navigable rivers, so the extent to which private parties may hold title to these lands is unknown. Ten of the 12 other original colony states do not track ownership of their submerged lands. Those that do track ownership only track coastal or tidally influenced submerged lands. Between 1985 and 2004, North Carolina administered a process to resolve and map all private claims to submerged lands in 25 coastal counties at a cost of more than $4.1 million to operate the office. The State has not conducted a comparable process for lands submerged under navigable rivers in the remaining 75 counties.

To more actively manage the use of lands submerged under navigable rivers in the future and protect its ownership interest, the General Assembly could consider

- requiring DOA to improve its management and tracking of all submerged lands; and
- using the coastal submerged lands claims process as a model to resolve private ownership claims to lands submerged under navigable rivers in the remaining 75 counties.

Scope

Session Law 2012-194 directed the Program Evaluation Division to study, in conjunction with the Department of Administration, the inventory of all state-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State. This evaluation addressed the following research questions:

- What are submerged lands in North Carolina and how are they different from other state-owned lands?
- How does North Carolina track state-owned land, including submerged land under navigable rivers?
- How do states track ownership and manage lands submerged under navigable rivers?
- How could North Carolina improve management of lands submerged under navigable rivers?

To conduct this review, the Program Evaluation Division analyzed information from numerous sources including

- interviews with the Department of Administration, Department of Environment and Natural Resources, Department of Justice, legal experts, and other stakeholders;
- the inventory of state property managed by the Department of Administration;
- a survey of selected states;
- North Carolina General Statutes and case law; and
- a memo on state ownership of submerged lands from counsel to the Joint Legislative Program Evaluation Oversight Committee.

Submerged lands are different than other state-owned lands and subject to a complex body of law. Concerns have been raised that the recent *PPL Montana* United States Supreme Court case could have an impact on North Carolina's ownership of submerged lands.[1] This report addresses the legal status of submerged lands in North Carolina and how the State tracks and manages submerged lands. Though the topic of submerged lands includes both coastal waters and navigable rivers, the primary emphasis of this report is on lands submerged under navigable rivers.

[1] *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012)

Questions and Answers

1. What are submerged lands in North Carolina and how are they different from other state-owned lands?

Submerged lands are defined in North Carolina law as being "State lands which lie beneath any navigable waters within the boundaries of this State, or the Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State."[2] In North Carolina, the mean high water mark is used as the boundary line, with anything lying below the mean high water mark considered submerged land. Submerged lands can include the beds of navigable rivers as well as coastal waters.

North Carolina gained ownership of its submerged lands when the colonies took sovereign powers from King George III through the Declaration of Independence and victory in the Revolutionary War. State ownership applies to lands beneath waters that were navigable at the time of independence. The definition of navigability is a key aspect in determining submerged lands ownership.

As one of the original 13 colonies, North Carolina has the sovereign right to define navigability. Under North Carolina law, navigability for State ownership of submerged lands depends on whether the waterway could have been used for commerce and travel by useful vessels. As articulated in caselaw, "travel by useful vessels" has included one-person craft with shallow drafts and "commerce" has included floating logs one-way down a stream made navigable only due to heavy rains or melting snow.[3] Thus, based on these definitions, navigability could extend far upstream and include certain tributaries of rivers. North Carolina has 37,662 miles of rivers and streams that are classified by the Department of Environment and Natural Resources, though not all of these river miles may meet the definition of navigability. See Exhibit 1 for a map of major rivers in North Carolina.

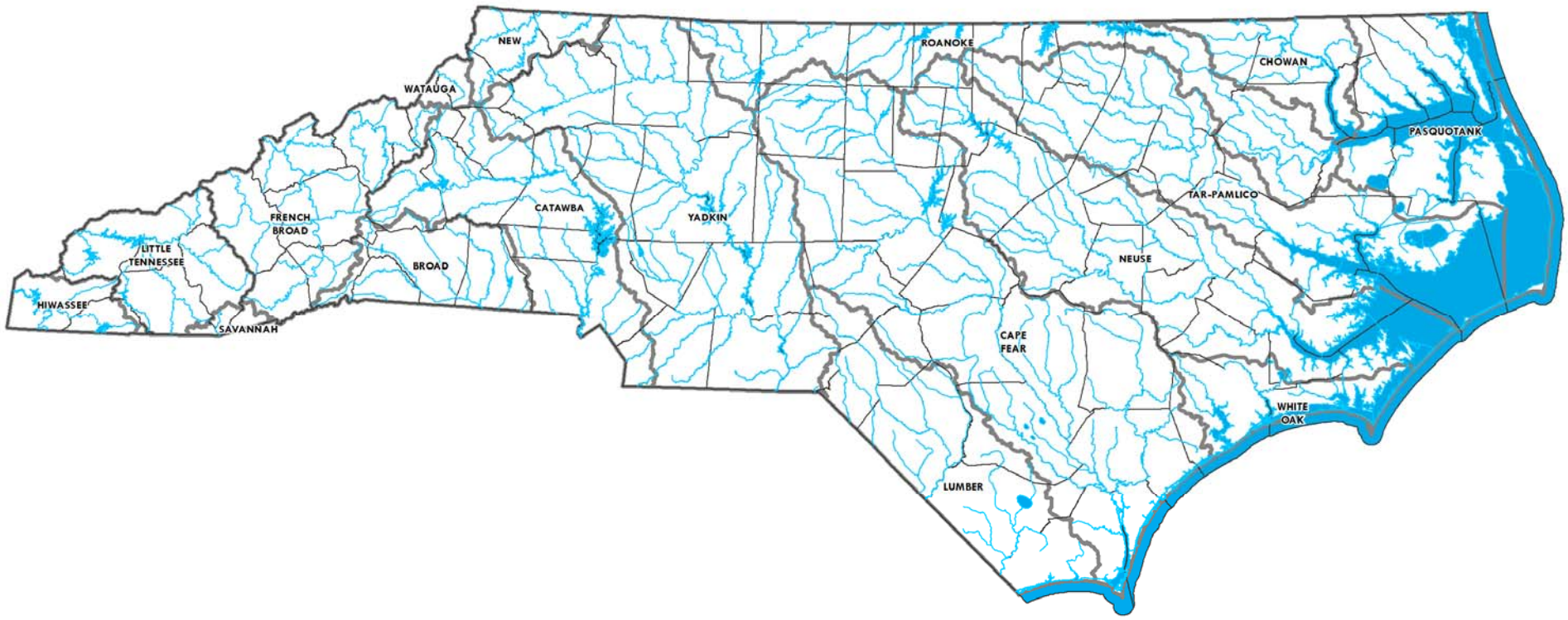
North Carolina differs from most other states, where navigability is based on the equal footing doctrine and determined by federal law. The equal footing doctrine asserts that new states must be admitted to the union on equal footing with the existing states. A new state gains title from the federal government to the lands under waters navigable at the time of statehood. For equal footing states, the definition of navigability for determining title to riverbeds is governed by federal law.[4] Because North Carolina is one of the original 13 colonies, the definition of navigability is within the purview of the State rather than determined by federal law under the equal footing doctrine. Thus, determinations of navigability in *PPL Montana* under the equal footing doctrine do not directly apply to North Carolina.

[2] N.C. Gen. Stat. § 146-64

[3] See, e.g. *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E. 2d 674 (1995) and *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895)

[4] *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 at 1227 (2012)

Exhibit 1: Major Rivers, Lakes, and Coastal Waters of North Carolina



Source: Program Evaluation Division and Information Systems Division

Unlike other state-owned lands, submerged lands cannot be adversely possessed or sold. Ordinary state lands have the potential to be adversely possessed.[5] Under N.C. Gen. Stat. § 1-35, the State will not sue any person when the person has possessed any real property for 30 years without a title or 21 years of possession under color of title.[6] However, submerged lands are treated differently because they are subject to public trust rights. N.C. Gen. Stat. § 1-45.1 states that, "title to real property held by the State and subject to public trust rights may not be acquired by adverse possession."

Under N.C. Gen. Stat. § 146-3, which was enacted in 1959, submerged lands cannot be conveyed in fee[7] by the State, though easements may be granted.[8] Any sale or transfer of submerged lands in fee today would require an act of the General Assembly to modify or notwithstand the current statute. Conveyances of submerged lands by the State to private parties occurred in the past, however. As one example, deeds for title to marshlands and open waters were issued by the State Board of Education, which was authorized to sell and convey swamplands from 1837 to 1959.

The State does not have a list of all conveyances of submerged lands that occurred in the past. Thus, the extent to which private parties may have legitimate claims to submerged lands throughout the State is unknown. In addition, it is unknown to what extent private parties may be making non-legitimate claims to submerged lands. As an example, in Wake County, the Program Evaluation Division reviewed tax records for property adjoining the Neuse River and identified 31 parcels that include some portion of the riverbed. The payment of property taxes on these parcels may indicate that private parties believe they hold title to submerged land. Although it is not possible to determine whether these examples represent legitimate private ownership of the riverbed because rivers can shift over time and the ownership history is unknown, these examples are indicative of the competing claims that could arise between the State and private parties.

Navigable waters are subject to public trust rights. State law defines public trust rights as the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.[9] These rights are held in trust by the State for the use and benefit of the people of the State. Applicability of public trust rights is based on current navigability-in-fact, not navigability at the time of statehood. As articulated in case law, North Carolina applies a "pleasure craft test" for navigability for purposes of public trust rights.[10] If a body of water is navigable by a pleasure craft, such as a canoe, kayak, or john boat, then public trust rights would apply.

[5] Adverse possession is a method of gaining title to the land of another through the actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period.
[6] Color of title is a written instrument that appears to transfer ownership of a property, but which does not, either from a want of title in the person making it or the defective mode of conveyance which is used.
[7] Fee means complete ownership of land without any claims against the title.
[8] N.C. Gen. Stat. § 146-3
[9] N.C. Gen. Stat. § 1-45.1
[10] *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d at 682 (1995)

Public trust rights are presumed to remain attached to the water above submerged lands and held by the State in trust for the public. Case law establishes that even in instances where submerged lands may have been conveyed by the State to a private party, public trust rights are presumed to remain with the State unless the deed specifically transfers away public trust rights.[11]

In sum, North Carolina gained ownership of its submerged lands by gaining sovereignty through the Declaration of Independence and the Revolutionary War. As one of the 13 original colonies, North Carolina has the sovereign right to define navigability for purposes of submerged lands ownership, which sets it apart from equal footing states. Under current law, submerged lands cannot be adversely possessed from the State and the State can no longer sell these lands. The extent to which the State conveyed submerged lands in the past is unknown.

2. How does North Carolina track state-owned land, including land submerged under navigable rivers?

The Department of Administration (DOA) has a statutory duty to prepare and keep current an inventory of all state-owned lands.[12] The inventory must show the location, acreage, description, source of title, current use of all land (including swamplands or marshlands) owned by the State or by any State agency, and the agency to which each tract is currently allocated. Certain lands are exempt from the inventory maintained by DOA, such as land owned by the Department of Transportation as right-of-way.

The State Property Office, organized under DOA, manages a database that tracks state property, including different types of buildings and land. The database includes a mapping function and is designed to record property transactions such as ownership of land assets, land dispositions, and land leases. There are 8,940 total land asset records in the database as of October 2012, representing 921,079 acres of land.

DOA does not specifically inventory or track lands submerged under navigable rivers. Submerged lands are a type of land and should be part of the inventory of all state-owned land that DOA is required to keep. However, the state property database does not specifically track ownership of submerged lands. The Program Evaluation Division identified 24 submerged land assets totaling 8,923 acres and located in four coastal counties: Brunswick, Carteret, New Hanover, and Onslow. When asked why only these submerged land assets are included in the database, DOA explained that titles for the 24 assets were transferred from a private party to the State. In fact, over half of these assets were listed as being acquired as part of the process to resolve private claims to submerged lands on the coast (see Question 3 for a description of this process).

[11] *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684 (1995)
[12] N.C. Gen. Stat. § 143-431(4)(a)

DOA justifies the lack of a comprehensive inventory of submerged lands because it assumes that all lands submerged under rivers are sovereign land. Although DOA has some submerged land assets in its database, it does not inventory submerged lands in any comprehensive manner. Instead, DOA presumes that all lands under navigable rivers are owned by the State. In fact, state law directs that "In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself."[13]

DOA believes that tracking ownership of lands submerged under navigable rivers could lead to controversy over ownership. DOA contends that developing a comprehensive inventory that describes state ownership in detail might lead to costly litigation with private parties who believe they hold title to certain lands submerged under navigable rivers.

Two state laws authorize DOA to grant easements on State lands, and these easements are tracked in the property database. Under N.C. Gen. Stat. § 146-11, DOA may grant easements for the purpose of cooperating with the federal government, utilizing the natural resources of the State, or otherwise serving the public interest. N.C. Gen. Stat. § 146-12 authorizes DOA to grant easements for structures built on lands covered by navigable waters. The DOA property database tracks easements, and the database generally includes two types.

- **Coastal submerged lands easements**. These easements are required for certain structures on submerged lands receiving a Coastal Area Management Act (CAMA) permit. DOA grants these easements to those owning land adjoining coastal waters, allowing them to build out onto the water. Structures built on submerged lands can include piers, docks, marinas, and wharves. Easements are for 50-year terms and specify that the holder of the easement may not exclude or interfere with the ability of the public to exercise public trust rights. Structures which generate no revenue or accommodate fewer than 10 vessels do not require an easement. Landowners pay a fee to DOA for the easement, and the fee amount varies based on an acreage formula outlined in statute.
- **Utility crossing easements**. These easements are required for utilities that cross state lands. When utilities cross a river, they are required to pay a $250 fee to DOA for an easement across the State's submerged lands. These utility easements can be for gas, water, sewer, electric, telephone, or cable lines. The utility easement is not specifically described in statute or administrative rules, and DOA did not provide any documentation that specifies the $250 fee.

Exhibit 2 describes the types of easements in the DOA database.

[13] N.C. Gen. Stat. § 146-79

Exhibit 2:

Types of Easements in the Department of Administration Database

Type	Number of Easements	Fee for Easement
Coastal submerged lands easements	116	Varies based on an acreage formula
Utility crossing easements		$250 per easement
Submerged land	157	
Other	78	
Total utility crossing easements	*235*	
Total Easements	**351**	

Note: Submerged land utility easements include easements across rivers, creeks, and other subaqueous land.

Source: Program Evaluation Division based on Department of Administration's property database.

DOA has broad authority to manage and control lands submerged under navigable rivers, but its management approach is largely passive. N.C. Gen. Stat. § 146-2 gives DOA the power to manage and control submerged lands and further states that DOA has the power to take such measures as it deems necessary to establish, protect, preserve, and enhance the interest of the State in those lands, and to call upon the Attorney General for legal assistance in performing this duty. Beyond utility crossing easements, DOA does not exercise its authority to manage and control a number of activities and structures that utilize lands submerged under navigable rivers. For example, DOA does not issue leases or easements for dams, most water intake or outfall structures, or any other structures or activities that make use of riverbeds. In addition, with the exception of a lease to PCS Phosphate Company to mine phosphate, DOA does not exercise its authority to lease or convey minerals from submerged lands.

The Department of Environment and Natural Resources (DENR) has regulatory authority for certain activities that may utilize lands submerged under navigable rivers. DENR regulates some activities that utilize submerged lands, though DENR is regulating the activity itself, not the use of submerged lands.

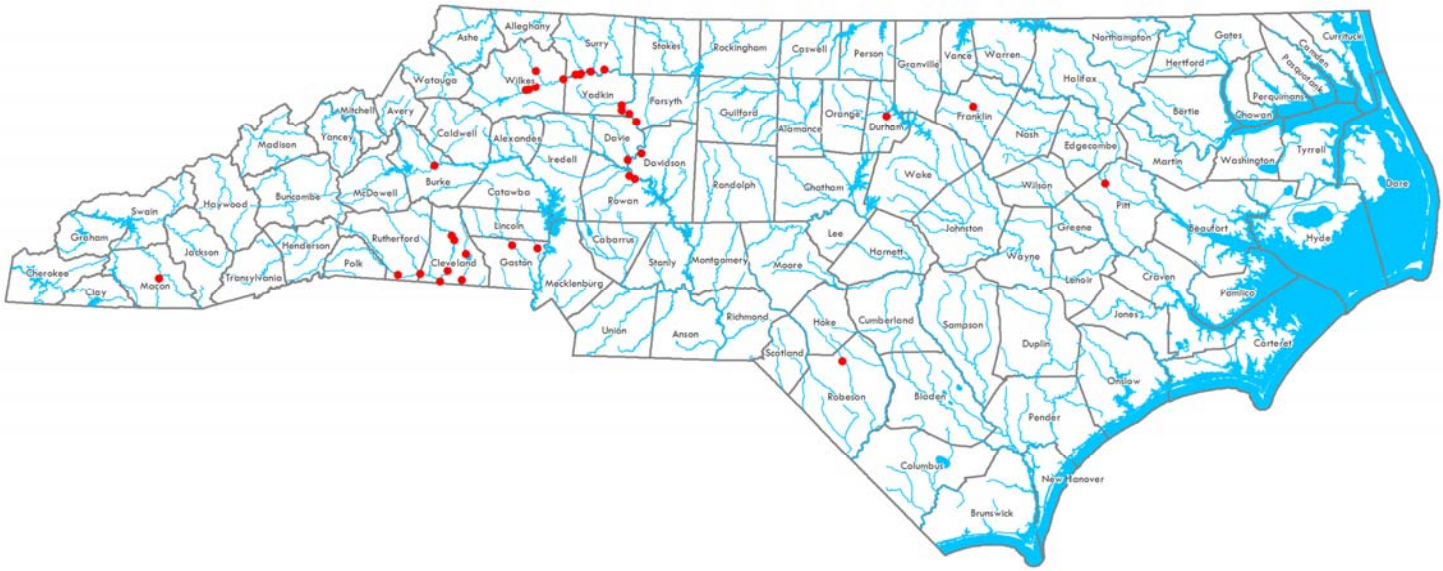
- **North Carolina Mining Act of 1971**.[14] This law requires anyone affecting one acre or more of land for the purpose of mining to obtain a mining permit through DENR. Not all mining is conducted in riverbeds, but when it does occur, neither DENR nor DOA requires an applicant to demonstrate ownership of a riverbed. Exhibit 3 shows permitted sand mining sites in North Carolina. State law authorizes DOA, at the request of DENR, to convey or lease mineral deposits located on state-owned submerged lands.[15] Before any sale, lease, or contract is made, it must be approved by DOA and by the Governor and Council of State. Whereas DENR issues permits under the Mining Act for the mining of sand from riverbeds,

[14] N.C. Gen. Stat. §§ 74.46 through 74.68.
[15] N.C. Gen. Stat. § 146-8.

DOA has not been issuing leases under N.C. Gen. Stat. § 146-8 for sand mining from riverbeds. DENR and DOA met a few years ago to discuss this issue, but DOA has not pursued requiring leases. DENR now includes the following language in applicable permits, which states

> It has come to our attention that certain waterways in your area are public trust waters, the beds of which are owned by the State of North Carolina for the use and benefit of the people of the State. In such cases, mining the bottom of the waterway may require easements from the State Property Office pursuant to N.C. Gen. Stat. § 146-8, and may be subject to the State Environment Policy Act, N.C. Gen. Stat. §§ 113A-1, et. seq, in addition to the permit requirements of the Mining Act of 1971, N.C. Gen. Stat. §§ 74-46, et. seq. We are working with the State Property Office and Attorney General's Office to determine which waterways would be included in these requirements.

Exhibit 3: Instream Sand Mining Sites in North Carolina Permitted Under the Mining Act of 1971



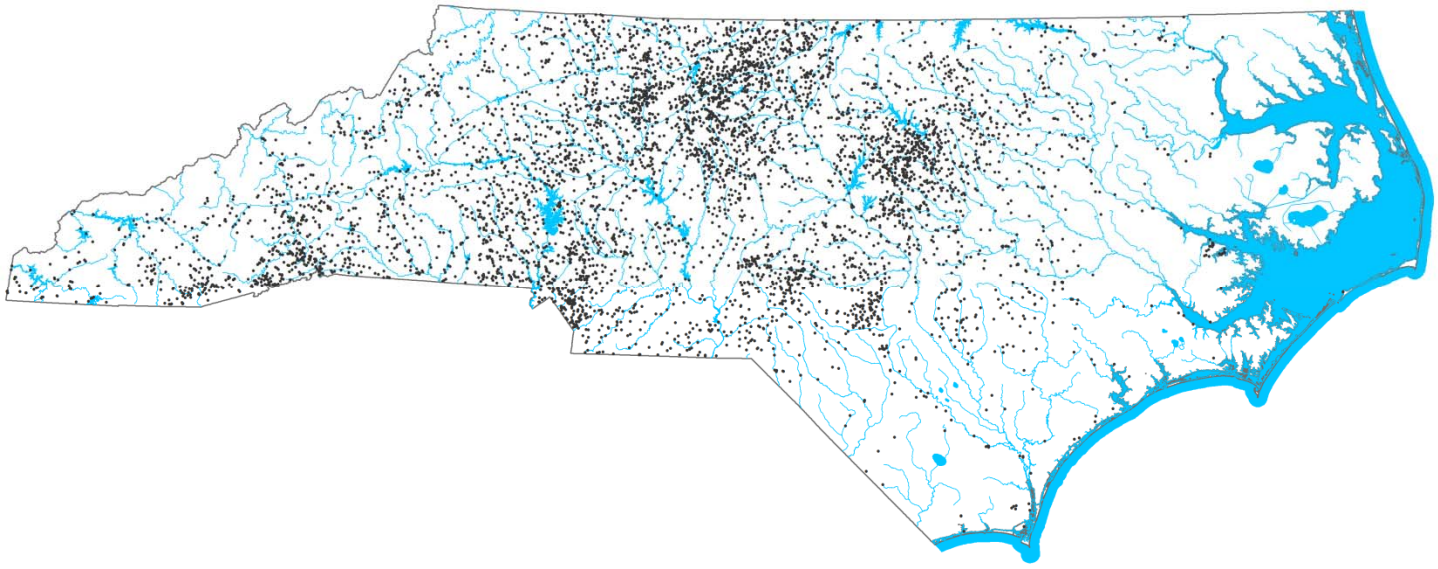
Source: Program Evaluation Division and Information Systems Division based on North Carolina Department of Environment and Natural Resources data

- **North Carolina Dam Safety Law of 1967.**[16] This law strives to prevent the failure of dams and requires that DENR conduct a dam permitting and certification program. DENR permits dams under the Dam Safety Law of 1967, but no state agency determines whether a dam is built on state-owned submerged land and DOA does not require easements or leases for those that are built on state-owned submerged lands. Exhibit 4 shows the location of the more than 5,600 dams in North Carolina. Only a portion of the dams in the

[16] N.C. Gen. Stat. §§ 143-215.23 through 143.215.37.

inventory are likely to be built upon lands submerged under navigable rivers.

Exhibit 4: The North Carolina Dam Inventory Contains Over 5,600 Dams



Source: Program Evaluation Division and Information Systems Division based on North Carolina Department of Environment and Natural Resources dam inventory

In sum, DOA does not track ownership of submerged lands in a comprehensive manner due to a presumption that the State owns all land submerged under navigable rivers. The DOA approach to management of lands submerged under navigable rivers is largely passive, though DOA does oversee coastal submerged land easements and utility crossing easements. DOA does not require easements for other structures or activities that occur on lands submerged under navigable rivers. Some uses of submerged lands, such as sand mining or dams, require permits from DENR. Neither DENR nor DOA verify ownership as a condition for receiving a permit and DOA does not require leases or easements for such activities.

3. How do states track ownership and manage lands submerged under navigable rivers?

The Program Evaluation Division surveyed the 12 other states that were part of the original 13 colonies to determine how these states track ownership and manage submerged lands under navigable rivers.[17] State ownership applies to lands beneath waters that were navigable at the time of independence, and these states, like North Carolina, have the sovereign right to define navigability.

[17] The 12 other states are Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia.

The survey revealed that 10 of 12 states do not specifically inventory or otherwise track state-owned submerged lands. Like North Carolina, these states presume that submerged lands are sovereign and state-owned. Two states, New Jersey and Rhode Island track ownership of coastal submerged lands. New Jersey tracks ownership of "tidelands," which are submerged lands below mean high tide, including tidally influenced rivers. The New Jersey Department of Environmental Protection spent roughly eight years mapping all state-owned tidelands. These maps show ownership boundary lines for state-owned tidelands and are used in New Jersey's management of tidelands. The Rhode Island Coastal Resources Management Council maintains a database of state-owned submerged lands in tidal waters up to where rivers are no longer influenced by tides. The database includes GIS coordinates, water zone types, and information on permits for docks, marinas, and aquaculture.

Factors affecting how the original 13 states approach submerged lands ownership and management are state-specific and include

- geography;
- historical use of submerged lands;
- use of the low-water or high-water mark to claim state-ownership;
- definitions of submerged lands or navigability that appear in a state's constitution or statutes; and
- interpretations of state-specific common law and case law that define navigability or submerged lands.

Because these factors affect each state differently, a state's approach to submerged lands ownership and management is unique.

The Program Evaluation Division identified three other states that manage submerged lands more actively than the original 13 states. A common theme among these states is that their more active management approach supports revenue collection from the leasing of submerged lands.

- **Louisiana.** The Louisiana Division of Administration, State Land Office tracks ownership of "water bottoms," which is the term for submerged lands in Louisiana. The State Land Office has developed an online map of state-owned water bottoms, though it offers a disclaimer that the map is intended only to be an initial reference and does not provide evidence of legal title to property. Louisiana spent more than five years developing its online map.

  The State Land Office in Louisiana manages ownership and leasing of water bottoms for commercial purposes such as docks, wharves, and piers and to ensure that the state is released from liability for activities that occur on those water bottoms. A different Louisiana agency, the Department of Natural Resources, handles mineral leases of water bottoms.

- **Oregon.** The Oregon Department of State Lands issues leases, licenses, temporary-use permits, and registrations for uses of state-owned submerged land. The revenue from leasing is deposited into a school fund to benefit K-12 schools throughout the state. The department maintains a list of waterways that have been determined to be navigable. Oregon has two methods by which it

determines navigability: a court determination or a study authorized by the State Land Board. If the State Land Board determines that the waterway is navigable, it may decide to assert ownership of the submerged land.

- **Washington.** The Washington Department of Natural Resources manages "aquatic lands," which is how Washington refers to submerged lands. Washington law directs the Department of Natural Resources to strive to balance four public benefits in its management of state-owned aquatic lands: encourage direct public use and access, foster water-dependent uses, ensure environmental protection, and utilize renewable resources. The department states that it acts "as a landlord on behalf of the state," and when authorizing uses of state-owned aquatic lands considers environmental risks, the risks to public health and safety, and the financial risks for the entire lifetime of the use. Revenues from state-owned aquatic lands are used to manage and enhance aquatic lands.

North Carolina underwent a process to determine whether private owners had legitimate claims to any part of the submerged lands in 25 coastal counties.[18] Rather than inventorying state-owned submerged lands, the State required private parties to register potential claims so that the State could determine what it did not own. In 1965, the General Assembly passed a law that every person claiming any interest in any part of the bed lying under navigable waters in coastal counties of North Carolina had to register the grant, charter, or other authorization by 1970.[19] Those claims not registered by 1970 were declared null and void. The Department of Conservation and Development[20] then began a process, in coordination with the Department of Justice, to resolve claims to submerged lands in 25 coastal counties.

A claim filed for a 10-acre oyster bed located on the bottom of the New River provides an example of how the resolution process functioned in practice. The State originally made a grant to an individual in 1886. Pursuant to the law, a subsequent owner registered a claim in 1969. The State began correspondence to verify the claim in 1987, requiring the claimant to demonstrate an unbroken chain of title to an original source instrument. The State validated the claim and, in 1991, officially recorded the claim in Onslow County.

In total, there were 14,566 private claims in the 25 coastal counties. The majority of the work to resolve claims was completed between 1985 and 2004. The State recognized a claim as being valid if the private party could demonstrate a chain of title to the original instrument, with the burden of proof on the private party claiming ownership.[21] The result was the

[18] The coastal counties were Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Gates, Halifax, Hertford, Hyde, Martin, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington.

[19] N.C. Gen. Stat. § 113-205, as amended

[20] The Department of Environment and Natural Resources (DENR) is the successor to the Department of Conservation and Development. Within DENR, the Division of Marine Fisheries fulfilled this responsibility.

[21] The requirement of a connected chain of title to a source instrument was in accordance with appellate court decisions such as *State v. Brooks*, 279 N.C. 45, 181 S.E. 553 (1971), and *State v. Chadwick*, 31 N.C. App. 398, 229 S.E.2d 255 (1976).

State recognized 256 claims, or less than 2% of all claims. These claims were all recognized subject to public trust rights held by the State. Those who believed that the resolution of their claim deprived them of property rights without just compensation could file an action in Superior Court within three years. The Program Evaluation Division estimates that it cost $4.1 million to resolve the claims over the 19-year period from 1985-2004. The Division of Marine Fisheries and Department of Justice have developed an online map that shows all the recognized claims.[22]

In sum, 10 of the 12 other original colony states do not track ownership of submerged lands, and those that do, only track ownership of coastal waters. The Program Evaluation Division identified three states that manage submerged lands more actively than North Carolina based upon objectives such as generating revenue, encouraging public access, ensuring environmental protection, and protecting the state from liability. North Carolina maintains a list and map of all state-recognized private claims on submerged lands in 25 coastal counties, though the State has retained public trust rights.

4. How could North Carolina improve management of lands submerged under navigable rivers?

The Program Evaluation Division identified two areas where the General Assembly could consider taking action to improve the management of lands submerged under navigable rivers. These actions include

- requiring the Department of Administration (DOA) to improve management and tracking of all submerged lands; and
- using the coastal submerged lands claims process as a model to resolve private ownership claims to lands submerged under navigable rivers.

The General Assembly could direct DOA to more actively manage state-owned submerged lands. As noted previously in this report, DOA has a passive management approach for state-owned submerged lands. DOA does not specifically track submerged land ownership, though some submerged lands assets exist in the state property database. The database also tracks easements for coastal submerged lands and utility easements, but the process and fee for utility easements is not specifically described in statute or rules. The Department of Environment and Natural Resources (DENR) issues permits for certain uses of lands submerged under navigable rivers, including mining and dam construction, but DOA does not require easements or leases even though state law allows the department to grant easements for the purpose of utilizing the State's natural resources.[23] North Carolina law authorizes DOA, at the request of the DENR, to convey or lease mineral deposits located on state-owned submerged lands, but DOA and DENR are not exercising this authority.

To improve DOA's management of state-owned submerged lands, the General Assembly could direct DOA to

[22] See http://portal.ncdenr.org/web/mf/submerged-lands-maps
[23] N.C. Gen. Stat. § 146-11

- create a field in its state property database that specifically tracks submerged lands ownership and easements;
- describe utility easements for state-owned lands through rule-making, specifying the easement process and fee;
- work with DENR to develop procedures for conveying or leasing mineral deposits located on submerged lands; and
- require easements for new structures built on all submerged lands and maintain a record of these easements within the DOA database.

These changes would allow DOA to more actively manage the use of state-owned submerged lands.

To determine the extent to which private parties hold legitimate title to lands submerged under navigable rivers throughout North Carolina, the General Assembly could use the coastal submerged lands claims process as a model for resolving claims. North Carolina owns lands submerged under navigable rivers, but some of these lands may have been conveyed to private owners in the past. No state list exists that identifies conveyances of submerged lands under navigable rivers.

The General Assembly could enact legislation that requires landowners to register potential claims to lands submerged under navigable rivers in the 75 counties that were not involved in the coastal submerged claims process. Those claiming ownership of lands submerged under navigable rivers could be given two years to register their claims. Claims not registered during the two-year time period would be declared null and void. The registered claims could then be adjudicated to determine which ones are legitimate.

The Program Evaluation Division estimates that operating an office to resolve claims would require seven staff and cost $600,000 for the first year of operation and $550,000 per year until claims were resolved.[24] Resolving ownership claims to submerged lands under navigable rivers could be an extended process, but the actual time frame depends on the total number of claims filed, complexity of claims, and the number of resulting legal challenges. The claims process for submerged lands under navigable rivers could proceed more quickly than the coastal process due to the advent of online access to county tax records, register of deeds records, and mapping programs.

To decide whether to initiate a process to identify and adjudicate private ownership claims to lands submerged under navigable rivers, the General Assembly should consider the potential benefits and costs of such an endeavor. Resolution of private ownership claims to lands submerged under navigable rivers would require a costly and extended process, but the State would identify all legitimate claims to these lands that were conveyed in the past, and all other claims would be null and void. The State could use this information to more actively manage the use of lands submerged under navigable rivers in the future and protect its ownership interest.

[24] This estimate is based on the mid-level salary, benefits, and operating expenses for the following seven positions: Attorney III, (four) Paralegal II, GIS Technician, and Information Processing Assistant II.

Appendix

Appendix A: Memo on State Ownership of Submerged lands; inventory requirement from Counsel to the Joint Legislative Program Evaluation Division Counsel

Agency Response

A draft of this report was submitted to the Department of Administration to review. Its response is provided following the appendix.

Program Evaluation Division Contact and Acknowledgments

For more information on this report, please contact the lead evaluator, Jeff Grimes, at jeff.grimes@ncleg.net.

Staff members who made key contributions to this report include Michelle Beck, Carol Shaw, and Pamela L. Taylor. Bill Drafting Division staff member Ryan Blackledge also contributed to this report. John W. Turcotte is the director of the Program Evaluation Division.

Appendix A: Memo on State Ownership of Submerged Lands; Inventory Requirement

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M E M O R A N D U M

TO: John Turcotte, Director, Program Evaluation Division

FROM: Ryan Blackledge, Counsel to Joint Program Evaluation Oversight Committee

DATE: November 19, 2012

RE: State ownership of submerged lands; inventory requirement

Introduction

Section 71.5(c) of Session Law 2012-194 requires the Program Evaluation Division to study "the inventory of all State-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State." This memo (1) provides legal background on the issue of submerged lands and (2) discusses existing statutes related to an inventory of submerged lands.

State Ownership of Submerged Lands

The State owns most submerged lands under navigable waterways within the State and has broad legal authority to define what it owns. Further, the State has fairly broad ownership-like interests in non-State-owned navigable waterways under the "public trust doctrine." That said, ownership of submerged lands certainly confers greater benefits on the State than the public trust doctrine alone. This section addresses each of these points in greater detail.

The State of North Carolina owns all submerged lands beneath bodies of water that were navigable when the colonies took the sovereign powers from King George III through the Declaration of Independence and victory in the Revolutionary War. The king's ownership of land submerged under navigable rivers came from English common law, which was based on the Roman legal tradition. That legal tradition defines both running waters and the waters and bottoms of natural navigable water bodies as public things to be held by the government for the benefit of the public for public uses.

For North Carolina, the definitions of "submerged lands" and "navigability" are completely within the purview of the State. This differs from states that were not part of the original thirteen colonies. Later admitted states, such as Montana, whose ownership of some submerged lands was recently the subject of *PPL Montanna, LLC v. Montana*, 132 S.Ct. 1215 (2012), received any ownership rights from the federal government rather than the king.

In North Carolina, "submerged land" is defined as the land that falls under the mean high water mark for a particular body of water. Defining "navigability" can be more complicated, and depends on whether one is defining it for the purposes of ownership, applicability of the public trust doctrine, or federal jurisdiction. Under North Carolina law, navigability for State ownership depends on whether or not the waterway could have been used at the time of statehood for commerce and travel by useful vessels. As articulated in caselaw, "travel by useful vessels" has included one person craft with shallow drafts and "commerce" has included floating logs one-way down a stream made navigable only due to heavy rains or melting snow. *See*, *e.g.*, *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1995) and *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895). Based on these definitions and conditions in 1776, State ownership could extend fairly far up many rivers within the State. Of course, proving a waterway's condition in 1776 is a challenging, fact-intense inquiry into the historical record.

Because of the importance of waterways to the public, it is difficult for the state to be dispossessed of its submerged lands. For example, per G.S. 1-45.1, "[t]itle to real property held by the State and subject to public trust rights may not be acquired by adverse possession." This differs from other land owned by the State, which may be acquired by adverse possession with 30 years of possession without a title or 21 years of possession under color of title. G.S. 1-35. Also, G.S. 146-3(1) provides that "[n]o submerged lands may be conveyed in fee, but easements therein may be granted." Because of G.S. 146-3(1), a transfer of submerged lands in fee would require an act of the General Assembly. Finally, even if submerged lands are purportedly transferred in fee simple, public trust rights are presumed to remain attached to the water above the submerged lands unless the deed specifically transfers the public trust rights. *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

No discussion of the ownership of navigable waterways would be complete, however, without mentioning the public trust doctrine, which gives the State some ownership-like interests in waterways not owned by the State. The public trust doctrine prohibits an owner of submerged lands from interfering with the public's "right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State." G.S. 1-45.1. All waters navigable by a pleasure craft are subject to the public trust doctrine, meaning that the State may regulate any interference in the navigation of a waterway by a jon boat or kayak. *See*, *Gwathmey*, 342 N.C. at 301, 464 S.E.2d at 682.

It is possible, then, for certain submerged lands not to be owned by the state but for the waterway to still be subject to the protections of the public trust doctrine. For example, if a property owner builds a canal on their dry land to connect to a river, the property owner will own the land under that canal. But, because the waterway connects to a river, that new canal would be subject to the public trust doctrine and would be open for public use and enjoyment. That public use may not interfere with the ownership interest of the canal builder, however, so the public would not normally be able to land a vessel on the builder's property or cross the builder's property to put in.

The broad power to regulate waterways conferred on the State under the public trust doctrine may suggest that ownership of submerged lands is not important or relevant. In fact, most navigability cases decided by the North Carolina Supreme Court involve the application of the public trust doctrine rather than testing for State ownership of the waterway. There are instances, however, in

which ownership of submerged land may be important. One example is resource extraction. If the State owns the bed, then the State is the party who may license the removal of sand from the bottom of a waterway or permit drilling for oil or natural gas. And the State is the party that stands to profit from such resource extraction. Additionally, the owner of submerged lands may attach fixtures to the submerged lands, subject to the public trust doctrine. Examples of fixtures attached to submerged lands include piers, oyster farms, cell towers, dams, and windmills. In the past, the State has granted licenses or permits for such activities, usually for low amounts of money so as to promote the public good. See, e.g., G.S. 146-1(a), which encourages the use of the State's submerged land for the construction of "piers, docks, wharves, marina, and other structures" that benefit the public; or G.S. 113-202, which covers grants for shellfish cultivation.

In summary, the State has broad controls that it may exercise over navigable waterways, regardless of State ownership of the beds. Ownership is based on navigability at the time of the Declaration of Independence and confers additional powers upon the State to control the use of the bed of owned waterways.

Inventory of All State-Owned Submerged Lands

The Department of Administration appears to have a statutory duty to maintain an inventory of State-owned submerged lands.

G.S. 146-2 gives to the Department of Administration "[t]he power to manage, control, and dispose of the vacant and unappropriated lands, swamplands, lands acquired by the State by virtue of being sold for taxes, and submerged lands… subject to rules and regulations adopted by the Governor and approved by the Council of State, and subject to the provisions of this Subchapter." Most submerged lands owned by the State, then, fall within the management purview of the Department of Administration, although G.S. 146-1(c) does provide exceptions from that management for "a privately owned lake or any hydroelectric reservoir licensed by the Federal Energy Regulatory Commission."

More specifically, G.S. 143-431(4)a. requires the Department of Administration "[t]o prepare and keep current a complete and accurate inventory of all land owned or leased by the State or by any State agency." The remainder of that sub-subdivision goes on to read, "[t]his inventory shall show the location, acreage, description, source of title and current use of all land (including swamplands or marshlands) owned by the State or by any State agency, and the agency to which each tract is currently allocated. Surveys may be made where necessary to obtain information for the purposes of this inventory. Accurate plats or maps of all such land may be prepared, or copies obtained where such maps or plats are available."

When interpreting G.S. 143-431(4)a., or any statute, one must look to the plain language within the statute. "Statutory interpretation properly begins with an examination of the plain words of the statute. If the language of the statute is clear and not ambiguous, [courts] must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *See*, *e.g.*, *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 809 (N.C. 2012) (internal citations and quotation marks omitted).

Given that "submerged land" is still "land," a plain language reading of G.S. 143-431(4)a. suggests that submerged lands owned by the State should be part of the inventory of all State land. Not being allocated to a State agency and not having a paper title are irrelevant to whether the land should be

included in an inventory, given that G.S. 143-341(4)a. speaks broadly of "all land owned… by the State." Further, the statute clearly contemplates land covered by water, as opposed to just dry lands, by the inclusion of both "swamplands" and "marshlands" within the statutory language requiring an inventory. (To note, the term "submerged lands" is not explicitly within the parenthetical list of "includes" in G.S. 143-431(4)a. This use of the word "includes" in this statute must be interpreted as an illustrative, rather than exclusionary, though. To interpret otherwise would mean that the inventory of State-owned lands should include only swamplands and marshlands, to the exclusion of all dry land.)

Again, the Department of Administration appears to have a statutory duty to maintain an inventory of State-owned submerged lands. If the Department has not been maintaining an inventory, they may need to be made aware of the existing statutory language.

Final Summary

Again, Session Law 2012-194 requires the Program Evaluation Division to study "the inventory of all State-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State." As discussed in this memo, (1) the State owns most submerged lands under navigable waterways within the State, has broad legal authority to define what it owns, and has interests navigable waterways it does not own under the public trust doctrine and (2) the Department of Administration appears to have a statutory duty to maintain an inventory of the submerged lands owned by the State.

North Carolina
Department of Administration

Pat McCrory, Governor

Bill Daughtridge, Jr., Secretary

January 8, 2013

Mr. John Turcotte, Director
Program Evaluation Division
North Carolina General Assembly
300 N. Salisbury Street, Suite 100
Raleigh, North Carolina 27603-5925

Subject: Submerged Lands – Response to Final Report

Dear Mr. Turcotte:

The Department of Administration acknowledges receipt of the final copy of the Submerged Lands Report prepared by the Program Evaluation Division for presentation to the Joint Legislation Program Evaluation Oversight Committee. The Department appreciates the opportunity to provide response to the final report.

As you are well aware, the final report was submitted for response at the change of an administration. The issues covered in the report involve complex legal and historical issues, and the new administration will need to do the research and review of the past history of the State's administration of submerged lands that will be necessary to provide a substantive formal response. Such adequate preparation would probably require PED to postpone the publication of its report for an unacceptable period of time. Further, the appendix to the report contains a memorandum from counsel to Joint Program Evaluation Oversight Committee. As previously stated in our discussion with staff, we are not in a position to respond to the legal opinions and advice expressed in the memorandum. These matters are more appropriately addressed by the Attorney General's Office.

For all the above reasons, the Department of Administration is satisfied for PED to proceed with the issuance of its report. It is noteworthy that according to the PED report, North Carolina's administration of its constantly changing submerged lands is in conformity with that of all but two of the original thirteen states, and although the report does not contain specific recommendations, it does contain suggested actions that the General Assembly may take. The Department looks forward to further discussions regarding these suggested actions and stands ready to assist and cooperate with the General Assembly regarding any proposed legislation that may be recommended.

Again, thank you for the courtesy extended by the staff and the opportunity to respond.

Sincerely,

Bill Daughtridge, Jr.

cc: Speros Fleggas

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