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It's Navigable in Fact So I Can Fish in It: The Public Right to Use Man-Made Navigable-in-Fact Waters of Coastal North Carolina

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"IT'S NAVIGABLE IN FACT SO I CAN FISH IN IT": THE PUBLIC RIGHT TO USE MAN-MADE, NAVIGABLE-IN-FACT WATERS OF COASTAL NORTH CAROLINA*

JOSEPH J. KALO**

An increasingly common amenity of large residential coastal developments in North Carolina is a man-made boat basin or marina connected by a canal to the natural navigable-in-fact waters of coastal rivers, tidal creeks, or estuarine waters. An important question is whether waters of these man-made boat basins, marinas, and canals are privately owned and privately controlled or whether the waters retain their public character and are open to public trust uses. Embedded within that question is the fundamental policy question of whether public trust waters and the living natural public trust resources within them may be appropriated for purely private use. The recent court of appeals Fish House case correctly concludes that these waters retain their public character but does this with flawed reasoning. The purpose of this Article is to show that despite its flawed reasoning the decision of the Fish House court was correct. Prior North Carolina case law, sound public policy, and pragmatic considerations support the conclusion that all man-made navigable-in-fact waters connected to natural navigable-in-fact waters are public trust waters open to public trust use rights.

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INTRODUCTION

Connected to the coastal rivers, tidal creeks, and sounds of the inner coast of North Carolina are numerous man-made, navigable-in-fact waterways and waterbodies.¹ Many of these were created to provide various types of amenities for the private residential enclaves that line the state’s inner coastal waters.² These man-made waterways and waterbodies consist of canals snaking through waterfront developments or large, private marinas or boat basins created by dredging out privately owned uplands and connecting them to coastal rivers or waters of the sounds.³ Following the path of the waters

1. Due to the lack of data from earlier years, the North Carolina Division of Coastal Management does not have precise numbers for the marina basins created by excavation of uplands and connected to natural navigable waters. See E-mail from Mike Lopazanski, Policy Analysis Manager, N.C. Div. of Coastal Mgmt., to author (Mar. 2, 2011) (on file with author). It is estimated that about sixty such upland basins were created. Id.

2. The planned SeaWatch Development is illustrative of such private developments. SeaWatch is described as: “a master planned gated amenitized community” in Brunswick County, North Carolina, located south of Wilmington, North Carolina. See What is the Future for SeaWatch in Brunswick County North Carolina?, SOUTHEAST DISCOVERY (Nov. 15, 2010, 4:03 PM), http://www.southeastdiscovery.com/southern-way-of-life/2010/11/what-is-the-future-for-seawatch-in-brunswick-county-north-carolina. A 267 slip safe-harbor, full service marina spanning ten or more acres is planned for this community and advertised as offering “residents an easily accessible, protected launching point for cruising the Intracoastal Waterway and fun-filled excursions on the Atlantic Ocean.” Id. The planned marina will be “the largest of its kind in North Carolina south of New Bern.” Id.

3. See, e.g., supra notes 1–2. A Google Maps satellite view of Pine Knolls Shores, North Carolina, provides an image of some of the canals one finds running through
entering these man-made waterways and waterbodies, fish and other aquatic creatures come into these areas seeking shelter along the shorelines or under the docks and piers.4 Following the fish, much to the displeasure of some of the homeowners, boat owners, and homeowners’ associations in these private developments, come outsider fishermen in pursuit of a fine catch.5 Some homeowners, boat owners, and homeowners’ associations believe that they have the right to exclude these interloper fishermen.6 After all, the canals, marinas, or boat basins were created by digging up privately owned uplands; the bottoms of these canals, marinas, and boat basins are privately owned;7 and the traditional common law principle of


4. Depending on time of year and many other variables, species of fish in these waters would include “flounder, speckled trout, red drum, spot, croaker, pinfish, and cutlass fish.” E-mail from J. Allen Jernigan, Special Deputy Att’y Gen., Env’tl Div., N.C. Dep’t of Justice, to author (Mar. 4, 2011) (on file with author).

5. See Letter from David Kelly, Dir., Marina at St. James Plantation Owners Ass’n Inc., Southport, N.C., to the N.C. Coastal Res. Law, Planning & Policy Ctr., N.C. State Univ. (Aug. 13, 2009) (on file with author). Among the problems allegedly created by outsiders fishing in the marina are “lines and hooks being accidently cast onto a boat moored in a Marina slip”; “small fishing boats drift[ing] and anchor[ing]” and blocking access to slips; and a “potential security situation.” Id. One property owner complained about fishermen in such a boat “being abusive.” Id. The rules of the Marina prohibit any fishing from boats docked in marina slips. Id.; see also Letter from resident, St. James Plantation Marina, to Mr. Bill Bines, President, Marina Owners Ass’n (May 8, 2009) (name withheld for privacy) (on file with author) (describing particular incidents involving conflicts with fishermen); Letter from Daniel F. McLawhorn, Special Deputy Att’y Gen., N.C., to James D. Carter, Jr., Assistant Dist. Att’y, Elizabeth City, N.C. (May 15, 1987) (on file with author) (responding to inquiry relating to whether the Waterview Shores development may control public access to man-made canals within the development).

6. The Marina at St. James Plantation Owners Association Inc. contended that “anchoring within the confines of our Marina can be controlled by us with any violation being deemed to be ‘Trespassing’ . . . under state law.” Letter from David Kelly to the N.C. Coastal Res. Law, Planning & Policy Ctr., supra note 5.

7. See, e.g., Steel Creek Dev. Corp. v. James, 58 N.C. App. 506, 511–12, 294 S.E.2d 23, 27 (1982) (noting that an owner of submerged land “owns also to the sky and to the depths”). Steel Creek is discussed more fully infra in the text accompanying notes 82–89. In a 1987 opinion letter, the Office of the Attorney General for the State of North Carolina stated that it was the State’s position that the bed of canals created by excavating uplands may be privately owned. Letter from Daniel F. McLawhorn to James D. Carter, Jr., supra note 5. This position was reaffirmed in a 1989 opinion letter. See Memorandum from Allen Jernigan, Assistant Att’y Gen., N.C., to P.A. Wojciechowski, Submerged Lands Coordinator (Aug. 8, 1989) (responding to the question “[a]re the beds of canals created from high ground subject to private ownership?”). The court of appeals’ language in Fish House, Inc. v. Clarke, ___ N.C. App. ___, 693 S.E.2d 208, discretionary review denied, 364 N.C. 324, 700 S.E.2d 750 (2010), is inconsistent with these opinions of the Office of the
ownership of the soil gives rights of ownership over the space above and below it. That right of ownership, arguably, would give the right to control and exclude the public from the water column above privately owned submerged land.

North Carolina law makes it crystal clear that all natural navigable-in-fact waterways and waterbodies are open to public navigation, fishing, and other public trust uses. The key question is whether these rights extend to man-made navigable-in-fact waterways and waterbodies connected to natural navigable-in-fact waterways or waterbodies. The recent North Carolina Court of Appeals decision in Fish House, Inc. v. Clarke recognizes the existence of such public rights but does so based on flawed reasoning. Unfortunately, to reach the correct result, the court conflates different aspects of the common law public trust doctrine and creates unnecessary confusion in the law. This gives rise to uncertainty over the status of the private title to the submerged lands within these man-made waterways and waterbodies.

Part I of this Article provides the essential facts of the Fish House case, explains the court of appeals' misuse of the Supreme Court of North Carolina's decision in Gwathmey v. State ex rel.

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Footnotes:


9. See, e.g., Steel Creek, 58 N.C. App. at 512, 294 S.E.2d at 27 (holding that an owner of submerged lands may prohibit others from placing permanent structures in waters overlying submerged lands).

10. See, e.g., N.C. Gen. Stat. § 1-45.1 (2010) (“Public trust rights include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State...”).

11. No reported case exists in which there was an attempt to prosecute fishermen for trespassing because they entered a private boat basin or private canal. That may be because the Office of the Attorney General for the State of North Carolina's position is that opening canals or boat basins to the public waters of the state “automatically subjected them and [their waters] to a public trust easement.” Letter from Daniel F. McLawhorn to James D. Carter, Jr., supra note 5. In addition, in Bell v. Smith, 171 N.C. 116, 87 S.E. 987 (1916), the Supreme Court of North Carolina stated that “[t]he right to fish in navigable waters is open to all.” Id. at 117, 87 S.E. at 988.


Department of Environment, Health, & Natural Resources, and discusses why the court of appeals' language has raised concerns about the legitimacy of private titles to submerged lands. Part A of Part II will first explain what the Gwathmey decision was really about and the important distinction between the question of whether submerged lands are publicly or privately owned and the question of whether a waterbody is open to public use. Part B will address the fundamental question of whether as a matter of law and public policy man-made navigable-in-fact waterbodies connected to natural navigable-in-fact waterbodies are open to public trust use rights, such as navigation and fishing. Part B will demonstrate that the public's right to use navigable-in-fact waters is not tied to any claims of public ownership of the submerged lands lying under such waters and that North Carolina case law does not distinguish between natural and man-made navigable-in-fact waters. Part B will also explain why federal law does not prohibit public trust uses of man-made navigable-in-fact waters in North Carolina. Part B concludes with a discussion of the pragmatic and sound public policy considerations supporting public trust uses of such navigable-in-fact man-made waterbodies.

I. FISH HOUSE, INC. V. CLARKE

A. The Underlying Dispute

The dispute in Fish House was between two neighboring fish house operators whose businesses are situated along a common, man-made, navigable-in-fact canal called "Old Sam Spencer Ditch."
This dead-end canal connects both fish houses' facilities with the Pamlico Sound. According to the court of appeals, the canal runs along the border of the two properties but lies wholly within the plaintiff's property lines. That being true, the canal was created by dredging land to which plaintiff's predecessors in interest held fee title at that time. The litigation arose because boats headed to the defendant's fish house enter the canal and tie up on plaintiff's side of the canal. This apparently interferes with boats attempting to access plaintiff's fish house. Consequently, plaintiff brought a trespass action seeking to enjoin the defendant from blocking and impeding the use of the canal. The plaintiff argued that, even if the canal were navigable, the plaintiff could exclude the defendant; however, the trial court found that the waters of the canal are navigable waters in which public trust rights exist. The trial court then dismissed the action, holding that neither party had any rights in the canal except as members of the public. In other words, the canal is public waters, open to public navigation, and the plaintiff has no private right of action. When the case reached the court of appeals, the court agreed with the trial court that the canal, although man-made, is a navigable waterway "held by the state in trust for all citizens of North Carolina" and affirmed the trial court's order.

20. *Id.* (describing the canal as "[l]ocated on the western border of Plaintiff's property and to the east of Defendant's"). The court's statement makes it appear that the canal lies wholly within the Plaintiff's property lines. However, Lloyd C. Smith, Jr., the attorney for the defendant, provides a slightly different set of facts. According to Mr. Smith, the defendant claimed to the middle of the canal, a fact hotly disputed by the plaintiff. That issue was never resolved due to the trial court basing its opinion on the navigability of the canal. See E-mail from Lloyd C. Smith, Jr. to author (Apr. 13, 2011) (on file with author). One hundred years ago the original ditch was enlarged and the canal created. See *id.* Some of the historical information relating to the history of the canal may have been lost when Mr. Smith's office was flooded on September 30, 2010. See *id.* Plaintiff purchased the property in 1992 and sold it to another company in 2005. *Fish House*, _N.C. App._ at __, 693 S.E.2d at 210. The new owner then immediately leased it back to the plaintiff. *Id.* So at the time the action arose, the plaintiff was in possession under a lease. *Id.*
22. See *id.*
23. *Id.*
24. *Id.* at __, 693 S.E.2d at 211.
25. *Id.* at __, 693 S.E.2d at 210.
26. *Id.*
27. *Id.* at __, 693 S.E.2d at 211.
B. Wrong Reasoning; Uncertainties Created

In Fish House, the court of appeals relied heavily upon the Supreme Court of North Carolina’s 1995 decision in Gwathmey. In its opinion, the Fish House court first states that “under the public trust doctrine, the lands under navigable waters are held in trust by the State for the benefit of the public and the benefit and enjoyment of North Carolina’s submerged lands is available to all its citizens... for navigation, fishing and commerce.” Then the court continues:

Our Supreme Court has clarified the law on navigability in the context of the public [trust] doctrine succinctly: “[A]ll watercourses are regarded as navigable in law that are navigable in fact.” The Court has explained that “if a body of water in its natural condition can be navigated, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose.”

Finally, the court of appeals concludes: “[t]hose lands submerged under such waters that are navigable in law are the subject of the North Carolina public trust doctrine.”

This last statement suggests that submerged lands lying under waters that meet North Carolina’s navigable-in-fact test are state-owned submerged lands. And that suggestion is generating concern about the legitimacy of private claims of title to submerged lands lying under man-made waterbodies. As Chris Burti, Vice-President and Senior Legal Counsel for Statewide Title, one of the largest title insurance companies in the state, explains:

the implications [of the Fish House case] portend a disastrous economic impact for owners of every submerged parcel of property in North Carolina upon which waters... flow by reason of manmade changes where it can be said that those waters are navigable in that [the Fish House] opinion creates a wholesale grant of their submerged lands to the State of North Carolina. There are hundreds of owners of boat slips in dozens of manmade marinas and harbors involving hundreds of

28. Id.
29. Id. at __, 693 S.E.2d at 210 (quoting Parker v. New Hanover Cnty., 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005)).
30. Id. at __, 693 S.E.2d at 211 (quoting Gwathmey v. State ex rel. Dep’t of Env’t Health & Natural Res., 342 N.C. 287, 300-01, 464 S.E.2d 674, 682 (1995)).
31. Id. at __, 693 S.E.2d at 208, 210–11.
millions of dollars in investments that will likely become uninsurable and possibly inalienable as a practical matter.  

This uncertainty stems from the failure of the court of appeals to appreciate the difference between cases in which the issue is whether navigable-in-fact waters are open to public use and cases in which the issue is whether fee title to submerged lands, free of public trust rights, have passed into private hands.

The *Fish House* court ties the public’s right to use navigable-in-fact waters to state ownership of the underlying submerged lands. However, state ownership of submerged lands under navigable-in-fact waters is not the sine qua non of the public trust right to use navigable-in-fact waters and never has been. Under North Carolina law, the common law test of navigability is relevant in two related contexts. The first is in answering the question of whether a particular waterbody is open to public use. These are “public trust use” cases. The second is in answering the question of whether submerged lands located under a particular waterbody or waterway are state-owned public trust lands, title to which remains in the state absent an explicit act of the General Assembly authorizing the transfer of title to private parties. These are “title determination” cases. *Gwathmey* is a title determination case; the *Fish House* case is a “public trust use” case.

II. PUBLIC OR PRIVATE OWNERSHIP OF SUBMERGED LANDS VERSUS THE PUBLIC RIGHT TO USE NAVIGABLE-IN-FACT WATERS

A. *What Gwathmey Was Really About: Title to Submerged Lands Under Navigable-in-Fact Waters*

The *Fish House* court’s linking of the public right of use of navigable-in-fact waters to public ownership of submerged lands is at best a case of judicial loose language and at worst a misunderstanding

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34. *Id.*
35. *See infra* notes 53–80 and accompanying text.
36. One holding of *Gwathmey* is that the General Assembly has the power to convey fee title to a private party without reserving public trust use rights “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 . . . free of all public trust rights, but only if the special grant does so in the clearest and most express terms.” *Gwathmey v. State ex rel. Dep’t of Env’t Health & Natural Res.*, 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995).
of the Gwathmey decision. The core dispute in Gwathmey was the validity of a private claim to a salt marsh located in Middle Sound in southeastern North Carolina. The basis of the plaintiffs' claim was State Board of Education deeds issued between 1926 and 1945. Prior to the issuance of the deeds, title to the salt marsh was in the State. The plaintiffs' contention was that the Board of Education deeds transferred to them fee title to the marshlands and that this fee title was held free of any public trust use rights. The State, on the other hand, contended that any interest the plaintiffs received was subject to public trust use rights. A preliminary, yet central, issue was whether the salt marsh was state-owned public trust submerged lands at the time of transfer of title. The answer to that question depended on what was the correct test for navigability. For if the salt marsh was "lands lying under navigable waters," then the salt marsh was state-owned public trust submerged lands. As such, the salt marsh was subject to public trust use rights unless the State made a valid conveyance transferring title to the plaintiffs free of public trust use rights.

The problem confronting the Gwathmey court was that the relevant case law was a bit of a mess. There is case law supporting an

37. Id. at 290–91, 464 S.E.2d at 676. The plaintiffs' claims also included submerged lands lying under the waters of Howe Creek. Id. at 291, 464 S.E.2d at 676.
38. Id. at 290, 464 S.E.2d at 676.
39. Id.
40. See id. at 290–91, 464 S.E.2d at 676. In fact the trial court found that the plaintiffs were the owners in fee simple absolute of the submerged lands at issue and they held title free of public trust rights. Id. at 292, 464 S.E.2d at 677. The Supreme Court of North Carolina vacated the judgment of the trial court on the ground that the trial court may not have applied the correct test for navigability. Id. at 310–11, 464 S.E.2d at 688. On remand, the trial court determined the waters under which the submerged lands at issue were navigable and that the plaintiffs' title to the submerged lands was subject to the public trust. See Judgment in Wainwright v. North Carolina, General Court of Justice, Superior Court Division, No. 91 CVS 640, 816, 1117, 1458, 1790, at 18 (1997).
42. The general common law rule in North Carolina and all other states is that the State holds title to submerged lands under navigable waters and such lands are held as public trust lands. See, e.g., State v. Twiford, 136 N.C. 603, 607, 48 S.E. 586, 587–88 (1904); Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 526–28, 44 S.E. 39, 42 (1903); Tatum v. Sawyer, 9 N.C. (2 Hawks) 226, 229 (1822).
43. The other major issues in the case were: (1) did the General Assembly have the power to authorize a conveyance of such lands free of the public trust use rights? and (2) did the General Assembly in fact make such an authorization? Gwathmey, 342 N.C. at 292, 301–08, 464 S.E.2d at 677, 682–86.
44. Id. at 311, 464 S.E.2d at 688 ("As we have indicated throughout this opinion, the law involving the public trust doctrine has been recognized by this and other courts as having become unnecessarily complex and at times conflicting.").
“ebb and flow” or tidal test, a “sea vessel” test, and a “navigable-in-fact” test. And, to further complicate matters, differences of opinion existed as to what constitutes “navigability-in-fact.” The Gwathmey court reviewed the existing law, discarded all conflicting precedent, and set forth the modern navigable-in-fact test. The court then vacated the judgment of the trial court in favor of the plaintiffs and remanded the case. On remand, the trial court found required the court to discard these conflicting cases. See, e.g., id. at 298, 464 S.E.2d at 680 (“This part of our decision [in Resort Development Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952)] was based on our prior erroneous interpretation of the law . . . and also is hereby expressly disavowed.”).

45. See State v. Glen, 52 N.C. (7 Jones) 321, 333 (1859) (“All the bays and inlets on our coast, where the tide from the sea ebbs and flows . . . are called navigable, in a technical sense . . . .”).

46. See id. (“[A]ll other waters, whether sounds, rivers or creeks, which can be navigated by sea vessels, are called navigable . . . .”).

47. E.g., State v. Narrows Island Club, 100 N.C. 477, 481, 5 S.E. 411, 412 (1888) (“[T]he public have the right to use rivers, lakes, sounds and parts of them, though not strictly public waters, if they be navigable, in fact . . . .”).

48. In fact, the trial court in Gwathmey appears to have applied an “actual current and historical use” test to determine whether the salt marsh was navigable in fact. Gwathmey, 342 N.C. at 292, 310–11, 464 S.E.2d at 677, 688. That approach was incorrect on two grounds. First, the Gwathmey decision states that navigability in fact can be based on the fact that navigation by watercraft is possible even if no watercraft has ever navigated the waterbody. Id. at 301, 311, 464 S.E.2d at 682, 688. Second, if the open waters of Middle Sound are navigable in fact under the full breadth rule, the full breadth of a navigable-in-fact body of water is considered navigable in law and not just the part of the waterbody that is actually navigable by vessels. See, e.g., Ward v. Willis, 51 N.C. (6 Jones) 183, 185–86 (1858).

49. Gwathmey, 342 N.C. at 293–301, 464 S.E.2d at 677–82.

50. See id. In fact, the court disavows two of its earlier decisions, id. at 297–98, 464 S.E.2d at 680, and explains how it believes other earlier opinions should be read. Id. at 298–99, 464 S.E.2d at 681.

51. According to the court:

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: “If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.” In other words, 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.

Id. at 301, 464 S.E.2d at 682 (emphasis added) (citations omitted) (quoting State v. Twiford, 136 N.C. 603, 608–09, 48 S.E. 586, 588 (1904)).
that any title to the salt marsh conveyed to the plaintiff was indeed subject to public trust use rights.\textsuperscript{52}

Properly read and confined to its facts, \textit{Gwathmey} simply decides the narrow question of whether certain state-owned submerged lands lying under natural navigable-in-fact waters were conveyed by the State free of public trust use rights. It did not hold that all submerged lands lying under navigable-in-fact waters, whether natural or man-made, are state-owned public trust submerged lands. Therefore, there is nothing in the \textit{Gwathmey} decision that brings into question the legitimacy of private titles to man-made submerged lands lying under artificially created navigable-in-fact waters connected to natural navigable-in-fact waters. Consequently, it is important in future opinions that the court of appeals takes care in its use of \textit{Gwathmey} and at the earliest opportunity remove any cloud on such titles created by its loose language in the \textit{Fish House} opinion.

Although the court of appeals misused \textit{Gwathmey} in deciding \textit{Fish House}, it does not mean the court reached the wrong result. Explicit judicial recognition of a public right to use all navigable waters—whether natural or man-made—for navigation, fishing, and other public trust uses is consistent with the historical development of public trust rights and other cases involving man-made waters. Furthermore, both pragmatic and public policy considerations support the result in \textit{Fish House}.

\textbf{B. The Public Trust Right to Use Navigable-in-Fact Waters}

1. Development of the Public Trust Right to Use Navigable-in-Fact Waters

Deeply imbedded in the common law is the concept of the public character of waters suitable for navigation, fishing, water commerce,

\textsuperscript{52} See Judgment in \textit{Wainwright v. North Carolina}, supra note 40, at 18. This did not deprive the plaintiffs of title to the submerged lands in the area of the salt marsh but only determined that the area subject to the conveyance was also subject to public trust use rights. \textit{Id.} In the \textit{Gwathmey} decision, the Supreme Court of North Carolina held that the General Assembly had conveyed submerged lands under navigable waters to the Board of Education subject to public trust use rights. \textit{Gwathmey}, 342 N.C. at 307, 464 S.E.2d at 686. Therefore, if any part of the salt marsh area conveyed to the plaintiffs by the Board was covered by navigable waters, title was taken subject to public trust use rights. \textit{Id.} ("[I]f . . . the marshlands at issue in this case are covered by navigable waters, the people of North Carolina retain their full public trust rights.").
and other water-based uses. Over the past three hundred or more years, as modes of commerce and water-based activities have evolved and waterways and waterbodies not previously used were determined to be suitable for these activities, challenges were raised to the public character of these waterways and waterbodies. In most jurisdictions, the challenge has been rebuffed and the public character affirmed until all navigable-in-fact tidal waters and all navigable-in-fact freshwaters have been brought under this umbrella concept. The key question has always been whether the waterway or waterbody was “navigable.” Inevitably judicial definitions of navigability were colored by the existing uses of waters and the technology of the times. The evolution of North Carolina’s common law definition of “navigability” stands as one example of this process, a process not unique to North Carolina.

Early in North Carolina’s history, the courts rejected the traditional English common law rule that only tidal waters were “navigable” waters open to public use. In 1828, in Wilson v. Forbes, the Supreme Court of North Carolina stated that the English rule “is entirely inapplicable to our situation, arising both from the great lengths of our rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths.” The court declined to provide a specific, definitive test for “navigability” because the case

53. See generally, e.g., 4 WATERS AND WATER RIGHTS §§ 29.01, 29.02(b), 32.01 to .03 (Robert E. Beck ed., repl. vol. 2004) (discussing the roots of the public right to water as well as the various tests for determining which waters are subject to the public right).

54. See generally 1 WATERS AND WATER RIGHTS § 6.02(f) (Amy K. Kelly ed., repl. vol. 2007) (distinguishing public waters from private waters); 4 WATERS AND WATER RIGHTS, supra note 53, §§ 33.02 to .03 (discussing the historical expansion of the scope of public waters in many states).

55. See, e.g., 1 WATERS AND WATER RIGHTS, supra note 54, § 6.02(f), at 6-184 to -192.

56. See id. at 6-184 (“Traditionally, the central characteristic of public waters is that they are natural and navigable.”).

57. See generally 4 WATERS AND WATER RIGHTS, supra note 53, §§ 32.01 to .03 (describing different tests that jurisdictions use to distinguish waters open to public use from those not subject to public use); Monica K. Kalo & Joseph J. Kalo, The Battle To Preserve North Carolina’s Estuarine Marshes: The 1985 Legislation, Private Claims To Estuarine Marshes, Denial Of Permits To Fill, And The Public Trust, 64 N.C. L. REV. 565, 578-84 (1986) (describing the development of the common law definition of “navigability” in North Carolina up to 1986).

58. See Ingram v. Threadgill, 14 N.C. (3 Dev.) 59, 61 (1831); see also, e.g., State v. Dibble, 49 N.C. (4 Jones) 107, 110 (1856) (calling this English ebb and flow rule “entirely inapplicable”).

59. 13 N.C. (2 Dev.) 30 (1828).

60. Id. at 34–35.
did not require it. However, the court suggested that a waterway meeting a "sea vessel" test would be public waters. According to Justice Henderson, "a creek or river, such as this appears to be, wide and deep enough for sea vessels to navigate . . . is a navigable stream within the general rule." Then in 1859, in a case involving an alleged obstruction to the passage of fish in the Yadkin River, the court accepted the fact that the bed of the river could be privately owned, but stated that there was "an easement in the public for the purposes of the transportation of lime, flour, and other articles in flats and canoes." Later in 1886, in Broadnax v. Baker, the court once again expanded the definition of navigability. According to the court:

Navigable waters, constituting highways, are not ascertained here, as they are in England, an island accessible to ocean tides, by the extent of their ebb and flow, but by a more practical test of their capacity to float boats used as instruments of commerce, in the interchange of commodities, and large enough for the purpose. Such waters lose not their navigability, because intercepted by falls, when above and below them, the waters can be thus used for the purpose of commerce for long distances.

When the lumber industry began booming in the late 1800s, the use of the western North Carolina rivers as instruments to move logs to mills was important to the economy of the State. Initially, the court struggled with the question of whether waters insufficient to float boats but sufficient to float logs were open to public use.

61. Id. at 35, 38.
62. Id. at 35. Later, in Collins v. Benbury, 25 N.C. (3 Ired.) 277 (1842), the court described navigable waters as "any waters, which are sufficient in fact to afford a common passage for all people in sea vessels." Id. at 282. In Collins the issue was whether a certain portion of the Albemarle Sound was open to public fishing. See id. at 277–81; see also Collins v. Benbury, 27 N.C. (5 Ired.) 118 (1844) (appealing the prior decision of the court).
64. 94 N.C. (5 Ired.) 675 (1886).
65. Id. at 681.
66. See, e.g., Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 553–60, 16 S.E. 692, 693–94 (1892) (MacRae, J., concurring) (discussing growth of western North Carolina timber industry and whether streams floatable for logs are "navigable"); id. at 563, 16 S.E. at 696 (Avery, J., dissenting) (describing timber of great value in sixteen mountain counties and large amount of logs moved by river). See generally J.G. De Rouhac Hamilton, 3 History of North Carolina 391 (1919) (noting that lumber and woodworking industries followed cotton and tobacco manufacturing in economic importance).
67. See Kalo & Kalo, supra note 57, at 581–83 n.108 (detailing the history of the court’s struggle with the classification of western North Carolina rivers).
Finally in *Commissioners of Burke County v. Catawba Lumber Co.*, the court settled the question. The result was that if rivers are "floatable, they are natural highways, in which the public have, as in other water highways, an easement, the reasonable use of which is paramount ...".

The Supreme Court of North Carolina returned to public use of North Carolina's coastal waters in 1904 in an obstruction of navigation case—*State v. Twiford*. This case is important for two reasons. First, it set forth what has become the basis for the modern North Carolina test for navigability. According to the *Twiford* court, "[i]f a stream is 'navigable in fact ... , it is navigable in law.'" And, "the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit of all water courses, whether tidal or inland, that are in their natural condition capable of such use.'"

Second, it made clear that the public rights of use are not affected by any private ownership of the bottom of navigable waters. The defendants in *Twiford*, employees of the riparian owner, had placed stakes in the creek creating the obstruction. The riparian owner claimed title to the bottom of the creek by reason of a state grant; however, the court determined that grant was void. Nonetheless the court stated that "[e]ven if the grant passed a title to the lands covered by the waters of the creek, the title became vested in the owner subject to the public easement—the right of navigation." Therefore, reading together western North Carolina river cases, *Twiford*, and similar coastal cases, there can be little doubt that the public right of use of navigable-in-fact waters exists regardless of whether the underlying submerged lands are owned by the State or are in private hands. Furthermore, this right is not limited

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68. 116 N.C. 731, 21 S.E. 941 (1895).
69. Id. at 741, 21 S.E. at 945.
70. 136 N.C. 603, 48 S.E. 586 (1904).
73. Id. at 607-08, 48 S.E. at 588 (quoting State v. Baum, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901)).
74. See *supra* text accompanying note 73.
76. Id. at 604, 48 S.E. at 587.
77. Id. at 607, 48 S.E. at 587.
78. Id. at 607, 48 S.E. at 588.
to navigation, but also includes other public trust uses appropriate to the waterbody, such as fishing.\textsuperscript{79} In many cases, this public trust right to fish in navigable-in-fact waters has been affirmed by the courts of the state.\textsuperscript{80} The key criterion for determining whether waters are open to public trust uses is whether the waters are navigable in fact. It is that criterion that makes available the coastal waters and the western rivers of the state to kayakers, canoeists, fishermen, and other recreational waters users.

2. North Carolina Case Law Draws No Distinction Between Natural and Man-Made Navigable-in-Fact Waters

Although it is true in prior cases the Supreme Court of North Carolina has referred to navigable waters in their \textit{natural condition}, that does not preclude public trust uses of man-made navigable-in-fact waters connected to existing \textit{natural} navigable-in-fact waters. The \textit{Fish House} court viewed “natural condition” as reflecting “only upon the manner in which the water flows without diminution or obstruction.”\textsuperscript{81} The \textit{Fish House} court may be correct; however, another possibility is that the Supreme Court of North Carolina simply has never considered whether man-made navigable-in-fact waters are open to public trust uses and the use of the phrase “natural condition” simply reflects the fact that in the decided cases the waterbody at issue was a natural one. Furthermore, at least four North Carolina Court of Appeals decisions suggest that no distinction is drawn in North Carolina law between natural navigable-in-fact waters and man-made navigable-in-fact waters connected to existing navigable waters.

In \textit{Steel Creek Development Corp. v. James},\textsuperscript{82} a 1982 court of appeals decision, the plaintiff asserted that the defendants were trespassing on its submerged lands located under Lake Wylie, a lake

\textsuperscript{79} See, \textit{e.g.}, Shepard’s Point Land Co. v. Atl. Hotel, 132 N.C. 517, 526, 44 S.E. 39, 42 (1903) (noting that title to public trust waters is “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”). For a statutory list of public trust rights, see N.C. GEN. STAT. § 1-45.1 (2010).

\textsuperscript{80} \textit{E.g.}, \textit{Twiford}, 136 N.C. at 609, 48 S.E. at 588 (“Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and \textit{unrestricted} use by the public for all time.” (emphasis added)); State v. Glen, 52 N.C. (7 Jones) 321, 333 (1859) (“In [navigable waters], . . . the right of fishing is free.”).


\textsuperscript{82} 58 N.C. App. 506, 294 S.E.2d 23 (1982).
formed by damming a portion of the Catawba River.\textsuperscript{83} The alleged trespass consisted of the construction of two boathouses, both of which were anchored on the plaintiff's submerged lands.\textsuperscript{84} The trial court entered an order directing defendants to remove the boathouses from the waters overlying plaintiff's submerged lands.\textsuperscript{85} The defendants appealed.

Interestingly, the issue of whether Lake Wylie was a navigable water was raised for the first time on appeal.\textsuperscript{86} Based on the limited factual record before the court of appeals, it said that the evidence in the record was insufficient to determine whether the lake was navigable, and the court did not consider that issue in reaching its decision.\textsuperscript{87} Nonetheless, the case is somewhat instructive. On one hand, the court reaffirmed the traditional common law principle that "the owner of submerged land, like the owner of dry land, owns also to the sky and to the depths";\textsuperscript{88} but on the other hand, the court only recognized the right of the submerged land owner "to proscribe permanent fixtures lying above such land."\textsuperscript{89} The court did not hold that the waters were closed to public navigation. Such a conclusion would be inconsistent with reality. Lake Wylie, which lies in part in both North Carolina and South Carolina, is capable of supporting commercial navigation\textsuperscript{90} and is a popular recreational boating and fishing site.\textsuperscript{91}

\textsuperscript{83} Id. at 508, 294 S.E.2d at 25.
\textsuperscript{84} Id. at 509–10, 294 S.E.2d at 25–26.
\textsuperscript{85} Id. at 510, 294 S.E.2d at 26.
\textsuperscript{86} Id. at 511–12, 294 S.E.2d at 27.
\textsuperscript{87} Id. It is also interesting that the court refused to follow a then recent United States district court decision—\textit{Hartman v. United States}, 522 F. Supp. 114, 117 (D.S.C. 1981)—that found the waters of Lake Wylie, which also lies within South Carolina, to be navigable for purposes of admiralty jurisdiction. \textit{See Steel Creek}, 58 N.C. App. at 512 n.1, 294 S.E.2d at 27 n.1.
\textsuperscript{88} \textit{Steel Creek}, 58 N.C. App. at 512, 294 S.E.2d at 27.
\textsuperscript{89} Id.
\textsuperscript{89} \textit{Hartman v. United States}, 522 F. Supp. 114, 117 (D.S.C. 1981) ("Lake Wylie is susceptible of being traversed by commercial craft between states and is therefore navigable for purposes of invoking admiralty jurisdiction."). Interestingly, the \textit{Hartman} court stated that a waterbody used or susceptible for use only "by non-commercial fishermen, water skiers, and pleasure boat[s]" is not a navigable body of water for federal admiralty jurisdiction. \textit{Id.} at 116. However, such a waterbody would qualify as a navigable-in-fact body of water under North Carolina law. \textit{See, e.g., State v. Twiford}, 136 N.C. 603, 608–09, 48 S.E. 586, 588 (1904) ("If water is navigable for pleasure boating it must be regarded as navigable water . . . . The purpose of navigation is not the subject of inquiry . . . .") (quoting \textit{Att'y Gen. v. Woods}, 108 Mass. 436, 440, 11 A.m. Rep. 380, 382 (1871)).
In a more recent court of appeals case, *Bauman v. Woodlake Partners, LLC* 92 the right to navigate waters lying over privately owned submerged lands was directly in issue. Woodlake Country Club, a gated community in Moore County, contains a twelve hundred acre lake "formed by the damming of two creeks, one of which [was] Crane's Creek." 93 When an annual fee was imposed upon Woodlake property owners, plaintiffs challenged the fee on the basis that the waters of the lake were navigable waters open to public navigation under state and federal law. 94 The key issue in the case was whether the lake was created by damming an existing navigable waterway. 95 Although the plaintiffs offered evidence that small portions of Crane's Creek above the lake were navigable in fact, 96 they did not offer any evidence as to whether the creek, in its pre-dam natural condition, was navigable in fact in the area in which the lake was located. 97 It was on this failure of proof that the plaintiffs lost the case. 98 However, the court concedes that if adequate evidence of navigability had been presented, then the waters of the lake would be public trust waters and no fee could be imposed for use of the waters. 99

93. Id. at 442, 681 S.E.2d at 820–21.
94. Id. at 442–43, 681 S.E.2d at 821.
95. Id. at 446–47, 450–51, 681 S.E.2d at 823–24, 826.
97. Id. at 451, 681 S.E.2d at 826. The plaintiffs' evidence did not show that, prior to the damming of the creek, it was navigable in its natural condition at the site of the lake or downstream. Id. at 449, 451, 681 S.E.2d at 825–26. Plaintiffs' evidence was that it was possible to paddle a canoe or kayak one-half mile upstream from the lake and that stream was also passable by canoe and kayak several miles upstream from the lake at two locations. Id. at 449, 451, 681 S.E.2d at 825, 826. The evidence did not show that the creek was navigable from the lake to the points several miles upstream. Id. at 449, 451, 681 S.E.2d at 825, 826.
98. Id. at 453–54, 681 S.E.2d at 827–28.
99. See id. at 454, 681 S.E.2d at 828. Unfortunately, some of the language in *Bauman*, just as in *Fish House*, suggests that if waters are navigable in fact, then the underlying submerged lands are state-owned public trust lands. For example, at one point the court says, "[t]hough 'the extent of the public trust ownership of North Carolina is confused and uncertain . . . the Supreme Court of North Carolina has affirmed original state ownership of . . . lands under all waters navigable-in-fact.'" Id. at 448, 681 S.E.2d at 824 (quoting Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. REV. 1, 17 (1972–73)). The continued loose use of such language is misleading. That language has no application to the state of title to uplands flooded by the damming of natural navigable-in-fact waters. If the uplands were in private ownership before being flooded, they continue to be in private ownership after being flooded. In such circumstances, the relevance of the public trust doctrine is limited to protecting the public's right to use all navigable-in-fact waters free of unauthorized obstructions or limitations. Despite the loose
In addition to Steel Creek and Bauman, two court of appeals riparian rights cases draw no distinction between natural navigable-in-fact waters and man-made navigable-in-fact waters connected to natural navigable-in-fact waters. In Pine Knoll Ass'n. v. Cardon, the issue was a claim of interference with riparian rights. Both parties owned water frontage on a navigable man-made canal. Without any discussion of the fact that the waterway was man-made, the Cardon court held that both parties were landowners with common law riparian rights. More recently, in Newcomb v. County of Carteret the court of appeals directly confronted the issue of whether “riparian rights only attach to natural, as compared to artificial, bodies of water.” In Newcomb, property owners with waterfront land adjacent to a man-made harbor in Marshallberg, North Carolina claimed common law riparian rights, in particular the right to wharf out. According to the court, whether waterfront landowners “have riparian rights ... does not hinge upon whether the harbor was natural or manmade.” Because Marshallberg Harbor was “clearly capable of navigation by watercraft,” it was navigable in fact and therefore the claimed riparian rights existed. Therefore, if a man-

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100. 126 N.C. App. 155, 484 S.E.2d 446 (1997).
101. Id. at 159, 484 S.E.2d at 447. Plaintiff and defendant owned lots adjoining a navigable man-made canal in a subdivision in Pine Knoll Shores, North Carolina. Plaintiff alleged that defendant’s dock and manner of mooring his boats interfered with its riparian rights. Id. at 157–59, 484 S.E.2d at 447–48.
102. Id.
103. Id. at 159–60, 484 S.E.2d at 449. Although it is said that “[i]t is axiomatic that riparian rights do not attach to artificial waterbodies,” the courts frequently apply the common law riparian rights doctrine to waterfront owners situated along an artificial waterbody. I WATERS AND WATER RIGHTS, supra note 54, § 6.02(c), at 6-173 to -174. In some instances, it may be because an artificial waterway was substituted for an existing natural waterway, as when a natural stream is deepened or widened, or because of what appeared to be the parties’ expectations, or simply because the common law doctrine is a convenient measure of the rights of waterfront owners in a situation in which the parties have left them undefined. See, e.g., id. at 6-174 to -175. In the Cardon case, the court of appeals never explained the basis of its assumption that the parties possessed riparian rights.
104. ___ N.C. App. ___, 701 S.E.2d 325 (2010).
105. Id. at ___, 701 S.E.2d at 336.
106. Id. at ___, 701 S.E.2d at 331 (stating the plaintiffs’ claim for riparian rights). For a history of the construction of Marshallberg Harbor, see id. at ___, 701 S.E.2d at 329–31.
107. Id. at ___, 701 S.E.2d at 337.
108. Id.
109. Id.
made waterbody constitutes navigable waters for purposes of private riparian rights, the same waterbody should constitute navigable waters for purposes of public use.

3. Public Trust Uses of Man-Made Waterbodies is Not Prohibited By Federal Case Law

When the issue of private control of waters has arisen, the owners of the submerged lands sometimes argue that the Supreme Court of the United States decision in *Kaiser-Aetna v. United States* stands for the proposition that no public right exists in the waters of marinas or boat basins created by a man-made connection to navigable-in-fact waters, and that imposition of such a right would constitute an unconstitutional taking of private property rights without just compensation in violation of the Fifth Amendment to the United States Constitution. However, any reliance on the *Kaiser-Aetna* case is misplaced.

The waterbody at issue in *Kaiser-Aetna*—Kaupa Pond—was a shallow lagoon on the island of Hawaii that had been converted into a private marina. Originally the lagoon was separated from an ocean bay by a barrier beach. Two openings connected the lagoon to the ocean, but early Hawaiians used the lagoon as a fish pond by


111. See *id.* at 174–80 (discussing the takings clause of the Fifth Amendment); *Fish House, Inc. v. Clarke,* __ N.C. App. __, 693 S.E.2d 208, 211, discretionary review denied, 364 N.C. 324, 700 S.E.2d 750 (2010) (discussing that no public right exists in a water that is connected to a navigable-in-fact water). The plaintiff in the *Fish House* case unsuccessfully tried to persuade the court of appeals that *Kaiser-Aetna* and a companion case, *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979) (per curiam), stood "for the proposition that the privately owned, manmade waterways ... did not become open to [public] use ... simply [by being connected to] other navigable waterways." *Fish House,* __ N.C. App. at __, 693 S.E.2d at 211. The court of appeals dismissed that contention on the grounds that the cases addressed only the question of general public use of navigable waters in the context of interstate commerce and not the "rights enjoyed by ... citizens ... under the Public Trust Doctrine." *Id.*

112. *Fish House,* __ N.C. App. at __, 693 S.E.2d at 211. Similarly, any reliance on *Vaughn*, the companion case to *Kaiser-Aetna*, is misplaced. The waterways at issue in *Vaughn* were man-made canals constructed on private property with private funds. *Vaughn,* 444 U.S. at 207. The canals system joined other naturally navigable waterways. *Id.* In the per curiam opinion, the court held that "no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause"; however, if the canal system was created through the destruction or diversion of naturally navigable waterways then the canal system might be open to public use. *Id.* at 209. Because there was a factual issue as to whether such destruction or diversion had occurred, the case was remanded for further proceedings. *Id.* at 209–10.

controlling the flow of water into and out of the lagoon by means of sluice gates.114 When the gates were opened, waters and fish from the bay entered the lagoon.115 When the gates were closed, the fish inside of the lagoon could be netted.116

In 1961, after Kaiser-Aetna acquired the lagoon and surrounding lands, it dredged and deepened the lagoon and dredged an eight-foot-deep channel connecting the lagoon to the bay creating the marina.117 Access to the marina was controlled by Kaiser-Aetna.118 In 1972, a dispute arose between the U.S. Army Corps of Engineers and Kaiser-Aetna, with the Corps contending that the waters of the marina were “navigable water[s] of the United States,” and, as such, open to public use.119

When the case reached the Supreme Court of the United States, the government's theory was that when Kaiser-Aetna dredged and improved Kaupa Pond, “the pond—although it may once have qualified as fast land—became navigable water of the United States.”120 In rejecting the Corps’ position, the Court held that connecting private waters to navigable waters of the United States does not convert those private waters to “navigable water[s] of the United States” and open them to public use.121 In the Court's view the position of the government constituted an attempted unconstitutional taking of Kaiser-Aetna’s private property rights.122

The key fact in the Kaiser-Aetna case is that Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system . . . . Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land.123

Therein lies the distinction. In North Carolina, existing statutory and case law does not declare the waters located in marinas, boat basins, or similar facilities created by excavating privately owned

114. Id. at 166.
115. Id.
116. Id. at 166–68.
117. Id. at 167.
118. Id. at 168.
119. Id.
120. Id. at 170.
121. Id. at 168; see id. at 172–73, 179–80.
122. Id. at 178–80.
123. Id. at 167.
uplands and connected to navigable-in-fact waters of North Carolina to be private waters from which the public may be excluded.

4. Pragmatic Considerations and Sound Public Policy Make Navigable-in-Fact Man-Made Waters Open to Public Trust Uses

Recognizing the continuing rights of public use of navigable-in-fact waters that enter an area excavated out of uplands makes sense from both a practical perspective and as a matter of public policy. A private boat basin or marina may be created by digging out privately owned uplands directly adjacent to the existing shoreline instead of creating the marina or boat basin by dredging navigable-in-fact public trust waters adjacent to privately owned uplands. The end result is public trust waters flow into the excavated area, covering the submerged lands that formerly were upland areas. This may be done for a number of reasons, one of which is that it may be easier to get the necessary permits for the digging out of the uplands than it would be to get permits to dredge directly in existing estuarine waters.

The central question is whether title to the submerged lands gives the marina or boat basin owner a common law right to exclude the public from the man-made waters within the marina or boat basin.

An easy case is the one in which shorelands are excavated to create a continuous body of water extending from the natural waters of a sound or coastal river into the man-made marina excavated out of adjacent uplands. When that happens, the marina waters may appear to be simply an indentation in the natural shoreline. To the boating and fishing public, natural navigable-in-fact waters and man-made navigable-in-fact waters lying within an excavated portion of the shoreline are indistinguishable. In such situations, the area of man-made waters should be treated the same as the area of natural navigable-in-fact waters. Such a bright line rule avoids the potential difficulty of drawing imaginary lines in the water to separate the public from the private.

A perhaps more difficult situation is one in which a man-made waterbody is connected by a man-made canal to a natural navigable-in-fact waterway. In these circumstances the separation of the marina and its artificial connection to the natural navigable-in-fact waterway

125. See id. (stating that the preferred alternative for the siting of marinas is “an upland basin site requiring no alteration of wetlands or estuarine habitat”).
is probably apparent to the average boater or fishermen. The central question then is whether such captured public trust waters retain or lose their public trust use character and become purely private waters. This is a matter of public policy and not pragmatic consideration.

Under existing North Carolina law, neither fee title nor exclusive rights can be obtained to public trust submerged lands, natural navigable-in-fact waters, or public trust natural resources without specific legislative authorization.\textsuperscript{126} The same rule should apply to the appropriation of navigable-in-fact waters and public trust resources by developers and other private parties. Public waters and public natural resources should not become private property simply because they pass over an imaginary line in the water. Allowing such an appropriation appears to be more a taking of public property than the exercise of a private property right. In the absence of specific legislative authorization, private parties may be able to use public waters for a private purpose, but their use of the waters should not be exclusive and should not come free of public trust use rights.

The position of the State of North Carolina is that such captured waters retain their public trust character.\textsuperscript{127} According to the North Carolina Division of Coastal Management, public trust areas include “all water in artificially created bodies of water containing public fishing resources or other public resources which are accessible to the public by navigation from bodies of water in which the public has rights of navigation.”\textsuperscript{128} Because of the shelter and habitat created by the piers, docks, and other features in a marina or boat basin, significant public fishing resources are likely to exist.\textsuperscript{129}

Furthermore, the excavation or creation of a boat basin or canal will require a state permit, and the applicable rule gives clear notice to anyone applying for such a permit that the man-made waterbody

\textsuperscript{126} See, e.g., RJR Technical Co. v. Pratt, 339 N.C. 588, 590, 453 S.E.2d 147, 148 (1995). Such rights can also not be acquired by prescription. See, e.g., id. at 592, 453 S.E.2d at 149 (“North Carolina law does not provide for private acquisition of exclusive or ‘several’ fisheries in the State’s navigable waters.” (citation omitted)). It is noteworthy that both Gwathmey and RJR were decided by the Supreme Court of North Carolina in the same year. Gwathmey v. State ex rel. Dep’t of Env’t, Health, & Natural Res., 342 N.C. 287, 464 S.E.2d 674 (1995).

\textsuperscript{127} See supra notes 103–09 and accompanying text.

\textsuperscript{128} 15A N.C. ADMIN. CODE 7H.0207 (2010).

\textsuperscript{129} See supra note 4 (describing important fish species that may be found in such areas).
may be open to public use. Among the factors that the State will take into account "[i]n determining whether the public has acquired rights in artificially created bodies of water," are:

(3) the value of public resources in the body of water; (4) whether the public resources in the body of water are mobile to the extent that they can move into natural bodies of water; (5) whether the creation of the artificial body of water required permission from the state.

In light of this rule language and the North Carolina Division of Coastal Management's statement, owners of man-made marinas, boat basins, or canals have no expectation that the public may be excluded from captured public trust waters and natural resources.

The marina, boat basin, or canal owner will still have title to the underlying submerged lands and may still prohibit unauthorized people from placing permanent structures in the marina or boat basin waters. If in particular circumstances, for purposes of public health, public safety, or the public welfare, limits on public access are warranted, then reasonable limitations may be imposed by state law, agency rules, or municipal ordinances.

CONCLUSION

On one hand, although the Fish House court's reasoning is suspect, the court's recognition of the right of public trust uses of man-made waterbodies connected to natural navigable-in-fact waterbodies is firmly grounded in good public policy, sound pragmatic considerations, and existing North Carolina law. On the
other hand, it is important for the courts in the future to clearly separate the question of ownership of the bottom of a man-made waterbody from the public ownership of submerged lands lying under natural navigable-in-fact waterbodies and waterways. The court of appeals appears to be habitually misreading *Gwathmey*, a practice that creates unnecessary confusion in the law and raises unnecessary anxiety as to the legitimacy of valid private titles to excavated privately owned uplands that become submerged by reason of an artificial connection to existing natural navigable-in-fact waters. To end such confusion and anxiety, the court of appeals must take care in its opinions to distinguish title determination cases from public trust use cases.