

# Commissioner of State Lands

State of Arkansas

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Tommy Land, Commissioner



Waterway Policy 2019 Edition

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## *Title I: General Information*

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### **SUBTITLE A | AUTHORITY AND PURPOSE**

The authority for this Waterways Policy (Policy) is power given to the Commissioner of State Lands for the State of Arkansas by Section 2 of Act 807 of 1991 of the Acts of Arkansas, as amended.

The purpose of this policy is to provide guidelines for the state of Arkansas and the Commissioner of State Lands in upholding public trust responsibilities and maintaining submerged lands in the navigable waterways of the state.

The Public Trust Doctrine is the basis of the implementation of the enabling legislation governing submerged lands. The doctrine requires that the state have ultimate responsibility in preserving the limited resources of the state. The state holds title to lands under navigable waterways in trust for the people so that they may enjoy navigation of the waters, carry commerce over them, and have the liberty of hunting, fishing, and other recreation therein, free from the obstruction of private parties.

The legislature cannot give away or sell the discretion of its successors. The state, as administrator of the trust on behalf of the public, does not have the power to abdicate its role as trustee by placing the property entirely beyond the direction and control of the state. It is the lands under navigable waters that afford the foundation for wharves, piers and docks and other structures in aid of commerce and recreation.

Arkansas Code Annotated Section § 22-6-201 (d) provides as follows: “It is further the intent of this subchapter to establish the policy that all submerged lands following the navigable waterways of this state shall remain in the state domain.” “Submerged lands” shall be those lands found at and below the line of ordinary high water and shall include, but not be limited to, the beds, channels, chutes, and adjoining areas of rivers, lakes, and streams.

Control of the state’s trust can never be lost, except as to such parcels used in promoting the interests of the public therein, nor can the trust be disposed of without any substantial impairment of public interest in lands and waters remaining.

The purpose of this policy is to carry out the provisions of Section 2 of Act 807 of 1991, as amended, and shall have the full force and effect of law. This section has been codified as Arkansas Code Annotated Section § 22-6-202, as amended.

### **SUBTITLE B | SCOPE**

This policy, having been adopted by the Commissioner, shall be in full force and effect until it is amended or repealed pursuant to law. All previous Policies adopted and published by the Commissioner are hereby superseded and repealed insofar as they may be different from or in conflict with the Policy herein.

Except where specifically noted, this Policy applies to submerged lands in the navigable waterways of this state. This Policy should be regarded as being supplementary to, and not in replacement of and in compliance with, the laws of this State relating to the matters covered by this Policy.

#### SUBTITLE C | SEVERABILITY

It is intended that this policy is severable and that if the policy or any parts thereof, shall be declared invalid, all other unaffected Policy, or parts thereof, shall remain in full force and effect.

#### SUBTITLE D | DEFINITIONS

The following definitions are applicable:

**Navigable or navigability:** the ability to move on or about the waters of a water source. Navigability shall be determined by public, recreational or commercial use, and may also be determined by administrative ruling, judicial ruling of the state or federal government or by legislative act.

**Submerged land:** land lying at or below the line of ordinary high water of any navigable water source in the state, including but not limited to the beds, channels, chutes and adjoining areas of rivers, lakes and streams.

**Debris:** any object that impedes public use, creates an issue of safety or aesthetically impacts the community in which it exists.

**Public purpose:** allowing access to all persons in order to enjoy equal access for the reasonable use thereof.

**Commissioner:** Commissioner of State Lands (COSL) or his/her designee, acting as the official agent of the State of Arkansas.

**Owner of Debris:** any person, individual, partnership, corporation, association, or public or private organization of any character that has any ownership interest in the debris matter.

#### SUBTITLE E | ENABLING AND PERTINENT LEGISLATION

This Policy shall become effective pursuant to Section 2 of Act 807 of 1991 of the Acts of Arkansas as amended. This section has been codified as Arkansas Code Annotated Section § 22-6-202.

The section specifically states:

- (a) Except as provided in § 22-6-204, islands formed or that may form in the navigable waters of this state are the property of the state and subject to sale and disposition in the manner and form provided in this chapter.
- (b) The Commissioner of State Lands may lease, grant, or sell islands or submerged lands and may promulgate rules to implement this section.

(c) The construction, alteration, or placement of objects below the ordinary high water mark in a navigable river, stream, or lake shall not be permitted without permission from the Commissioner of State Lands.

(d) The Commissioner of State Lands may:

(1) Enter into agreements and partnerships with other agencies to carry out the intent of this section;

(2) Require the removal of an existing structure that occupies the submerged lands of a navigable stream, river, or lake; or

(3) Require compensation to the Commissioner of State Lands by the owner for the continued use of submerged lands.

(e) (1) The Commissioner of State Lands, or at the request of the Commissioner of State Lands, the Attorney General, may institute an action in a court with proper venue and subject matter jurisdiction over submerged lands or the Pulaski County Circuit Court to remove a structure or debris resting on the submerged lands of the navigable waters of the state or to enjoin the construction or placement of a structure upon the submerged lands.

(2) If a court finds that a structure or debris on the submerged lands of the state without permission from the Commissioner of State Lands, the court may order the owner of the structure or debris to:

(A) Remove the structure or debris; and

(B) Pay the expenses of removing the structure or debris.

(3) If the structure or debris has been removed by the state or local government, the judge may order the owner to:

(A) Reimburse the state or local government for the costs of removal; and

(B) Pay the state or local government its court costs and reasonable attorney's fees.

Ark. Code Ann. § 22-6-202 (Repl. 2016).

In addition, this policy shall in no way conflict with Arkansas Code Annotated § 22-5-801, et. seq. Should a conflict arise, the prevailing authority shall be Arkansas Code Annotated § 22-5-801, et seq. This subchapter of the Arkansas Code provides for the treatment and lease of certain mineral, timber and other resources.

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## *Title 2: Debris in Navigable Waterways of the State*

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### **SUBTITLE A | NOTICE TO COMMISSIONER**

1. **Notice to be provided to the Commissioner of State Lands Office.** Upon discovery of debris located in a navigable stream, river, or lake, any person or entity may notify the Commissioner's office by submitting an online waterways debris report. The website for reporting is [www.cosl.org](http://www.cosl.org). The Commissioner reserves the right at his discretion to remove debris without receiving notification if discovery is made by the Commissioner. Removal of debris shall be at the complete and absolute discretion of the Commissioner.
2. **Form of the Notice.** The Commissioner shall require the following information before the submission form is considered complete:
  - a. Identity of the person submitting the form, including name and email.  
Anonymous reports may not be considered complete.
  - b. Identity of the owner of the debris.
  - c. If owner cannot be identified, documentation must be provided along with the submission showing a good faith effort to identify the owner of the debris.
  - d. Complete legal description and map detailing the area of the submerged property, including the county, city, and waterway where the property is located.  
Submitting information such as photos, geographic data, or other specific identifying information is strongly encouraged.
  - e. Such additional information the Commissioner may require from the notifying party.
3. Upon receiving a completed notification form, the Commissioner shall review information within and make a determination based on the standard of review as provided in this policy.

### **SUBTITLE B | REVIEW OF WATERWAYS DEBRIS REPORTS**

The Commissioner of State Lands will review removal of debris based on the following considerations:

1. If removal is in the best interest of the State of Arkansas.
2. If removal upholds the Public Trust Doctrine.
3. If removal is necessary for public health and safety.
4. How removal will impact the local community in which the debris is located.
5. How removal will impact the environment.
6. Cost of removal and likelihood of recovery of cost from the owner.

### **SUBTITLE C | NOTICE TO DEBRIS OWNER**

1. **Notice when Owner is Known.** No later than fifteen (15) days before the debris is removed or taken into custody, the Commissioner shall send notice, by certified mail, return receipt requested, bearing a postmark from the United State Postal Service to the owner of the debris, if the owner can be identified and a last known address is available.

The notices required shall contain the following:

- (1) Description of the debris;
- (2) The location where the debris is located;
- (3) Notice to the owner that the owner has thirty (30) days to reclaim and remove the debris;
- (4) Statement that failure to claim the debris will constitute a waiver of all right, title, and interest in the debris, and consent to the Commissioner's disposition of the debris.

2. **Notice by Publication.** If the Commissioner is unable to determine the last registered owner or if the certified mail noticed is returned for any reason whatsoever, the Commissioner shall give the required notice by publication in at least one (1) newspaper of general circulation in the county where the debris is located. Where no county newspaper is circulated, notice by publication shall be in one (1) newspaper of statewide circulation. The notice by publication shall contain the information required in the "Contents of notice" section of these policy and shall be published not later than fifteen (15) days before debris will be removed.

3. **Disposition without Notice.** If the debris is in such condition of disrepair that the Commissioner cannot remove the debris intact, the Commissioner may dispose of the debris in whatever manner is reasonable without providing notice as required by this policy.

If the debris is in such condition that it cannot be properly identified or the owner of the debris cannot be identified, the Commissioner may dispose of the debris in whatever manner is reasonable without providing notice as required by this policy.

If at any time the Commissioner determines that the removal of debris is a time sensitive issue, he/she may declare an emergency and remove the debris after a reasonable review of the information that he/she has obtained.

## **SUBTITLE C | REMOVAL**

Once the report has been reviewed and the Commissioner has determined that the debris will be removed, the Commissioner may begin the process for removal of the debris. For this purpose, Commissioner may use his/her own personnel, equipment, and facilities or have the right to contract with an outside vendor for the removal of debris. The Commissioner shall not be held liable for any damage to debris which may occur during removal, storage, or custody of the debris.

The Commissioner is not required to bid out any removal project that he/she may engage. Furthermore, the Commissioner has absolute discretion to contract with any vendor he/she feels is best qualified for the project and any vendor that is in the State of Arkansas' best interest.

If the owner fails to claim the debris within thirty (30) days after the certified mail notice or after the notice by publication is given, the Commissioner may sell the debris and proceed to receive title to debris or otherwise dispose of the debris.

Removal of debris shall be at the complete and absolute discretion of the Commissioner.

#### **SUBTITLE D | COSTS**

The owner of debris may be responsible for costs associated with the removal. These costs include but are not limited to the following:

1. Notification costs,
2. Costs for estimates or consultations,
3. Actual removal costs,
4. Damage to private or public lands as a result of removing debris,
5. Costs associated with easements to remove debris, and
6. Disposal costs of debris.

The Commissioner has the right to pursue legal remedies as set forth in Ark. Code Ann. § 22-6-202, et seq., or as otherwise authorized by law.

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### *Title 3: Other Waterways*

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This policy in no way restrict or exclude the Commissioner's jurisdiction over recreational, private, or commercial use of islands located in the navigable rivers of the State of Arkansas or the submerged lands lying beneath the navigable waterways of the State of Arkansas.

This policy in no way waive the Sovereign Immunity of the Commissioner as granted under the Arkansas Constitution and the Arkansas Code.