

PUBLIC TRUST WATERS

I. Origin in the Common Law

a. At common law the English sovereign owned the sea and the lands over which the tide ebbed and flowed, but this ownership was subject to restraints imposed by the rights of the people to use, for example, the waters for fishing and navigation and the riverbanks and seashores for towing and drying nets.

At the time of independence and formation of the United States, title to all lands underlying navigable waters vested in the individual 13 states unless the English Crown or the colonial governments had previously issued valid grants to such lands. The concept of state ownership flowed from the assumption that public ownership was essential to prevent private individuals from asserting monopolistic rights and would inhibit economic growth. America was a developing country huddled on the shore of the Atlantic Ocean; lacking roads, it depended heavily on water routes for the transportation of its people and goods. Fishing was a major economic activity. Promotion of coastal commerce required keeping the waters unobstructed and open as public highways for the movement of people and goods. As new states were admitted to the Union they also became owners in trust in this fashion.

The concept of the "public trust" doctrine evolved from the theory that presumed that the Crown held title to tidal lands and waters for the benefit of the public.

Boundaries - Ocean & Interior Waters

Ownership In State

G.S. § 146-64 - submerged lands Defined:

(7) "Submerged lands" means State lands which lie beneath

- a. Any navigable waters within the boundaries of this State, or
- b. The Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State.

NC Dept of Administration is responsible for issuing easements for State owned lands covered by navigable waters that recognize the common law rights of riparian or littoral property owners as balanced against the State's obligation to protect public trust rights of all its citizens G.S. § 146-1

- a. Dept. of Administration responsible for management, control and disposition of submerged lands where title is vested in the State G.S. § 146-2
- b. No submerged lands may be conveyed in **fee**, but easements therein may be granted - G.S. § 146-3(1)

The foreshore - between the high and low water lines - is the property of the State
Mineral deposits under State's waters may be sold or leased subject to the right of navigation and other conditions imposed by State - G.S. § 146-6

Interests In Submerged Lands That May Be Conveyed By The State

- a. Old Conveyances Recognized:
 - Board of Education Deeds (Gwathmey v. State Ex. Rel. DENR)
 - Wharf Easements
- b. Current Interests:
 - Shellfish leases on public bottom

II. Concept of Public Trust Rights of Citizens

North Carolina Statutory Rights:

N.C.G.S. § 4-1 provides:

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). The "**common law**" referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence.

Common Law can be Changed:

Further, much of the common law that is in force by virtue of N.C.G.S. § 4-1 may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment

§ 1-45.1. No adverse possession of property subject to public trust rights:

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this section, "public trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, 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.

It has consistently been the law of this jurisdiction that lands and waters held by the sovereign in trust for the public cannot be conveyed by the State so as to deprive the public of its rights therein, except for legislatively authorized public purposes furthering the trust.

G.S. § 146-1 - recognizes public trust right of boating, fishing, and swimming

Case Law Before the Statutes

US Supreme Court (1892) In *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435, 36 L.Ed. 1018, 1036 (1892), the United States Supreme Court referred to the well-settled principle "that the ownership of and dominion and sovereignty over lands covered by tide waters" passed to the various states after the Revolution. Under the public trust doctrine, each state could regulate or dispose of its tidal lands, provided that it could be done "without substantial impairment of the interest of the public in the waters. The Supreme Court expanded the public trust doctrine to include not only waters subject to the ebb and flow of the tides, but also those that were navigable in fact. [See *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842) ("any waters, which are sufficient in fact to afford a common passage for all people in sea vessels, are to be taken as navigable.")].

The United States Supreme Court stated:

[Title to soil under navigable waters] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title 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 or interference of private parties

NC Supreme Court:

State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901). The North Carolina Supreme court stated that "the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use."

If a body of water in its natural condition can be navigated by watercraft, it is navigable in

fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine.

Navigable waters, then, are subject to the public trust doctrine. Where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public.

No constitutional provision throughout the history of our State has expressly or impliedly precluded the General Assembly from conveying lands beneath navigable waters by special grant in fee simple and free of any rights arising from the public trust doctrine. See *Battle to Preserve N.C.'s Estuarine Marshes*, 64 N.C. L. Rev. at 576-77. The public trust doctrine is a common law doctrine. In the absence of a constitutional basis for the public trust doctrine, it cannot be used to invalidate acts of the legislature which are not proscribed by our Constitution. Thus, in North Carolina, the **public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights.** **"Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights."** *RJR Technical Co. v. Pratt*, 339 N.C. 588, 590, 453 S.E.2d 147, 149 (1995). However, this presumption is overcome by a special grant from the General Assembly expressly conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights. See *Ward v. Willis*, 51 N.C. at 185-86.

The NC Supreme Court concluded that "the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to

have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.”

No Exclusive Fisheries (Grants or Franchises) in navigable Waters

(RJR v. Pratt case Bertie Co.)

The NC Supreme Court has repeatedly held that exclusive or "several" fisheries could not be obtained in the navigable waters of the State:

A several fishery in the ocean or in a navigable stream is not, and never has been, the subject of private ownership in this State, because land covered by a navigable water course has always been expressly excluded from entry, and a grant of it by one individual to another would therefore exhibit on its face its own nullity.

Gilliam v. Bird, 30 N.C. 280, 284 (1848).

In *Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916), plaintiff argued that she held the exclusive right to a seine fishery adjacent to her beach in Bogue Sound by either grant of the bed or her habit of fishing the same area for many years. The Court wrote: "The right to fish in navigable waters is open to all, and the proprietorship of the adjacent beach gives no exclusive right of fishing in the navigable waters in front thereof. Rejecting her claim of exclusive fishing rights by grant and prescription, the Court concluded:

The right of fishing in the navigable waters of the State belongs to the people in common, to be exercised by them with due regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by any one at a given point. Such right must be exercised, in the absence of express regulations by the State, with due regard to the rights of all under the general custom of fishing in the sound.

The prohibition against granting exclusive fishing rights has not been modified in the years

which followed. The Court recently reaffirmed that "no exclusive right to fish in navigable streams exists." in the Credle case.

III. **Federal Law**

Submerged Lands Defined 43 USC 1301 et seq.

Meaning:

(a) The term "lands beneath navigable waters" means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,

43 USC 1311 - Title of Submerged Lands is Vested in the States:

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or

successors in interest thereof;

US Court Cases:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

Illinois Central Railroad v. Illinois (1892)

This formulation recognizes the division of sovereignty between the state and federal governments those aspects of the public interest in the tideland and the land below the low water mark that relate to the commerce and other powers delegated to the federal government are administered by Congress in its capacity as trustee of the jus publicum, while those aspects of the public interest in this property that relate to nonpreempted subjects reserved to local regulation by the states are administered by state legislatures in their capacity as co-trustee of the jus publicum.

Navigation Servitude Under US Constitution Commerce Clause

The right of the Federal Government to regulate commerce, under Article 1, § 8, Subdivision 3, of the Federal Constitution, giving Congress control over interstate commerce, confers the supreme authority over navigable rivers and streams for the purpose of regulating navigation, and all that pertains thereto; and under this authority the Federal Government is supreme and may not be interfered with by the laws of the States.

New York ex rel. Cornell S. B. Co. v. Sohmer, 235 U.S. 549 (1915)

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

The state's title is subject only to the paramount power of the United States to control such waters for the purpose of navigation in interstate and foreign commerce

Military Uses of State Waters

Statute

33 USC § 3. Regulations to prevent injuries from target practice

In the interest of the national defense, and for the better protection of life and property on said waters, the Secretary of War [Army] is hereby authorized and empowered to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Coast Artillery [Artillery] fire in target practice or otherwise, or by the proving operations of the Government ordnance proving grounds at Sandy Hook, New Jersey, or at any Government ordnance proving ground that may be established elsewhere on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications, or by any plant or facility engaged in the execution of any public project of river and harbor improvement; and the said Secretary shall have like power to regulate the transportation of explosives upon any of said waters: **Provided**, That the **authority hereby conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry**, and the regulations

prescribed in pursuance hereof **shall provide for the use of such waters by food fishermen operating under permits** granted by the War Department [Department of the Army].

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Danger Zone and Restricted Area Regulations by Military Process to Establish Target Areas

Military affairs are specifically excepted from application of rule-making provisions of Administrative Procedure Act by § 553(a)(1) and (2).

CHAPTER II -- CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY PART 334 -- DANGER ZONE AND RESTRICTED AREA REGULATIONS 33 CFR 334.1

§ 334.1 Purpose.

The purpose of this part is to:

- (a) Prescribe procedures for establishing, amending and disestablishing danger zones and restricted areas;
- (b) List the specific danger zones and restricted areas and their boundaries; and
- (c) Prescribe specific requirements, access limitations and controlled activities within the danger zones and restricted areas.

§ 334.2 Definitions.

(a) **Danger zone.** A defined water area (or areas) used for target practice, bombing, rocket firing or other especially hazardous operations, normally for the armed forces. The danger zones may be closed to the public on a full-time or intermittent basis, as stated in

the regulations.

(b) **Restricted area.** A defined water area for the purpose of prohibiting or limiting public access to the area. Restricted areas generally provide security for Government property and/or protection to the public from the risks of damage or injury arising from the Government's use of that area.

33 CFR 334.3

(a) . . . **Danger zone and restricted area regulations shall provide for public access to the area to the maximum extent practicable.**

(b) **Food fishing industry.** The authority to prescribe danger zone and restricted area regulations must be exercised so as not to unreasonably interfere with or restrict the food fishing industry. Whenever the proposed establishment of a danger zone or restricted area may affect fishing operations, the District Engineer **will consult** with the Regional Director, U.S. Fish and Wildlife Service, Department of the Interior and the Regional Director, National Marine Fisheries Service, National Oceanic & Atmospheric Administration (NOAA).

(c) Temporary, occasional or intermittent use. If the use of the water area is desired for a short period of time, not to exceed thirty days in duration, and that planned operations can be conducted safely without imposing unreasonable restrictions on navigation, and without promulgating restricted area regulations in accordance with the regulations in this section, applicants may be informed that formal regulations are not required. Activities of this type shall not reoccur more often than biennially (every other year), unless danger zone/restricted area rules are promulgated under this Part. Proper notices for mariners requesting that vessels avoid the area will be issued by the Agency requesting such use of the water area, or if appropriate, by the District Engineer, to all known interested persons.

Notification to all parties and Agencies shall be made at least two weeks prior to the planned event, or earlier, if required for distribution of Local Notice to Mariners by the Coast Guard.

§ 334.4 **Establishment and amendment procedures.**

(a) **Application.** Any request for the establishment, amendment or revocation of a danger zone or restricted area must contain sufficient information for the District Engineer to issue a public notice, and contain at least the specific information set forth in the rule.

Example of the required information: Name of waterway/Water body; closest city or town; location of danger zone and a map; statement of need and intended use, times, dates and extent of restrictions;

(b) **Public notice.** (1) The Corps will normally publish public notices and Federal Register documents concurrently

(2) **Content.** The public notice and Federal Register documents must include sufficient information to give a clear understanding of the proposed action and should include the following items of information:

A reasonable comment period which is normally **30 days**. Address where additional information can be obtained; the location of the proposed activity accompanied by a **map** of sufficient detail to show the boundaries of the area(s) and its relationship to the surrounding area.

(3) **Distribution.** Public notice will have general distribution and public notices will be sent to the federal Agencies listed.

(c) **Public hearing.** The District Engineer may conduct a public hearing in accordance with 33 CFR part 327.

(d) Environmental documentation. The District Engineer shall prepare environmental documentation in accordance with appendix B to 33 CFR part 325.

(e) District Engineer's recommendation to Chief Engineer of whether or not the danger zone or restricted area regulation should be promulgated.

(f) Final decision. The Chief of Engineers will notify the District Engineer of the final decision to either approve or disapprove the regulations who will notify the applicant/proponent and publish a public notice of the final decision. Concurrent with issuance of the public notice the final decision will be published in the Federal Register and either withdraw the proposed regulation or issue the final regulation, as appropriate. The final rule shall become effective no sooner than 30 days after publication in the Federal Register unless the Chief of Engineers finds that sufficient cause exists and publishes that rationale with the regulations.

§ 334.5 **Disestablishment of a danger zone.**

(a) When a request from any agency for the disestablishment of a danger zone is received, the District Engineer shall notify that agency of its responsibility for returning the area to a **condition suitable for use by the public**. The agency must either certify that it has not used the area for a purpose that requires cleanup or that it has removed all hazardous materials and munitions, before the Corps will disestablish the area. The agency will remain responsible for the enforcement of the danger zone regulations to prevent unauthorized entry into the area until the area is deemed safe for use by the public and the area is disestablished by the Corps.

(b) Upon receipt of the site certification, the District shall forward its recommendation. Notice of proposed rulemaking and public procedures as outlined in § 334.4 are not normally required before publication of the final rule revoking a restricted area or danger zone regulation. The disestablishment/revocation of the danger zone or restricted area regulation removes a restriction on a waterway.

IV. **MFC Authority Derived from Legislature**

- a. Commission Purpose - to manage, restore, develop, cultivate, conserve, protect and regulate the marine and estuarine resources within its jurisdiction
- b. Statutory Powers - G.S. § 143B-289.52 - Adopt rules to regulate all forms of marine and estuarine resources in coastal fishing waters; provide fair regulation of commercial and recreational fishing groups
- c. Commission's Rules are enforced by the Department

Court Action in Name of Commission: commence an action contesting § 205 claims to submerged lands registered with the Department.

- d. **Commission** and **Division** may **Comment** on Army Corps of Engineers Danger Zone/Restricted Area Rulemaking

MFC Rules for Military Danger Zones

15A NCAC 3I .0110 MILITARY DANGER ZONES AND RESTRICTED AREAS

(a) Pursuant to Title 33 United States Code Section 3, the United States Army Corps of Engineers has adopted regulations which restrict access to and activities within certain areas of coastal and inland fishing waters. Federal Rules codified at 33 CFR 334.410

through 334.450 designate danger zones and restricted areas, within North Carolina coastal waters. These areas are designated in 15A NCAC 3R .0102. Only the applicable military commanders listed in the federal regulations have authority to authorize navigation or fishing access to these designated areas. All military danger zone and restricted area closures shall be enforced by the appropriate federal agency. **If reasonable use of these areas by the food fishing industry is allowed or a permit process implemented** by the appropriate military authorities **to allow access** in accordance with 33 U.S.C. Section 3 or the appropriate federal authority allows access to danger zones or restricted areas, **all applicable fisheries statutes, N.C. Marine Fisheries Commission rules, and proclamations issued by the Fisheries Director**, other than those allowing access, **shall apply within these areas.**

(b) The military danger zones and restricted areas are shown on navigational charts and specifically described in the Coastal Pilot and the Code of Federal Regulations (CFR). Copies of the CFR provisions are available on the internet at www.access.gpo.gov/nara/cfr/index.html or at the Division of Marine Fisheries, P.O. Box 769, Morehead City, NC 28557. These areas are also designated in 15A NCAC 3R .0102.

15A NCAC 3R .0102 MILITARY DANGER ZONES AND RESTRICTED AREAS

Locations

The designated military danger zones and restricted areas referenced in 15A NCAC 3I .0110(b) are delineated by longitude and latitude coordinates in the Commissions Rules.

CAMA Rule

SECTION .1000. POLICIES ON WATER AND WETLAND BASED TARGET AREAS FOR MILITARY TRAINING ACTIVITIES

15A N.C.A.C. 7M.1001 (2009)

DECLARATION OF GENERAL POLICY

The use of water and wetland-based target areas for military training purposes may result in adverse impacts on coastal resources and on the exercise of public trust rights. The public interest requires that, to the maximum extent practicable, use of such targets not infringe on public trust rights, cause damage to public trust resources, violate existing water quality standards or result in public safety hazards.

(Statutory Authority G.S. 113A-102(b); 113A-107)

15A N.C.A.C. 7M .1002 POLICY STATEMENTS

(a) It is the policy of the State of North Carolina that all public trust waters subject to surface water restrictions pursuant to 33 USCS 3 for use in military training shall be opened to commercial fishing at established times appropriate for harvest of the fisheries resources within those areas.

(b) **Where laser weaponry is used**, the area of restricted surface waters shall be at least as large as the recommended laser safety zone.

(c) Water quality shall be tested periodically in the surface water restricted areas surrounding such targets and results of such testing shall be reported to the Department.

[Above outline taken from State and federal cases and statutes and UNC Law Review Article by Kalo]