



North Carolina General Assembly
House of Representatives

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COMMITTEES:

APPROPRIATIONS
SUBCOMMITTEE ON TRANSPORTATION-CHAIR
TRANSPORTATION-VICE CHAIR
AGRICULTURE
COMMERCE AND JOB DEVELOPMENT
GOVERNMENT

March 9, 2012

Attorney General Roy Cooper
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

**RE: Constitutionality of Governor Perdue's Executive Order No. 116, "Establish a
Moratorium on the Collection of New Tolls for the North Carolina Ferry System"**

Dear Attorney General Cooper:

As co-chair of the House Appropriations Subcommittee on Transportation and on the unanimous motion of that subcommittee, I request a legal opinion from your office on the constitutionality and effectiveness of Governor Beverly Perdue's Executive Order No. 116, which is entitled "Establish a Moratorium on the Collection of New Tolls for the North Carolina Ferry System." The order contradicts the 2011-2013 budget passed by the General Assembly in S.L. 2011-145. As such, our subcommittee has concerns over both (i) the order's impact on the budget for the Ferry Division of the Department of Transportation and (ii) what precedent the order might set for future budget policies established by the General Assembly through session law that an executive chooses not to like.

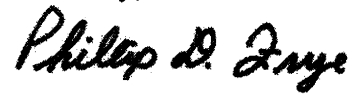
I have attached a copy of a legal memorandum prepared by Mr. Gerry Cohen, Director of the Bill Drafting Division, General Assembly. This legal analysis was presented to our committee at our March 8th meeting and concludes that, contrary to the claim of Executive Order No. 116, the Governor lacks any legal authority to declare a moratorium on ferry tolls.

I have also attached a copy of the relevant portions of S.L. 2011-145 and the accompanying committee report, as well as a copy of Executive Order No. 116.



I recognize that legal analysis can sometimes take time, but, per S.L. 2011-145, the ferry tolls are scheduled to take effect April 1, 2012, and the Department of Transportation estimates a 30 day ramp up period before they can collect all of the tolls. Our subcommittee, the General Assembly, and, I am sure, the entire State would appreciate an opinion from your office as swiftly as you can responsibly provide one.

Sincerely,

A handwritten signature in black ink that reads "Phillip D. Frye". The signature is written in a cursive, slightly slanted style.

Phillip D. Frye

CC: Speaker of the House Thom Tillis
President Pro Tempore of the Senate Phil Berger
Governor Beverly Perdue
Secretary of Transportation Eugene A. Conti, Jr.



NORTH CAROLINA GENERAL ASSEMBLY

Legislative Services Office

George R. Hall, Legislative Services Officer

Bill Drafting Division

300 N. Salisbury Street, Suite 401
Raleigh, NC 27603-5925
Tel. 919-733-6660 Fax 919-715-5459

Gerry Cohen
Director

March 8, 2012

MEMORANDUM

TO: Rep. Phillip D. Frye and Rep. Ric Killian, co-chairs
House Appropriations Subcommittee on Transportation
FROM: Gerry F Cohen, Director of Legislative Drafting
SUBJECT: Constitutionality of Executive Order 116 "Ferry Tolls Moratorium"

You have asked me my opinion on the constitutionality and effectiveness of Executive Order 116 dated February 29, 2012 "Establish a Moratorium on the Collection of New Tolls for the North Carolina Ferry System." For the reasons set out below it is my opinion that the Governor's Executive Order 116 has no force or effect.

1) Cited in the order as alleged authority is the **former** law giving discretion to the Department of Transportation in setting ferry tolls. Section 31.30 of S.L. 2011-145 (Current Operations Appropriations Act of 2012) states in pertinent part (new language underlined):

Effective April 1, 2012, G.S. 136-82 reads as rewritten:

"§ 136-82. Department of Transportation to establish and maintain ferries.

The Department of Transportation is vested with authority to provide for the establishment and maintenance of ferries connecting the parts of the State highway system, whenever in its discretion the public good may so require, and to prescribe and collect such tolls therefor as may, in the discretion of the Department of Transportation, be expedient. The Board of Transportation shall establish tolls for all ferry routes, except for the Ocracoke/Hatteras Ferry and the Knotts Island Ferry.

....."

The Executive Order mentions in its justification that: "N.C. Gen. Stat. § 136-82 directs DOT to use its discretion to only collect such tolls as it deems expedient in the exercise of its discretion.", but the 2011 act is an amendment to that very statute and eliminates the discretion of the Board of Transportation. I also note that the Senate Appropriations Committee Report on House Bill 200, the budget bill, provides on page K-3 that the bill "Raises tolling on existing routes and adds tolls to two untolled routes." That report under Section 32.4(a) of SL 2011-145 "... shall be used to construe this act ... and is considered a part of this act ..."

The 2011 act, to the extent that it might conflict with the prior sentence of GS 136-82, is the later and more specific law and is thus controlling. See *Oxendine v TWL Inc.* 184 N.C.App. 162, 645 S.E.2d 864, NC Court of Appeals 2007:

"[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature ... unless it clearly appears that the legislature intended the general statute to

control. "

Also see *Henderson Amusement v Good*, 172 F Supp 2nd 751 (WDNC 2001):

"[It] 1 would also run counter to North Carolina's rule of statutory construction-that a later-enacted particularized statute controls over a preexisting more generalized statute. ..."

2) The Governor next claims as authority for the Executive Order:

"By the power vested in me as Governor by the Constitution and the laws of the State of North Carolina: Due to the harm that the collection of newly established or increased tolls threatens to cause to the economic well-being of the State's citizens, immediately upon the establishment of any new tolls as set out in Session Law 2011-145, section 31.30, the DOT shall place a moratorium on the collection of all such newly established tolls and all increases in existing tolls. The moratorium shall remain in place for a minimum period of twelve (12) months unless said moratorium is ended by act of the General Assembly within that period of time."

I find no constitutional or statutory authority for this part of the executive order that attempts to suspend the statute for a year. Indeed, Article I, Section 7 of the Constitution provides:

"Sec. 7. Suspending laws.

All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised."

Thus not only is there no inherent constitutional power of the Governor to suspend law, the Constitution specifically bars such power without statutory authority. The Governor cites no such statutory authority to suspend laws based on threats to the economic well-being, because there is none. There might be some limited authority to suspend ferry tolls in the North Carolina Emergency Management Act of 1977, as in GS 166A-6(c) the Governor during a state of disaster may compel an evacuation from a stricken or threatened area, including economic controls and perhaps an authorization to waive any regulation which restricts immediate relief. That statute would prevail over the statute requiring tolls, for example in evacuating and providing relief, but no such state of disaster currently exists nor is there an evacuation order.

Additionally, Subdivision 3 of Section 5 of Article III of the N.C. Constitution provides in pertinent part:

"(3) Budget. The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor."

Session Law 2011-145 is the budget. The Governor is bound by the Constitution to administer it as enacted. This does not include declaring a moratorium on a provision.

3) While the Executive Order itself does not refer to the ferry tolls as a tax, the Governor's press release referred to it in several places as a "ferry tax". If indeed it were a tax, an alleged power of the Governor in suspending it also runs afoul of Article V, Section 2 of the North Carolina Constitution which states in pertinent part: "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."

(a) The Division shall disclose personal information contained in motor vehicle records in accordance with the federal Driver's Privacy Protection Act of 1994, as amended, 18 U.S.C. §§ 2721, et seq.

(b) As authorized in 18 U.S.C. § 2721, the Division shall not disclose personal information for the purposes specified in 18 U.S.C. § 2721(b)(11).

(c) The Division shall not disclose personal information for the purposes specified in 18 U.S.C. § 2721(b)(12) unless the Division receives prior written permission from the person about whom the information is requested.

(d) As authorized in 18 U.S.C. § 2721, the Division may disclose personal information to federally designated organ procurement organizations and eye banks operating in this State for the purpose of identifying individuals who have indicated an intent to be an organ donor. Personal information authorized under this subsection is limited to the individual's first, middle, and last name, date of birth, address, sex, county of residence, and drivers license number. Employees of the Division who provide access to or disclosure of information in good-faith compliance with this subsection are not liable in damages for access to or disclosure of the information.

(e) As authorized in 18 U.S.C. § 2721, the Division may also provide copies of partial crash report data collected pursuant to G.S. 20-166.1, partial driver license data kept pursuant to G.S. 20-26(a), and partial vehicle registration application data collected pursuant to G.S. 20-52 in bulk form to persons, private companies, or other entities, for uses other than official, upon payment of a fee of three cents (3¢) per individual record. The Division shall not furnish such data except upon execution by the recipient of a written agreement to comply with the Driver's Privacy Protection Act of 1994, as amended, 18 U.S.C. §§ 2721, et seq. The information released to persons, private companies, or other entities, for uses other than official, pursuant to this subsection, shall not be a public record pursuant to Chapter 132 of the General Statutes."

TRANSPORTATION/FERRY DIVISION TOLLING

SECTION 31.30.(a) Effective April 1, 2012, G.S. 136-82 reads as rewritten:

"§ 136-82. Department of Transportation to establish and maintain ferries.

The Department of Transportation is vested with authority to provide for the establishment and maintenance of ferries connecting the parts of the State highway system, whenever in its discretion the public good may so require, and to prescribe and collect such tolls therefor as may, in the discretion of the Department of Transportation, be expedient. The Board of Transportation shall establish tolls for all ferry routes, except for the Ocracoke/Hatteras Ferry and the Knotts Island Ferry.

To accomplish the purpose of this section said Department of Transportation is authorized to acquire, own, lease, charter or otherwise control all necessary vessels, boats, terminals or other facilities required for the proper operation of such ferries or to enter into contracts with persons, firms or corporations for the operation thereof and to pay therefor such reasonable sums as may in the opinion of said Department of Transportation represent the fair value of the public service rendered.

The Department of Transportation, notwithstanding any other provision of law, may operate, or contract for the operation of, concessions on the ferries and at ferry facilities to provide to passengers on the ferries food, drink, and other refreshments, personal comfort items, and souvenirs publicizing the ferry system."

SECTION 31.30.(b) The Board of Transportation shall toll all ferry routes no later than the effective date of subsection (a) of this section but is encouraged to begin tolling on all routes before that date. In establishing tolls for ferry routes under G.S. 136-82, as amended by this section, the Board of Transportation shall consider the needs of commuters and other frequent passengers.

Senate Subcommittee on Transportation

FY 11-12**FY 12-13****16 Establish Per Record Fee for Bulk Data**

(\$5,049,796)

R

(\$5,049,796)

R

Establishes a fee of three cents (\$.03) per partial license, registration, and accident report data record downloaded by third parties, principally for resale. Revenues are projected to increase by \$5,049,796 recurring. Highway Fund appropriations are reduced per projected revenues.

17 Eliminate Vacant Positions

(\$343,990)

R

(\$417,117)

R

Eliminates vacant positions within the Division of Motor Vehicles.

-5.00

-7.00

18 Implement Credit/Debit Payments at Driver License Offices

\$648,879

R

\$1,297,757

R

Provides funds to offset transactional costs upon implementation of merchant card (credit/debit) point-of-sale processing at driver license offices. Pilot implementation is proposed for January 2012. Second year transactional costs are annualized. Point-of-sale terminal and other installation costs will be supported with existing funds.

Governor's Highway Safety Program

19 GHSP - Cuts

(\$28,233)

R

(\$28,233)

R

Eliminates a Public Relations Officer position supported by 50 percent highway funds and 50 percent federal funds, and shifts the employee into a vacant position fully supported by federal funds.

-0.50

-0.50

20 GHSP - Cuts

(\$3,700)

R

(\$3,700)

R

Eliminates costs to Board in fund code 84210-0042.

Intermodal Divisions

21 Division-wide

Appropriates \$24,000,000 of accumulated unencumbered fund balance from the five intermodal divisions. This balance resulted primarily from funds encumbered as the state matching component for grant applications for federal funds that were not awarded.

22 Aviation Division - Cuts

(\$3,050,000)

R

(\$3,050,000)

R

Reduces grant funds for commercial air carrier airports by \$1,200,000, miscellaneous aviation programs by \$1,100,000, and general aviation airports by \$750,000.

23 Ferry Division - Cuts

(\$2,097,950)

R

(\$2,097,950)

R

Reduces non-essential seasonal temporary employees; reduces fuel costs through engine RPM adjustments and from increasing hull cleanings from every two years to annually; eliminates non-essential overtime; and, reduces consumables used by operations and vessels.

24 Ferry Division - Tolling

(\$2,000,000)

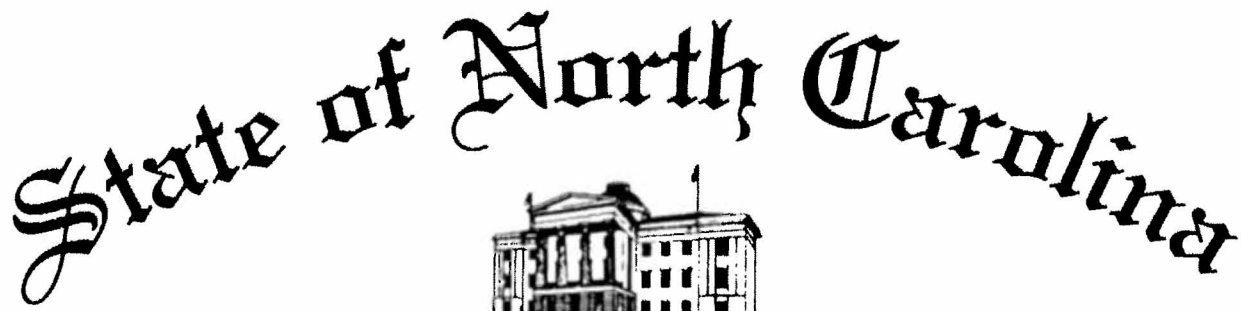
R

(\$2,500,000)

R

Raises tolling on existing routes and adds tolls to two untolled routes. Revenues will increase by \$2,000,000 in FY 2011-12 and by \$2,500,000 recurring in FY 2012-13.

Highway Fund



BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 116

**ESTABLISH A MORATORIUM ON THE COLLECTION OF NEW TOLLS FOR THE
NORTH CAROLINA FERRY SYSTEM**

WHEREAS, the North Carolina Department of Transportation ("DOT") operates ferries connecting components of the State highway system; and

WHEREAS, the ferry system is essential to our State's citizens who use the ferries each day as a means of transportation to pursue their livelihoods; and

WHEREAS, the ferry system is also important to the State's travel and tourism industry as a mode of transportation for thousands of tourists who explore North Carolina's coastal areas each year; and

WHEREAS, a number of the ferries currently operating are offered at no expense to the public; and

WHEREAS, pursuant to Session Law 2011-145, section 31.30, the North Carolina General Assembly directed the Board of Transportation, no later than April 1, 2012, to establish tolls for all ferry routes, except for the Ocracoke/Hatteras Ferry and the Knotts Island Ferry; and

WHEREAS, while our State and nation are beginning to rise out of the recent economic recession, many of our citizens are still struggling to regain their economic footing; and

WHEREAS, the citizens and counties of coastal North Carolina continue to recover from the devastation caused by Hurricane Irene, which made landfall in coastal North Carolina on August 27, 2011; and

WHEREAS, North Carolina's coastal counties continue to experience a slower economic recovery than other areas of the State due to the impact of Hurricane Irene; and

WHEREAS, it is crucial that our citizens who use the ferry system are not burdened with extra costs that threaten to negatively impact their economic progress and well-being; and

WHEREAS, it is also important that our State not impose additional costs that could reduce the attractiveness of our coastal areas as a tourist destination, thus harming our travel and tourism industry; and

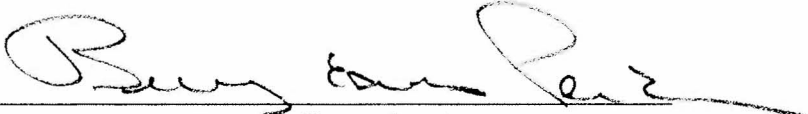
WHEREAS, N.C. Gen. Stat. § 136-82 directs DOT to use its discretion to only collect such tolls as it deems expedient in the exercise of its discretion.

NOW, THEREFORE, by the power vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

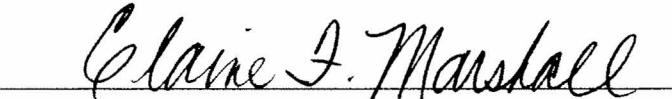
1. Due to the harm that the collection of newly established or increased tolls threatens to cause to the economic well-being of the State's citizens, immediately upon the establishment of any new tolls as set out in Session Law 2011-145, section 31.30, the DOT shall place a moratorium on the collection of all such newly established tolls and all increases in existing tolls. The moratorium shall remain in place for a minimum period of twelve (12) months unless said moratorium is ended by act of the General Assembly within that period of time.
2. At the conclusion of the moratorium, the DOT shall review the economic conditions of the State and its citizens and make a recommendation as to whether the moratorium should be extended.
3. The Secretary of DOT is also directed to immediately conduct a comprehensive review of all existing costs and expenses within the DOT to identify sufficient savings to offset budgeted revenue that was anticipated to be collected from any new or increased tolls established pursuant to Session Law 2011-145, section 31.30. Savings identified by the Secretary of DOT shall be used to offset said anticipated budgeted revenues.
4. In addition, the DOT shall immediately cease ongoing construction of all new tolling infrastructure commenced in response to Session Law 2011-145, section 31.30, and shall refrain from renewing said construction while the above-referenced moratorium is in effect.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twenty-ninth day of February in the year of our Lord two thousand and twelve, and of the Independence of the United States of America the two hundred and thirty-sixth.




Beverly Eaves Perdue
Governor

ATTEST:


Elaine F. Marshall
Secretary of State