MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY

MEMORANDUM

TO: MPCPPAA

FROM: Lewie Lawrence, Dir of Regional Planning

DATE: March 30, 2005

RE: April PAA Meeting

This announcement serves as notice to call a meeting of the Public Access Authority on Friday, April 8th , 2005 at 12:00 p.m. The meeting will be held in the MPPDC Board Room. Lunch will be provided.

The agenda and related material follow. A draft Browne Tract brochure is attached below. The brochure is correctly laid out for a tri-fold. The February minutes are attached as well. If you have any questions, please do not hesitate to call or e-mail. I can be reached at 804-758-2311.

AGENDA

(Amended 4/7/05)

1. Welcome and Introductions
2. Approval of February minutes
3. Treasurer Report
4. Public Comment
5. Old Business
   a. Browne Tract Brochure
   b. New Point Brochure
6. Request from the River County Tourism Council
   a. Desire to market public access opportunities as a tourism incentive
   b. Request a study on what's available and what can be done at each site.
7. Funding Request to Virginia Coastal Program NOAA- Study of Regulatory Barriers to Public Access within the Middle Peninsula- (proposal attached)
8. Informal Request from the Director of Planning Gloucester County to coordinate all water trail activity
9. Discussion about public ingress and egress
10. **CELCP Update**
11. **TNC Donations**
    a. **New Point, Mathews County**
    b. **Guinea Marsh, Gloucester County**
    c. **Island Marsh, King William**
12. Other business
13. Chairman's Observations
14. Next Meeting
15. Adjourn

Saluda Professional Center
125 Bowden Street
P. O. Box 286
Saluda, VA 23149-0286
Phone: (804) 758-2311
FAX: (804) 758-3221
email:
PublicAccess@mppdc.com

MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY
MINUTES

February 11, 2005
Middle Peninsula Planning District Commission
Saluda, Virginia

1. Welcome and Introductions

The Middle Peninsula Chesapeake Bay Public Access Authority held its meeting in the Middle Peninsula Planning District Commission Board Room in Saluda, Virginia, at noon on February 11, 2005. Members and Alternates present were Chairman, Stephen Whiteway; Vice Chairman, Frank Pleva; Treasurer, R. Gary Allen; Louise Theberge, Gloucester County Board of Supervisors; Ron Hachey, King and Queen County Administrator; and Trent Funkhouser, West Point Town Manager. Also present were Lewis Lawrence, Director of Regional Planning MPPDC; David Fuss, Program Director of Dragon Run Special Area Management Program MPPDC; Tom Brockenbrough, Regional Planner MPPDC; Jimmy Sydnor; Town of Tappahannock Zoning Officer; Ben Wills, Mr. and Mrs. Wills, King and Queen County.

Chairman Whiteway welcomed everyone in attendance.

2. Public Access Authority Logo Design Award Presentation

Ben Wills, a resident of King and Queen County and a student at West Point High School was invited to the meeting as the winner of the logo design competition. Mr. Wills discussed how he developed the logo. Mr. Lawrence informed Mr. Wills how the logo has been incorporated into Public Access Authority signage and letterhead and showed the Department of Forestry sign for the Browne Tract. Mr. Wills was presented with a plaque as well as a check in the amount of $100.00 for winning the competition.

3. Approval of December Minutes

Chairman Whiteway requested a motion to approve the December Minutes. Mr. Allen moved that the December Minutes be approved; Mr. Pleva seconded the motion; motion carried by unanimous vote.

4. Treasurer's Report

The Treasurer's Report was reviewed by Mr. Lawrence. Ms. Theberge moved to accept the Treasurer's Report subject to audit; Mr. Pleva seconded; motion carried by unanimous vote.

5. Public Comment

There were no public comments.

6. Browne Tract

Mr. Lawrence informed the Authority they still own the portion of the Browne Tract which will be transferred to the Virginia Department of Forestry. The Attorney General's Office still has problems accepting the property with the NOAA restrictive language on the deed.

7. Land Acquisition - CELCP

Mr. Lawrence provided the Authority with information on the properties in the Dragon Run Watershed under consideration for acquisition using $1,000,000 of federal funds earmarked for land acquisition. This list includes those properties identified by the Public Access Authority as well as those identified by others. Mr. Lawrence will be in attendance at the meeting when the acquisitions are discussed by the Coastal Program.

Mr. Hachey inquired as to the role of the Department of Forestry in the CELCP acquisitions if they are unable to take over property which has been acquired. It was noted the Authority can dispose of these deals in a more timely manner and possibly the Authority should offer to hold all the properties until the Department is able to accept any properties.

8. Discussion of Middle Peninsula State Park

There is only one site in Gloucester near Rosewell under consideration as a possible site for a new state park. Chairman Whiteway reported there had been no progress on the potential site in Mathews. He is looking for two smaller sites in the event the Department of Conservation and Recreation revises its criteria for site selection.

9. 2005 NOAA Coastal Management Fellowship Program.

Mr. Lawrence briefed the Authority on the process for selecting the NOAA Coastal Fellow. Fellows will be matched with programs following a workshop in Charleston during April. The Authority needs to send staff to the workshop. Mr. Lawrence recommended that travel funds be utilized from the PAA Browne/BFI Project. Mr. Hachey moved the Authority use the funds from the project to send staff to the matching workshop; Ms. Theberge seconded; motion carried by unanimous vote.

10. Legislative Update

Mr. Lawrence updated the Authority on House Bill 2692 which creates a Northern Neck Chesapeake Bay Public Access Authority. The Bill is identical to the legislation creating the

Middle Peninsula Chesapeake Bay Public Access Authority and the new Authority would not have any new powers that the Middle Peninsula Authority does not have. Mr. Lawrence also detailed contacts he has made with Delegate Morgan to obtain funding for the Authority, possibly in conjunction with funding for the Northern Neck Authority as well.

11. Liability Insurance Renewal

Mr. Lawrence provided information from VACO on renewal of the liability insurance policy for the Authority. No action is required at this time other than a signature which authorizes the sending of a quote to the Authority.

12. Other Business.

A member of the Dragon Run Steering Committee has raised concerns about access to the Dragon. Discussion ensued on the needs of educating the public on active versus passive access as well as emphasizing the role the local governments have played in the purchases and protection of the land. Chairman Whiteway recommended developing a 1-2 page document on the Authority which can be given to landowners near Authority sites.

Mr. Lawrence recently attended a workshop on easements and solicited information on VDOT prescriptive easements. Attorneys at the workshop indicated they felt the value of prescriptive easements could be used as match funding by the Authority. Mr. Hachey inquired on the status of the sites for action identified by each locality. Mr. Lawrence indicated that task will fall to the NOAA fellow.

13. Chairman's Observations

Chairman Whiteway chose not to comment at this time.

14. Next Meeting

The next meeting of the Middle Peninsula Chesapeake Bay Public Access Authority will be April 8, 2005 at noon.

15. Adjourn

Mr. Pleva motioned to adjourn, Mr. Allen seconded; meeting adjourned.

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Stephen K. Whiteway, Chairman

Revenue and Expenditure Report by Element

Middle Peninsula Planning District Commissi
Fiscal Year: 2005
Period 07/01/04 to 03/31/05

Run Date: 04/06/2005
Run Time: 10:35:21 am

32001 PAA Brown /BFI — **Project Period** 07/31/2004 to 06/30/2005

Element Code & Description		Budget	Prior Year	Current	YTD	Proj Tot	Un/Ovr	% Bud
320010 Brown Tract Management								
Revenues								
44010	MPLT/BFI Award	37,500.00	264.00	0.00	37,236.00	37,500.00	0.00	100.00%
44900	Miscellaneous Income	0.00	1,661.00	0.00	0.00	1,661.00	-1,661.00	0.00%
	Revenues	37,500.00	1,925.00	0.00	37,236.00	39,161.00	-1,661.00	104.43%
Expenses								
56400	Consulting/Contractural S	37,236.00	0.00	0.00	0.00	0.00	37,236.00	0.00%
57400	Public Officials Insuranc	1,925.00	1,925.00	0.00	0.00	1,925.00	0.00	100.00%
	Expenses	39,161.00	1,925.00	0.00	0.00	1,925.00	37,236.00	4.92%
	Balance:	-1,661.00	0.00	0.00	37,236.00	37,236.00		
	Project Revenues:	37,500.00	1,925.00	0.00	37,236.00	39,161.00	-1,661.00	104.43%
	Project Expense:	39,161.00	1,925.00	0.00	0.00	1,925.00	37,236.00	4.92%
	Project Balance:	-1,661.00	0.00	0.00	37,236.00	37,236.00		

Browne Tract: Conceptual Recreational Trails and Facilities Map

BROWNE TRACT

Providing access opportunities to the waterways of Virginia's Middle Peninsula

Saluda Professional Center
125 Bowden Street
P.O. Box 286
Saluda, VA 23149-0286
Phone: (804) 758-2311
Fax (804) 758-3221

MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY

MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY

What is the Public Access Authority?
Enabled by Virginia State Code 15.2-6600 through 15.2-6625, the Public Access Authority is a political subdivision that acts to serve the public access needs of the encompassed communities.

When was the Authority enabled?
The Authority was enabled by the Virginia General Assembly on April 7, 2002 and ratified by participating localities on June 13, 2003.

Who are the members?
The counties of Essex, Gloucester, King and Queen, King William, and Mathews and the towns of Tappahannock and West Point

Why was the Authority enabled?
The Authority was established to identify, acquire and manage public water access opportunities in the region that can be used by the general public for passive and active activities.

AUTHORITY DIRECTORS

Essex County – Mr. R. Gary Allen, *Treasurer*
Town of Tappahannock – Vacant
Gloucester County – Hon. Louise D. Theberge
King and Queen County – Mr. Ronald Hachey
King William County – Mr. Frank Pleva, *Vice Chairman*
Town of West Point – Mr. Trenton Funkhouser
Mathews County – Mr. Steve Whiteway, *Chairman*

Staff – Mr. Lewis Lawrence
www.mppdc.com/projects/access.shtml

BROWNE TRACT

What is the Browne Tract?
The Browne Tract is a 274-acre tract of land that straddles Essex and King & Queen counties and has approximately 7,500 feet of water frontage on the Dragon Run Swamp in the two counties and about 2,500 feet of frontage on Route 604 in Essex County.

Who manages the Browne Tract?
The Middle Peninsula Chesapeake Bay Public Access Authority (MPCBPAA) manages 137-acres of this 274-acre tract purchased with grants from the Virginia Coastal Program at the Department of Environmental Quality. The Virginia Department of Forestry will manage the residual 137-acre area.

How was a management plan developed?
Virginia State Code, 15.2-6600 through 15.2-6625 directs the Authority to develop appropriate acquisition and site management plans for public access usage. Through collaboration with stakeholders, a management plan was adopted that focused on resource conservation while allowing compatible activities.

What are the management goals of this site?
The primary goals of the site are to protect geographic areas of particular concern in the coastal zone and to provide passive public access, resource protection and sustainable traditional uses (i.e. forestry and hunting). The MPCBPAA will implement management strategies designed to make the site more accessible and functional to a variety of users and to reduce the negative impacts on the natural resources of the area.

Why was this location chosen as a MPCBPAA site?
The site's wide variety in terrain, flora and fauna provides the base for a diverse range of multi-use activities. These activities will be geographically and temporally separated based on activity compatibility within the tract to maximize the multi-use aspect of the plan, while minimizing harmful impacts to significant natural resources.

What types of activities will be available on this site?
Potential activities incorporated on the tract may cover a variety of low-impact uses include hiking, horseback riding, research forest practices, forest and habitat management, riparian buffer demonstration, paddling, education, environmental workshops, bird watching, hunting, fishing, reptile watching, biking, research, restoration of species, wading, water quality monitoring, hunter safety.

Browne Tract Walking Bridge Looking South

2005VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM GRANT

Project Title: Regulatory Barriers to Public Access

I. LEGAL APPLICANT

Name: Lewie Lawrence
Organization: Middle Peninsula Chesapeake Bay Public Access Authority
Street Address: Bowden Street
City, State, Zip: Saluda VA 23149

Project Manager: Lewie Lawrence Title: Director of Regional Planning
Phone:804-758-2311
Fax:804-758-3221
E-mail: mppdc@inna.net

II. PROJECT DETAILS

Geographic Area of Impact: Member localities of the PDC: Essex, Gloucester, King and Queen, King William, Mathews, Middlesex Counties and Towns of Tappahannock, Urbanna, and West Point

Congressional District(s):1
Classification: *Local and Regional Implementation*
Start Date: 10/01/2005 End Date: 0930/2006

Project continuing from previous year? **(yes**

III. PROJECT SUMMARY *(2000 Character Limit)*

The Middle Peninsula Planning District Commission's Public Access Site Inventory was completed in 1999 under grant #NA87ozo253-01 Task ??. This study identified 326 potential Virginia Department of Transportation maintained road terminus points, defined as any primary or secondary road that ends in or near proximity to any tributary that could yield access to public waters.

This project will improve coastal resource management by facilitating direct access to the waterways of the Commonwealth through establishments of protocols to transfer terminus points to the Middle Peninsula Chesapeake Bay Public Access Authority (MPCBPAA), a political subdivision of the Commonwealth.

This project will identify four or five significantly different examples of terminus points and develop a protocol to facilitate the transfer of each to the MPCBPAA. The protocol will be developed by legal counsel specializing in land use law. The Protocol will characterize each site, identify obstacles to determining ownership interest, describe an effective process to resolving ownership obstacles, describe a process to mediate clouds that prohibit full access by the public, and characterize potential claimant positions. The outcome will be a standardized protocol that the MPCBPAA may use on the remaining 300 plus access sites. The protocol will be usable by other groups within the coastal zone desiring to provide public access to the Commonwealths waterways.

IV. BUDGET

(This table does not automatically calculate totals, be sure to double check all figures before submitting to the Coastal Program)

	Federal	Match	Total	Budget Narrative
Personnel			5,000	Project management and coordination
Fringe			1,600	32%
Equipment				
Travel			1,000	travel
Supplies				
Contractual			50,000	Legal Counsel- Protocol development
Construction				
Other				
TOTAL DIRECT			51,000	
Indirect			2,904	44% salary and fringe
TOTAL			60,504	

River Law:

Who owns the rivers?

Questions and answers about river ownership, use, and conservation.

Following are answers to frequently-asked questions about federal law regarding public ownership, use, and conservation of rivers. Note that this is a general discussion, and is not a substitute for legal counsel on a specific river issue! State law in a particular state may modify some of the following. Questions and answers are now in preparation for various states, and will be posted in the River Registry department of this web site as soon as they are ready. The following information, which is part of a continuing project of research and publishing about river law, is made possible by the generosity of the members of the National Organization for Rivers.

1. Which rivers are owned by the public?

The U.S. Supreme Court has held that the bed and banks under all rivers, lakes, and streams that are navigable, for title purposes, are owned by the states, held in trust for the public. Title in this context means ownership. This public-trust ownership extends up to the ordinary high water line, (or ordinary high water mark,) encompassing what is commonly referred to as the submerged and submersible land, as opposed to the upland. This type of navigability is called title navigability.

2. How did the public come to own these rivers and lands?

The Supreme Court has held that navigable rivers, lakes, and streams have been public since ancient times in all civilized societies, and that in colonial America they were held for the public by the King of England. When the original thirteen states took sovereignty of their land from the British after the American Revolution, those states became owners of the land underlying navigable waters. States that subsequently entered the Union have the same ownership rights as the original thirteen states under the Equal Footing Doctrine, and became owners of the land underlying navigable waters as of the date of statehood.

3. What does navigable, for title purposes, mean?

Through various court cases, federal courts have articulated the following test, which is known as the federal test of navigability for title purposes:

1. The waterway must be capable of or susceptible to use as a highway for the transportation of people or goods;
2. The waterway must be usable for transportation conducted in customary modes of trade and travel on water;
3. Waters must be navigable in their natural and ordinary condition; and
4. Navigability is determined as of the date of statehood.

The courts have determined that the use or potential for use by almost any type of watercraft is sufficient to determine this type of navigability. The use did not have to occur at the time of statehood; it is enough that it could have occurred (i.e., susceptibility.) Modern-day usefulness of a river that has not been artificially modified helps prove navigability for purposes of state title,

as do historical uses that no longer exist, such as log drives.

Note that this "federal test" is not found in any one Supreme Court document or other government publication; it is just the sum of the relevant passages and phrases in various court decisions. Congress has never passed legislation defining navigability for title purposes, so the court decisions are the applicable law on the subject.

4. Are there other legal definitions of the word navigable, and other legal tests of navigability?

Yes! The U.S. Army Corps of Engineers uses the term "navigable waters" which stems from the Rivers and Harbors Act of 1899. This Act, along with associated federal regulations, determines the Corps' jurisdiction over the alteration of waterways. Similar regulations direct the U.S. Coast Guard. "Navigable waters" are also defined in the Clean Water Act as areas subject to the Corps' regulatory authority over filling in waterways. State government agencies also use the term "navigable waters" in regulations relating to boating safety. Federal courts use the term "navigable" in cases involving Admiralty Law and the Commerce Clause of the U.S. Constitution.

None of these other definitions of navigable is the same as the definition federal courts use to determine navigability for title purposes. They may include a narrower range of waterways in some cases and a broader range in others. This has caused much confusion, such as the common misconception that only a few particularly large rivers are legally navigable. The fact is that even rivers and streams that can be navigated only by small watercraft and logs are still navigable for title purposes, even if they are not navigable for other legal purposes.

5. How can you measure or scientifically evaluate a river to know if it is navigable for title purposes, and therefore publicly owned?

You can't. The federal test of navigability for title purposes does not include any measurements or minimum requirements regarding the width, depth, or gradient of the river, or the amount of water in the river, or the size of watercraft that can navigate the river. There are no scientific criteria involved. It is just a usability test, derived from various court decisions, as described above. It rests on the question of whether people can use the river for transportation in ordinary watercraft, even small watercraft, and the related question of whether people did use it or could have used it at the time of statehood.

6. What size of watercraft must be able to navigate a river to make it navigable for title purposes?

Federal courts have held that even those rivers that are navigable only by small, non-motorized watercraft are still navigable for title purposes. (Remember that other requirements may apply to navigability for other legal matters, such as cases involving the "commerce clause" of the U.S. Constitution.)

Navigability for title purposes originated with early American court decisions that predate the invention of motors. These decisions in turn refer to public use of rivers under earlier British law and under the laws of ancient civilizations. Title navigability depends on a river's physical navigability at the time of statehood. In frontier America rivers were frequented by fur trappers in canoes. Lewis and Clark, the famous explorers, traveled by canoe, as did thousands of other

settlers and frontier traders.

As areas of the country became more populated with settlers, another common use for rivers was to float logs downstream from forests to lumber mills. This was often done through major rapids and waterfalls that still challenge expert canoeists and kayakers today.

Early American court decisions concluded that navigable rivers were those rivers that could be used "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Subsequent decisions confirmed that navigation by small watercraft such as those used by fur trappers and explorers, as well as floating logs downstream, qualified as commerce, trade, and travel, for purposes of title navigability.

In recent decades, interests opposed to public ownership of rivers have argued that guided recreational trips on rivers should not qualify as commerce for title navigability purposes. Again, the courts have specifically rejected this. Today, commercial river trips for recreation are a major economic activity for numerous smaller towns around the nation. Trips using inflated rafts are perhaps the best known, but commercial trips using individual canoes and kayaks are also common. Modern plastic canoes and kayaks require less care and maintenance than those used in the past by fur trappers and Eskimos, but otherwise they are about the same. This type of navigation, although newly popular, is essentially hundreds, or thousands, of years old.

Interests opposed to public ownership of rivers have also tried other arguments to narrow the definition of "commerce" for title navigability purposes. The courts have consistently rejected these "narrow definitions of commerce," and have instead opted for a broad definition. Outside of the courtroom, the word "commerce" refers to the exchange of goods, but it also refers to traffic of any kind, including communication and social interaction between individuals, as in "the commerce of ideas." With a broad definition, river "commerce" would include any traffic on a river, including an individual canoeist paddling down a river to admire the scenery. The courts have not supported a narrower definition relating to title navigability.

7. Do shallows, rapids, and other obstacles make a river non-navigable for title purposes?

No. The courts make no requirements that a river be uniformly deep, or flat, or that navigation be practical going upstream as well as downstream. As already mentioned in the previous paragraphs, the presence of rapids, even numerous rapids and waterfalls, does not disqualify a river.

Recall that the courts view navigability and public-trust ownership as having originated in ancient civilizations and in America prior to the twentieth century. In their natural condition, all rivers have shallow areas and obstacles, such as gravel bars, sand bars, rocks, logjams, etc. People unfamiliar with river navigation tend to assume that a river's depth is fairly uniform, but in fact flowing water inherently removes sand, gravel, and debris from some areas and deposits it in others, resulting in great fluctuations in depth, from very shallow to very deep. Even the mighty Mississippi, perhaps America's best-known navigable river, was historically full of hazards and shallows, requiring flat-bottomed boats and constant checking for depth. The pen name of the famous American author, Mark Twain, was originally a frequent expression from one riverboat crewman to another, to report a depth of two fathoms. (Twelve feet.) Even with such checking, riverboats frequently ran aground on submerged sand and gravel bars.

One of the most famous navigable rivers of the world, the Nile, is also full of shallow areas in its

natural condition. Historically it was the key resource of the ancient civilization of Egypt. Today it is navigated by small ships that carry overnight passengers and have dining rooms, sleeping rooms, etc. Some of these small ships are two stories high but are cleverly designed to only extend nine inches below the surface of the water. Nevertheless, they still occasionally run aground on the shifting sand and gravel bars. Freeing them can take many hours. Such is the inherent nature of river navigation.

People who navigate rivers, as well as people who discuss navigability law, wish that rivers were uniformly deep, but nature refuses to cooperate. Riverside landowners, government agencies, and other people affected by navigability law often assume that to qualify as "navigable" a river would have to be reasonably deep, so they keep looking for some objective criteria for navigability, such as a certain depth measurement. Unfortunately the federal test of title navigability contains no such criteria. In effect it is not a river test as much as it is a people test: It rests on the question of whether members of the public find the river--in its natural, cantankerous condition, as it was at the time of statehood--useful for navigation, despite having to push their boats off of its sand bars and carry them around its waterfalls. If the answer is yes, the river is navigable for title purposes and is public land up to the ordinary high water line.

8. But don't really big waterfalls, or really big rapids, make a river non-navigable for title purposes?

No, they don't. Many thousands of people have admired and felt the power of America's most famous waterfall, Niagara Falls, from the pool of water at the base of the falls, on board the *Maid of the Mist,* a tour boat. The entire excursion took place within this single pool of water, confined by the falls on the upstream side and large rapids on the downstream side. Yet the boat operated for many years, charging passengers for the trip in a plainly commercial fashion. The *Maid of the Mist* is an outstanding example of navigation on a very limited stretch of river.

Few people attempt to run the actual falls of Niagara Falls, and local authorities prohibit this (the offender is often dead by the time he is apprehended.) The rapids located just downstream from the falls and the pool of water are perhaps the largest in North America. The river in this section often flows at over 100,000 cubic feet per second, more than most rivers ever reach. Courts found this section navigable for title purposes as well.

9. What if the river is only physically navigable during the wet season of the year?

It still qualifies as navigable for title purposes. But a normally dry creek bed or "wash" that is only temporarily navigable during extreme weather does not qualify. (If it's normally dry because of upstream dams, then it does qualify. The legal test is based on the river's **natural** condition.)

10. Does it matter whether the waterway is called a "river" or a "creek" on maps and signs?

No. Some "rivers" are not physically navigable in even the smallest watercraft, and some "creeks" are large enough for fair-sized boats carrying several passengers. The name of the waterway has no legal significance.

11. So how do you tell the difference between a navigable river and a non-navigable river, for title purposes?

In ancient civilizations, as well as in early America, navigability has never been a technical concept. As the U.S. Supreme Court says, "Rivers that are navigable in fact are navigable in law." The intent of the courts has been that the difference between navigable and non-navigable rivers should be a practical matter that can be understood by ordinary people such as settlers, fur trappers, and riverside landowners. The courts have confirmed that even logs and small boats such as canoes, kayaks, and rafts qualify as navigation for title purposes. Therefore a navigable river is one on which you can use a small boat, and a non-navigable river is one on which you can't.

This difference between the two has not been discussed in detail in court decisions, but it is apparent to anyone who will take the time to look carefully. A river that is small yet navigable may contain many rocks and shallow spots, but there is still a route down it, a small channel that is passable in small boats. This route may be left, right, or center, and it may occasionally be interrupted altogether, but on most of the section of river there is a route.

The bed of a non-navigable river or creek, on the other hand, is an undifferentiated jumble of rocks. In steeper terrain, the water is spilling over the rocks in a sort of cascade, while in flatter terrain, the water is threading its way between the rocks. In either case, there is no route down it; it is equally impassable on the left, right, or center. A key difference between the two is that higher water flows on a navigable river or creek make it easier to navigate, by making the route down it wider and deeper. (Although very high flows may make it dangerous to navigate.) But higher flows on a non-navigable river or creek do not help navigation much--they just bring more water spilling over or around the rocks, making more noise and spray, but still not creating any distinguishable route. On a non-navigable river or creek, even a skilled boater using a good canoe or kayak would be continuously blocked by some combination of rocks, logs, and overhanging brush from the banks. (This combination of blockages varies depending on the local terrain and vegetation.) In other words, it is simply **not worth it** from the boater's point of view. It may be nice to walk along and admire, but not to boat. It may have occasional pools where fish hide under the ledges, and you could cast a line. If you own the land through which it flows, (or you are a guest of the landowner,) you can walk along it, admire it, or cast a line into it, in a state of privacy. It is, simply stated, "not navigable in fact."

Not all rivers are readily categorized--there are some rivers that are in a "gray area" between navigable and non-navigable. However, river disputes seldom involve those rivers. Instead, they usually involve rivers that are obviously navigable by small boats, and are in fact regularly navigated. For example, a farmer or rancher may erect a fence across a river and expect boaters coming down the river to terminate their trip at that point and leave the river, even though the river is every bit as navigable downstream from the fence as it is upstream. So, in actual practice, the "gray area" between navigable and non-navigable rivers is seldom the problem.

12. What if the current property owner's deed reads to the middle of a river, or seems to surround and include the river?

If the physical characteristics of the river are such that it meets the federal test of title navigability, it is public land up to the ordinary high water line. Since a deed can only convey interests actually owned by the seller, and since the bed and banks of all navigable rivers passed to the states at the time of statehood, it is likely that the state is the true owner. The state's ownership is a "prior existing right" and is frequently mentioned as such on deeds. Somewhere along the chain of property transactions, a deed may have been changed to include the riverbed.

Unfortunately, if this happened it was likely done incorrectly.

In some states the property owner next to a river may have certain rights, such as the right to construct a small dock that extends onto the public land at the edge of the river.

Note that a determination that a river is navigable for title purposes is not a "taking" of private property under the U.S. Constitution-the river and the land along it were public land all along. A "taking" can only occur if the land in question was clearly privately owned in the first place.

13. Who decides which rivers are navigable for title purposes?

The U.S. Supreme Court has repeatedly ruled that "rivers that are navigable in fact are navigable in law." If a river is physically navigable, it is legally navigable. **No court or agency has to designate it as such.**

If there is a dispute about whether a river is navigable for title purposes, only the federal courts can ultimately decide it, and that is a lengthy, expensive process. The courts only consider a river when a legal case arises-they don't go around rating rivers just to help get things organized. Only a few rivers in the entire nation have had court determinations. The rest of the rivers which are "navigable in fact", i.e., physically navigable in small watercraft per the federal test, are public land up to the ordinary high water line, even though most of them do not have any official designation as such.

14. Can states create their own definition of navigability for title purposes?

No, it's a federal test, as explained earlier. State legislatures cannot create their own definitions of navigability for title purposes, nor can they direct state agencies to create their own definitions.

However, state legislatures and agencies can decide certain other river use issues, as described later in this publication.

Federal courts have also recognized that state courts have concurrent jurisdiction to apply the federal test.

Obviously neither the federal courts nor the state courts will ever have time to consider every river in the nation. So state government agencies or legislatures can make a provisional determination based on whether the river is physically usable as described in the federal test. If a state agency's determination accurately reflects both the physical characteristics of the river and the legal standards of the federal test, then the federal courts would presumably concur.

But keep in mind that rivers that are physically navigable per the federal test are public land even with no state determination. Conversely, if a river is navigable in fact per the federal test, but a state agency or state legislature declares it not navigable and not public land, such a declaration must be regarded as erroneous.

15. Can states sell or give away rivers, or riverside land?

Federal courts have held that the state does not simply own the river and the riverside land, it holds it "in trust for the public." These court decisions, taken together, are known as the **Public Trust Doctrine.** The state holds the resources in trust for the benefit of all the people. The general public has a right to fully enjoy these resources for a wide variety of public uses

including navigation, recreation, and fisheries. The state cannot divest itself of these public-trust ownership.

The state can sell or lease pieces of land along a river, such as for public or private docks, etc., but not the whole river. Such transactions must be beneficial for use of the waterway. They cannot interfere with public use of the overall waterway.

16. Where is the ordinary high water line?

As with the definition of navigability itself, the courts have not formulated a scientific, measurable definition for the ordinary high water line (or ordinary high water mark.) But as with navigability, people keep searching for a scientific definition. You could say that it is the highest that the water gets under normal conditions during the course of a year, but not the highest it gets during extreme flooding. The courts have not been scientific about the difference between normal and extreme conditions. In the related matter of the high water line on ocean beaches, some courts have referred to a "debris line" left by the highest water at high tide, with normal waves but not under storm conditions.

As with navigability in general, the notion of the high water line developed in early America. Courts were referring to something that ordinary river users, and adjacent landowners, could see on the ground, and could agree on. The courts were not referring to some theoretical, invisible line that could only be determined with surveying instruments or other technical procedures. They were not referring to some "average" line that could only be determined by reviewing years of data on water levels. Some courts have attempted to create such theoretical definitions, but that approach has been rejected by higher courts. The line has to be something that ordinary people can see.

In the case of rivers, such a line would be the line below which the vegetation and soil show the effects of submersion under water. On most rivers such a line is pretty obvious-below it you see water-dependent vegetation like green grass, small green bushes, tamarisk, or other plants that you don't see up on the surrounding hillsides. And you see sand, gravel, and rock that have been washed clean by the passing of water, while above the ordinary high water line you see more dirt and soil.

Wherever the land along the river is fairly flat, the ordinary high water mark can be quite some distance from the edge of the water, when the river is at medium levels. Public use of this land is not part of an "easement," rather it's a case of actual public ownership of the land, along rivers that are navigable for title purposes.

17. What can the public do on rivers that are navigable for title purposes?

The three activities that the courts have traditionally mentioned are navigation, fishing, and commerce. But the courts have ruled that any and all non-destructive activities on these land are legally protected, including picnics, camping, walking, and other activities. The public can fish, from the river or from the shore below the "ordinary high water line." (Note that the fish and wildlife are owned by the state in any case.) The public can walk, roll a baby carriage, and other activities, according to court decisions.

18. What public activities can government agencies lawfully restrict?

They can and must prohibit or restrict activities that conflict with the Public Trust Doctrine. What is known as "responsible recreation" must be allowed, but offensive or destructive activities can be limited to certain areas or prohibited altogether. Leaving trash, building fires, and making noise can and should be limited or prohibited as appropriate for the area.

State and local restrictions on river use have to be legitimately related to enhancing public trust value, not reducing it. Rivers cannot be closed or partially closed to appease adjacent landowners, fishermen who want to dedicate the river to fishing only, or to make life easier for local law enforcement agencies.

19. Can state governments expand public rights to visit rivers?

Yes. In many states, state courts and legislatures recognize a **floatage easement,** a public right to navigate even on rivers that might not qualify for state ownership for some reason. This floatage easement is a legal right to run a river even if it is assumed that the bed and banks of the river are private land. In some states such easements cover all waters in the state, except things like stock ponds and swimming pools.

Note that this floatage easement is a matter of state law that varies from state to state, but the question of whether a river is navigable, for title purposes, and therefore owned by the state, is a matter of federal law, and does not vary from state to state. This has caused much confusion. Even on rivers that are navigable for title purposes, many people mistakenly believe that there is only an easement for public passage, not actual state ownership of the bed and banks. Conversely, many people mistakenly believe that unless a river is navigable for title purposes, there is no public right to visit it, where in fact the state may confer a floatage easement on all rivers, regardless of their navigability for title purposes.

Note that a state floatage easement is something that comes and goes with the water: When the water is there, people have a right to be there on it, and when it dries up, people have no right to be there. But rivers that are navigable for title purposes are public land up to the ordinary high water line, so that even when the river runs dry, people still have the right to walk along the bed of the river.

20. What about walking briefly on private land while in the process of navigating a river?

Federal court decisions seem to allow for this but have not been conclusive. Some state courts have found that the public has the right to walk on the river bank, either as part of navigation or for other reasons. Also, some state laws allow certain trespasses under certain urgent conditions. If you are unable to proceed down a river due to unique circumstances, or due to an emergency of some sort, state law may allow what would otherwise be a trespass.

21. What about waterfalls? Can boaters run them? Can they walk around them?

Throughout the world, people have an enduring fascination with waterfalls. As explained earlier in this publication, even rivers with huge waterfalls can still be navigable for title purposes.

Whether the waterfall itself is navigable is more a matter of opinion. Canoeists and kayakers regularly run waterfalls. Some commercially guided canoe and kayak trips include runnable waterfalls as a main attraction. Higher waterfalls are generally more hazardous, although the shape and setting of the waterfall are often more critical than the height. Under certain

conditions, a waterfall only three feet high can create such a strong upstream current at its base that it traps and drowns boaters, by holding them right on the line where the waterfall and the upstream current meet. A much higher waterfall may, in some cases, be safer. Furthermore, a waterfall that is relatively safe at some water levels can become quite dangerous at other levels.

Because of the above, most canoeists and kayakers consider that an individual, case-by-case decision must be made about whether to run a particular waterfall on a particular day. Often the decision may be to walk around the waterfall. Some courts have recognized a legal right to carry boats around waterfalls (and other obstructions in the river) even when that involves walking onto private land, as discussed above.

In keeping with navigability law and the Public Trust Doctrine, government agencies must normally allow individual boaters to decide whether to navigate a waterfall or carry their boats around it. Government agencies should post signs that warn of upcoming waterfalls and direct boaters to the route to walk around them. (On rivers in wilderness areas, such signs should not be more obtrusive than necessary.) If a waterfall has been the site of boating accidents, agencies should post an account of the accidents to warn boaters. Government agencies that are considering closing a waterfall to navigation should consider that navigation is a basic and long-standing right, even under hazardous conditions. Before terminating that right, they should seek the concurrence of the majority of those affected. Any waterfall is dangerous to inexperienced boaters. Government agencies should not close the waterfall to navigation unless even experienced boaters agree that they consider it unrunnable themselves.

22. What about getting to and from the river?

Normally there is no right to cross private land to get to or from a river (except perhaps in extreme cases as mentioned above.) For example, there is no right to walk across a farmer's field to get from a public highway to a river.

However, the state has a duty to maintain public access routes to rivers under certain conditions, as part of its public trust duties. Courts have found it unlawful for a state to close off an existing public access route when there are not other public access routes nearby.

A common problem involves highway bridges over rivers. The river, if navigable for title purposes, is public land up to the ordinary high water mark, and the highway is public out to the edge of its right-of-way. Usually there is enough space to legally park next to the highway near the bridge. But the adjacent landowner may build an impassable fence up to the bridge abutments and post "No Trespassing" signs on the fence, so people can't get from the highway down to the river. This is unlawful; there is a right of passage from the highway to the river. Courts have ruled that when one public route meets or crosses another, there is a right to proceed between the two.

23. What about motors on rivers?

People tend to think that the right to navigate includes a right to navigate with a motorized watercraft, but the courts see it differently. Recall that much of navigability law predates the invention of motors. The courts have held that state government agencies can allow motors in some areas and prohibit them in others. So while people have every right to navigate the navigable rivers of the nation, on many of those rivers they may do so only in human-powered craft (such as canoes, kayaks, rowboats, non-motorized rafts, etc.) There is no right to use motors

in places where motors are prohibited. Simply put, motors have no legal rights.

Depending on the state, the decision to allow or disallow motors on a waterway usually must be made at the state level--local government agencies may need state approval to prohibit motors. Federal agencies, too, may need state government agreement to prohibit motors on a waterway in a state.

Of course, there is often great political support for motorized use, so state government agencies are often politically pressured to allow motors. The main problems with motorboats relate to their noise and to their speed, especially within the confines of a river. On navigable rivers, adjacent landowners are legally obligated to tolerate navigation, but not necessarily motor noise, which inherently migrates from the river to the adjacent private land and can be quite intrusive.

In considering whether to allow motors, agencies should keep in mind that there is no legal obligation to allow them, and, on the other hand, there is a legal obligation under the Public Trust Doctrine to conserve river resources for a whole range of uses, not just motorboats. Therefore agencies should only allow motorboats at times and places where they are not a major impact on other uses. One legally valid solution is to only allow the kind of quieter motors made possible by new technology. Another is to only allow motors at certain times.

24. What about commercial river trips?

People tend to think that under the free enterprise system, businesses should be able to operate commercial trips anywhere. But the courts see rivers as public resources, and state and federal courts have upheld the authority of government agencies to limit commercial river trips on waterways or prohibit them altogether. Note that the courts view this authority as arising from the government's general authority to control commercial operations, not from an authority to control or prohibit river navigation per se--the courts have rejected government agency attempts to prohibit noncommercial navigation, although noncommercial navigation may be limited under certain conditions related to the public trust.

25. What about mining in river beds, for gold, gravel, etc.?

Courts have upheld government authority to regulate or prohibit mining in rivers, because of the damage it can do to publicly-owned river resources.

26. What about construction and bulldozing along a river?

The U.S. Army Corps of Engineers grants "section 404" permits for alteration of riverbeds. A number of rural landowners have paid hefty fines for bulldozing along rivers to build dikes and other structures, mistakenly thinking that they were bulldozing on their own land.

27. What about river pollution?

State and federal regulations limit or prohibit water pollution. Hefty fines can apply, even to city utilities departments and other public agencies.

In 1972, Congress passed the Clean Water Act. Before the Act, river conservationists had to claim injury and sue polluters to prevent them from polluting waterways. Since the Act, however, it has become a felony to discharge wastes into waters without acquiring government permits that follow set guidelines. The Safe Drinking Water Act was passed in 1974 to require states to

comply with federal safety guidelines.

28. What about ownership of the water itself?

The water itself may be allocated by water courts to various users such as farmers and city utility companies that divert the water from the river. But the higher courts have ruled that public ownership and the Public Trust Doctrine must also be considered in water use regulation. Courts have specifically rejected the argument that public trust values on rivers were "subsumed" into water rights allocations. Courts have held that the public trust applies to natural water resources regardless of their navigability. (Flowing water is a public resource in any case.) This public trust extends to even very small streams.

29. How do I determine if a certain river is public, and what public uses should be allowed on it?

You call the State Lands Office, and the State Attorney General's Office. (The official name of these two offices may vary from state to state.) State law may say that all waters in the state are open to navigation, and may also grant permission to walk along the shore under certain circumstances. If state law allows the uses you are concerned about, then you don't need to look further. If it doesn't, then the question becomes whether the river meets the federal test of navigability for title purposes. If a river appears to be navigable per the federal test, but riverside landowners, or a government agency, or the state legislature says that the river is not navigable, (or if they restrict public uses in ways that conflict with navigability and the public trust doctrine,) then you have a problem, which you can help resolve mainly by educating people about navigability and public ownership of rivers, as discussed below.

30. What about river navigability committees and commissions?

Needless to say, the undetermined status of thousands of miles of rivers across the nation exasperates landowners, river recreationists, conservationists, and government agencies. Consequently, various government agencies make provisional determinations about whether or not various rivers qualify as navigable. But they can't make definitive rulings, only the courts can. If a government agency tells you a certain river isn't legally navigable, it's only their opinion, it's not the law (except in the very few cases where there actually has been a court ruling.)

This is where the confusion and the problems can build up. A state agency may be confused about its role, and may draft its own test of navigability, conflicting with the federal test, perhaps following a directive from the state legislature. (Such a directive would be unlawful.) They may set up a committee or commission and hold public hearings. Landowners, sheriffs, government agency staff members, recreationists and conservationists will be confused about what the commission can and cannot decide. They may think the commission can decide what sorts of watercraft uses make a river navigable, so they may testify about all sorts of legal issues that were decided by the federal courts long ago. They may testify at length about all sorts of river conflicts and problems, mistakenly believing that the commission has the authority to close rivers that are clearly navigable in fact (and therefore meet the federal test.)

Ultimately only the federal courts can decide whether a river is navigable for title purposes. So the state agencies or commissions would do well to divide their work, and their hearings, into two very distinct phases. First, to determine whether a river is navigable for title purposes, they should only apply the federal test (discussed previously) and the physical usability of the river to

make a provisional determination. Public testimony on this issue should be limited to the simple question of whether the river is usable by people in small watercraft. Those testifying should be knowledgeable about this--i.e., people who navigate rivers in small watercraft.

Second, once they have provisionally determined that a river is navigable for title purposes, they should proceed to the question of how to manage navigation and other public uses of the river. Here the adjacent landowners, sheriffs, and other interests can testify about river problems, and the commission can consider how to solve them. In these days of government cut-backs, such a commission should look for solutions using existing government agencies and law enforcement entities rather than setting up new ones. Littering, illegal fires, offensive behavior, trespassing on private land, and numerous other offenses are all covered by existing laws, and offenders can be cited by the local police, sheriff's office or state police.

31. What happens when riverside landowners go to court?

The feeling of being invaded by trespassers strikes a deep emotional chord in many a rural landowner who has a river flowing through his land. Some landowners tend to lump all river users together, including those who canoe quietly down the middle of the river, those who stand quietly on the bank, those who stay on or near the river but litter and make noise, and those who proceed well away from the river onto private land where they break into cabins and commit various offenses. One landowner told a local newspaper, "This is a kind of trend to socialism. They want the right to use property owners' property without paying for it."

We have read a number of court decisions from cases where riverside landowners passionately sought to protect their private property rights. The cases vary, of course, but here are some of the usual key features: The landowner's property deed, a legal document, doesn't say that the river is public. He figures that even if the court decides that it is public, he will have the basis for a claim of "taking" of private property, contrary to the U.S. Constitution. He may retain an attorney who thinks that only larger rivers are navigable. They assume, logically enough, that to qualify as "navigable" a river would have to be reasonably deep, so they get a geologist or hydrologist to testify that the river has spots so shallow that most boats would run aground.

After much time and money spent on depositions and motions, the courts rule against them. The courts may find that state law alone is sufficient to allow river recreation. Or they may find that the federal test of navigability for title purposes is broad enough to include the river in question. They may bring in the Public Trust Doctrine as well. Since there is no scientific test of navigability, the courts may set aside the geologist's lengthy testimony about the shallowness of the river, and instead rely on the simple testimony of local canoeists that the river is useful for canoeing.

As for the claim of taking private property, the courts may find that river recreation must be allowed under state law, so that the question of whether the riverbed is public or private land doesn't even need to be resolved. Or they may find that the river is navigable under the federal test and always has been, so it never was private land in the first place, and therefore no "taking" could have occurred.

The time, money, and frustration involved in these cases may be tragic, particularly since the landowner might have been able to address most of the issues much more easily by talking with people at the state lands office or the state attorney general's office. In those offices, questions of easements, ownership, recreation rights, and navigability are everyday fare.

32. What happens when river recreationists go to court?

Despite the above paragraphs, river users also often encounter problems with the court system. Most of the landmark court decisions about navigability law, (cited in this publication and others,) did not involve river recreationists. Instead, they typically involved disputes between the federal and state governments, or between government agencies and large companies, about government control and use of valuable resources in or near waterways. They took years to go through the appeals process, and were litigated by full-time government attorneys.

Courts usually require that the facts in a river dispute be formally proven, which can take a lot of time and can cost thousands of dollars. Local courts may be primarily concerned about keeping the peace, which can translate into maintaining the local status quo. So they may convict boaters of trespassing, or uphold river closures, restrictions, or abuses promulgated by various government agencies, regardless of navigability law and the Public Trust Doctrine. It will probably turn out that if you want to address the real legal issues, you have to appeal to a higher court--which will in turn take even more time and money, way beyond what you can afford.

Courts usually have a backlog of urgent criminal and civil cases. The District Attorney may suspect that river users have valid legal rights, but may feel that it is not worth dealing with. He may offer alleged river "trespassers" a plea bargain in which they pay a token fine and promise to not return to the river in question. This costs the river users far less than it would to take the issue to court. But the net result is that they do pay a fine. In this way, a river closure or restriction can be enforced for many years even though it is unlawful.

If you are faced with an unlawful river situation, don't go to court. Your time is better spent advertising the favorable court decisions that we already have. You do have legal rights to visit rivers and to insist that river resources be conserved as part of the public trust, but actually claiming and making use of these legal rights can be done better through public education than through a court procedure. So instead of going to court, contact all the local powers that be--government agencies, politicians, landowners, and journalists. Give them a copy of this folder and anything you can obtain from the State Lands Office, or the Natural Resources Department of the State Attorney General's Office. Notify them of the legal issues involved and the legal rights that are being violated, and emphasize that the problem needs to be corrected. Then follow up as necessary to make sure that it is.

Don't expect overnight success. The law is on your side, but few people know that, so you need to get as many people as possible to understand it. You can start doing that right now. It takes time for people to shift their beliefs. The chances of a court making a future ruling in your favor will be greatly enhanced if you start laying the educational and political groundwork now. Why not get started today?

Other folders are in preparation, covering:

- **State law, in each state.** These will be published as they are finalized for each state. Each folder will discuss state law in that state and how it relates to federal law as described in this folder.
- **Permit systems** for running rivers that flow through National Parks, National Forests, and other federal lands. These folders will explain the legal matters raised by those systems,

and how to work on them.

If you have additional questions about federal river law, click to go to the Ask an Attorney page. If you have questions about a particular river or state, click to go to the River Registry, then select the state, then go to that state's section on river law. The information for most of the states is still in preparation, but you can post your questions about river law in that state, and the webmaster will seek qualified answers.

The National Rivers Website and the River Law Project are made possible by the generosity of the members of the National Organization for Rivers (NORS.) To start or extend your membership, go to NORS Memberships.

NORS was founded in 1978.

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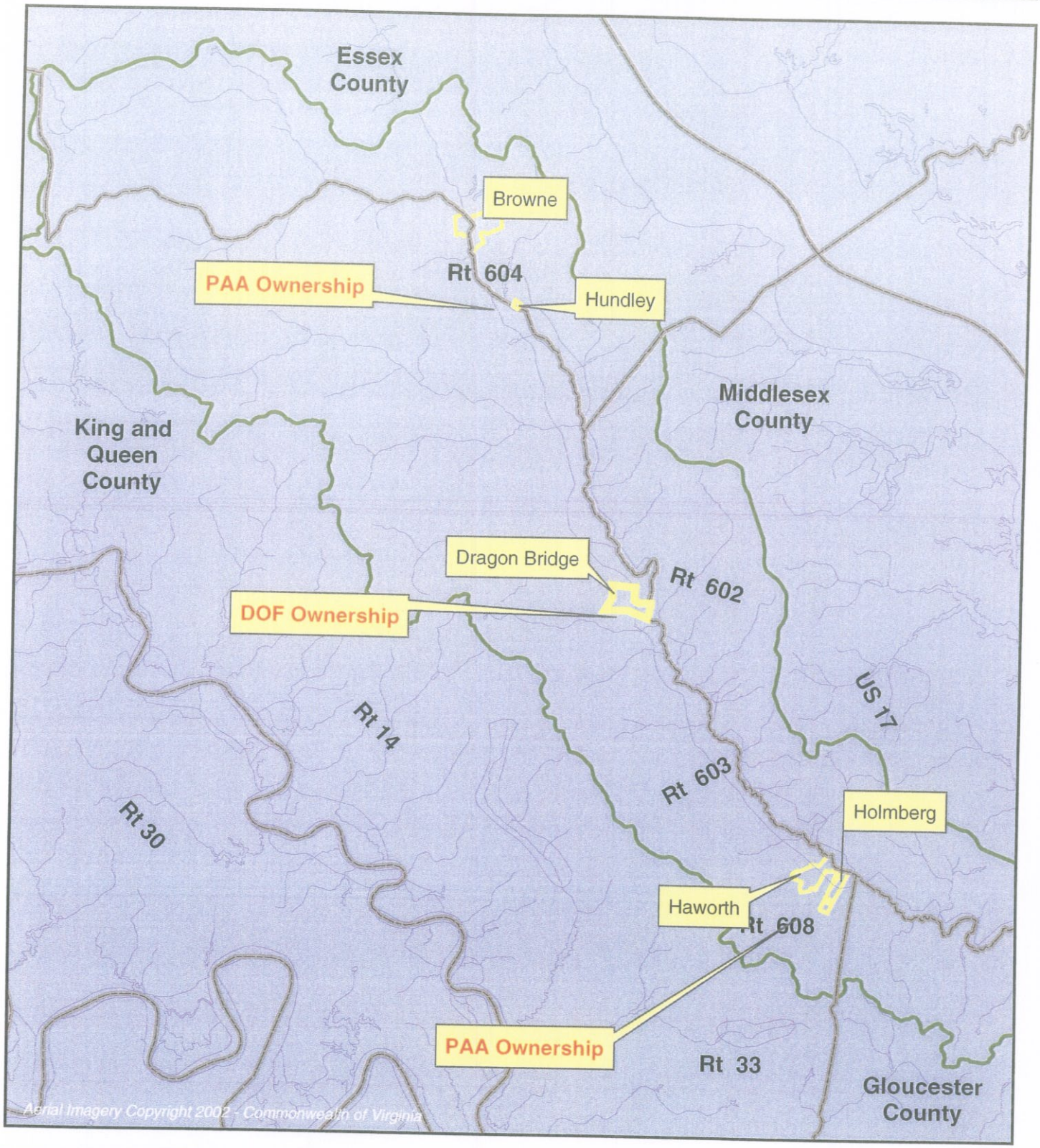
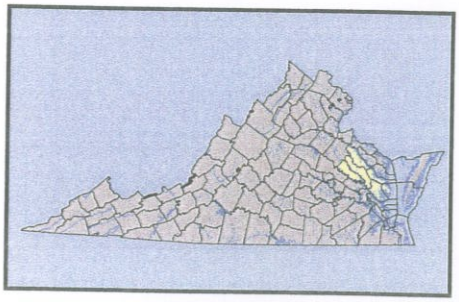
Back to the *National Rivers* home page

The National Organization for Rivers (NORS)
Membership Offices: 212 West Cheyenne Mountain Blvd.
Colorado Springs, CO 80906
(719) 579-8759. Fax (719) 576-6238.
nationalrivers@email.msn.com

Possible CELCP sites in Dragon Run Watershed





Candidate parcels in yellow
Watershed boundary in green
Roads in red

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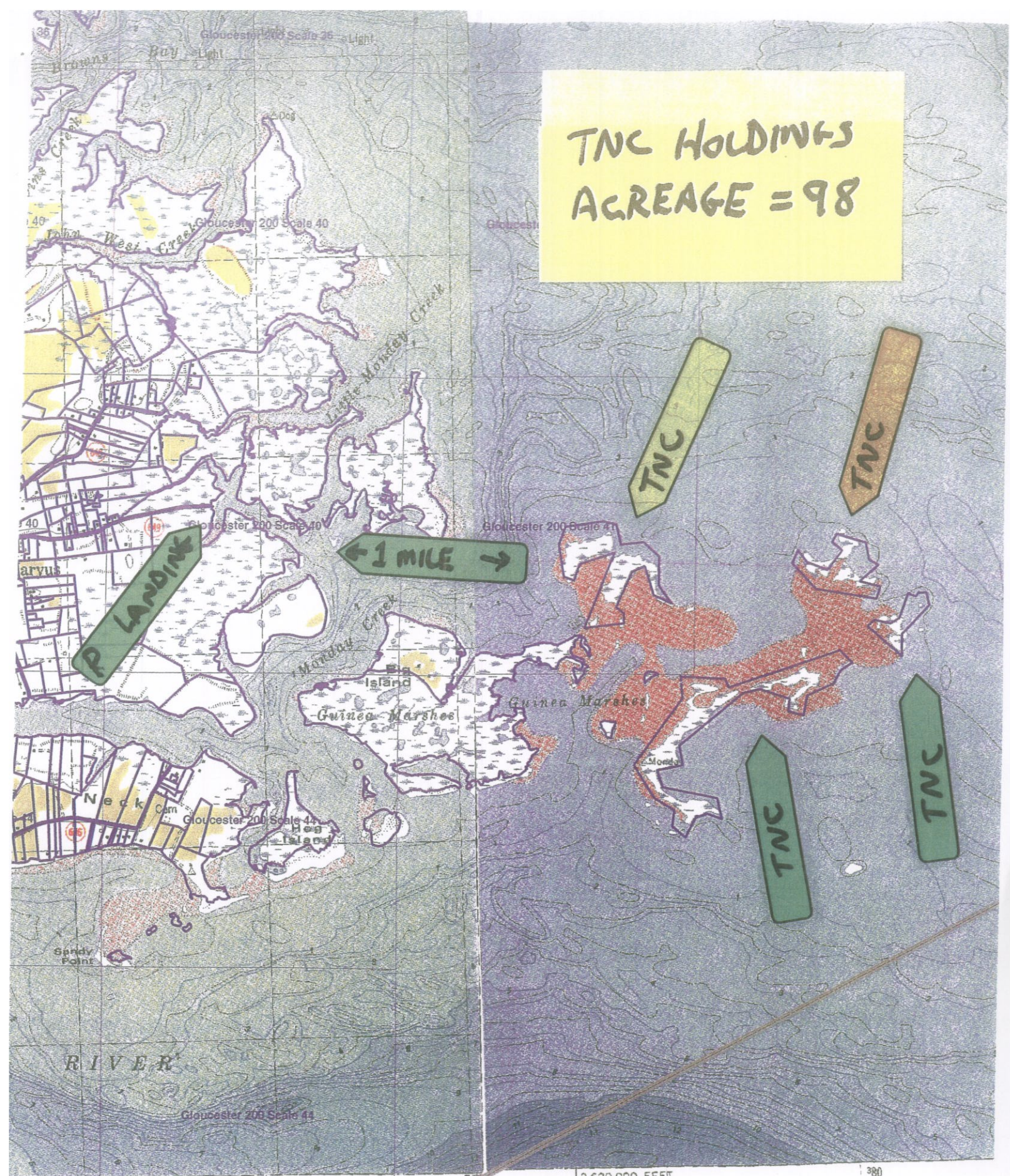
This map production is a product of the Dragon Run Technical Assistance Program and was funded by Virginia's Coastal Program of the Department of Environmental Quality through Grant #NA04NOS4190060, Task 91 of the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resources Management, Under the Coastal Zone Management Act of 1972, as amended.

NOAA

DEQ
Virginia Department of Environmental Quality
Virginia Coastal Program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Big Island
Hog Island
Sandy Point
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ROAD CLASSIFICATION
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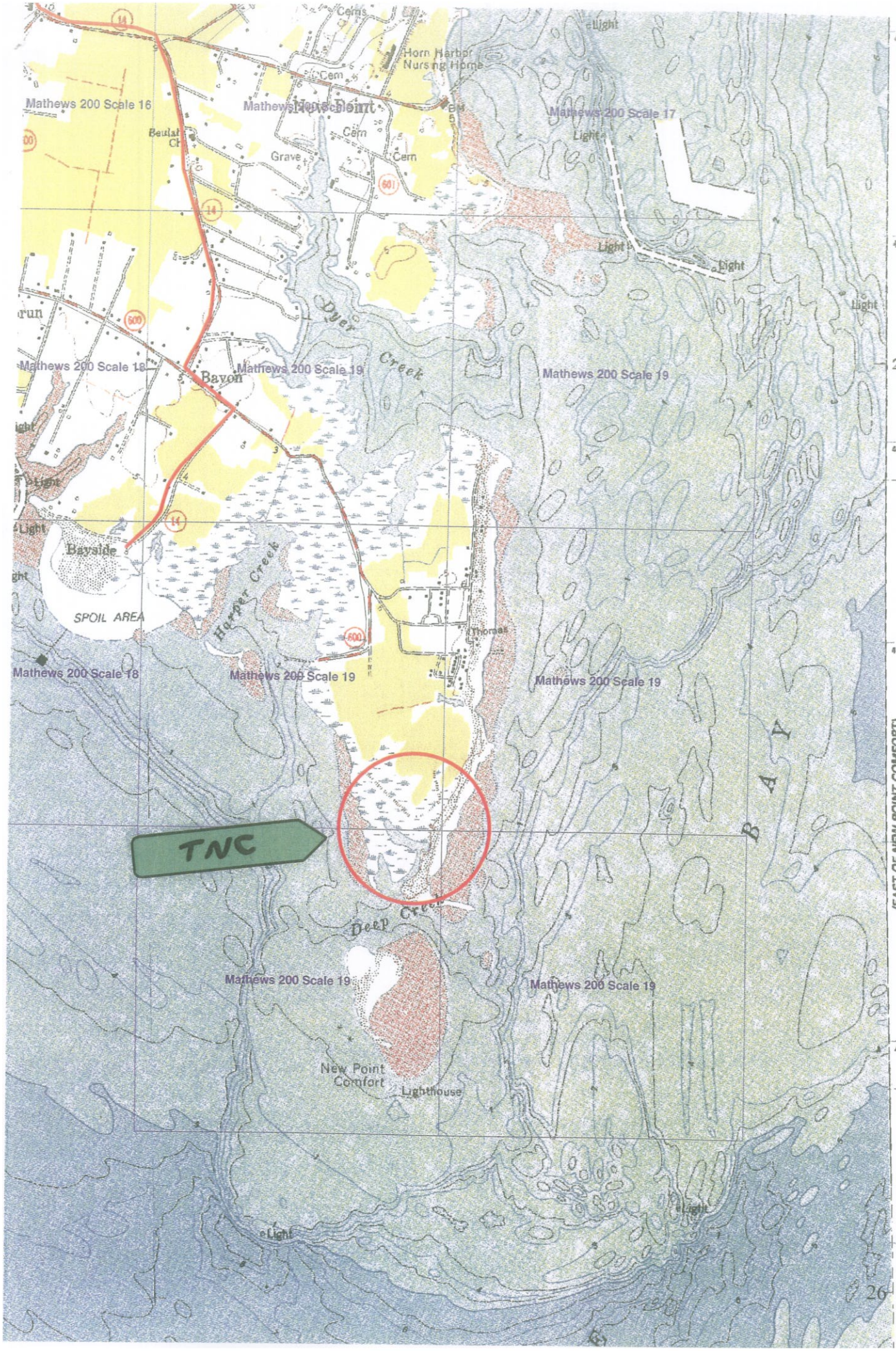
Secondary highway, hard surface
Light duty road, hard or improved surface
Unimproved road
Produced by the United States Geological Survey and the National Ocean Service
Control by USGS and NOS/NOAA
Topography by photogrammetric methods from aerial photographs taken 1963. Field checked 1965
Supersedes Army Map Service map dated 1957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Bayside
SPOIL AREA
Dyer Creek
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Deep Creek
Horn Harbor Nursing Home
Thomas
New Point Comfort
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