

# **MAJOR LAND USE LAWS IN ALABAMA**

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**CURRENT LAND USE AND  
ENVIRONMENTAL ISSUES**

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## **IV. ENVIRONMENTAL ISSUES IN PROPERTY DEVELOPMENT**

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### **A. Introduction -- Spectrum of Land Use Controls**

#### **Regulatory Concerns for Developers**

##### **a. Overview of Land Use Regulation**

Developers and landowners must be aware of the local, state and federal issues that continue to evolve and directly affect the business, economic and operational aspects of developing and owning real property.

All aspects of the development site are now regulated by land use, environmental, health or safety rules, regulations, laws or ordinances.

Land use and environmental regulations affect every step of development from initial site considerations to the operation of the business, industry or residential community on the site.

Some of the more familiar federal land use and environmental laws affecting development include the Federal Water Pollution Control Act (and Clean Water Act Amendments), the National Environmental Protection Act, the Clean Air Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act (and Superfund Amendments), the Endangered Species Act, the Occupational Safety and Health Act, and the National Flood Insurance Act.

There are also state and local counterparts to many of these federal laws, as well as subdivision, zoning, and permitting requirements.

There are cost, liability and compliance considerations associated with each of these laws that

should be examined for each development.

b. Land Use and Environmental Baseline:

Each developer should pay attention to the physical, natural, historical and regulatory characteristics of each proposed development site, as well as surrounding sites.

The conditions are determined by reviewing the site conditions, as well as the local and regulatory records of the site and landowner. All of the information gathered will help establish the existing conditions or the baseline of the property and should be part of the initial investigation for use of the property as well as the environmental due diligence investigation.

i. Issues to Investigate: Some of the matters to be examined include:

(1) Topography: The physical and natural conditions of the site and surrounding sites should be reviewed to determine the following conditions:

- (a) drainage
- (b) flood conditions/history
- (c) flood zone requirements
- (d) location of waterways
- (e) condition of soil surface and subsurface
- (f) existence of regulated conditions such as wetlands, endangered species, historical properties
- (g) condition and availability of access
- (h) past and present condition/use of the site (existing operation condition of buildings, rural area, vacant, unimproved)
- (i) geology, hydrogeology, groundwater flow and conditions

(2) Existing Land Use Regulations:

- (a) state/federal statutes/regulations
- (b) local building codes, zoning and planning and other local ordinances
- (c) health and safety regulations
- (d) special districts/locations; historical/archeological sites
- (e) similar businesses

(3) **Surrounding Conditions:**

- (a) past and existing land uses
- (b) economic and social character of neighborhood
- (c) surface and subsurface drainage
- (d) location of waterways, water wells
- (e) existing air and water quality

(4) **Utilities and Resources:**

- (a) what are available utilities
- (b) transportation routes/requirements
  - rail, highway, waterways, air
- (c) water use
- (d) discharge/treatment facilities
- (e) disposal facilities

(5) **Community Relations:**

- (a) environmental justice
- (b) existing organizations
- (c) regulatory agencies
- (d) local government

(e) existing businesses

ii. Reasons for Establishing a Baseline and Conducting an Environmental Due

Diligence Investigation:

(1) **General:** Any development should include an investigation, among other matters, of the past and present uses of the real property related to the proposed development and surrounding properties, as well as business, operations and processes of any proposed or past business or near the development site.

The process of investigation and inquiring of the environmental conditions of the surface and subsurface of the real estate, of environmental compliance of past, existing, or proposed activities, as well as the effect of the development or real property from surrounding activities is called the **environmental due diligence investigation**.

The due diligence investigation is being used and recognized as an essential part of development to protect and avoid parties from potential and severe environmental liabilities, as well as requirements to meet existing land use conditions, and to identify any development, transactional and operational problems.

(2) **Standards for Conducting Due Diligence:** The primary problem has become “what should be the level of environmental investigation in order to qualify for the defenses provided by federal and state statutes, or to fully protect parties to the development?”

Developers, buyers, sellers, lenders, corporate officers, agents or other parties not only have exposure to liability, they are required by statute or regulatory “guidance” to conduct certain inquiries to determine the environmental statutes of properties and to comply with complex and regulatory requirements.

One of the often claimed defenses and basis for due diligence investigation is the *innocent landowner defense* to hazardous wastes cleanup liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which is discussed later.

The level of due diligence inquiry is still unclear but should be practicable for the particular transaction. The use of such vague language "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" to meet the requirements for the innocent landowner defense by Congress did not provide a clear answer or set a clear standard. 42 U.S.C. § 9601(B).

ASTM Standards: Independent, non-profit organizations such as the American Society for Testing and Materials (ASTM) have also attempted to standardize environmental due diligence by publicizing certain environmental due diligence standards in an attempt to address the elements of defenses such as the *innocent landowner defense* under CERCLA.

- \* Transaction Screen Process - (ASTM E1528)
- \* Phase I Environmental Site Assessment Process (ASTM E1527)
- \* Phase II Environmental Site Assessment Process (ASTM E1903-97)

c. **Primary Land Use Permits for a Successful Development:**

i. **General:** There can be many agencies and authorities interested in a particular development, many of whom will require a permit or approval of some aspect prior to performing the activity. Identifying and obtaining the permissions necessary as well as assembling the persons qualified and necessary to obtain the permissions are vital.

Which land use and environmental permits are necessary to develop property

in Alabama depends upon a thorough review of each transaction to determine the location of the development (site), the types of operations involved in the development, the processes of each phase of the operations, and a strategy for obtaining, maintaining and, in appropriate circumstances, transferring land use and environmental permits. Most permit applications are interdisciplinary, involving engineering and legal preparation. Developers, owners and operators should always focus on the fact that the permit applications and permits are legal documents, based on laws, regulations and rules, and are subject to legal interpretation and have legal consequences. Persons doing business, developing real property, merging, or acquiring operations in Alabama must consider, obtain and comply with numerous land use requirements and environmental permits from federal, state and local agencies.

Factors and information gathered during the initial siting considerations and the environmental due diligence investigations should be used to determine the type of permits which may be necessary for each development.

ii. **Permitting Agencies:**

- (1) EPA
- (2) ADEM
- (3) USFWS
- (4) NMFS
- (5) FEMA
- (6) U.S. Army Corps of Engineers
- (7) ADEM



- (8) Alabama Department of Conservation
- (9) NCRS
- (10) Alabama Department of Public Health
- (11) Alabama State Docks
- (12) Alabama Historical Commission
- (13) local planning commission, city councils, engineering departments

B. **Regulation of Land Uses in Hazardous Areas.**

Hazardous areas include:

- (1) hydrologic hazards
  - (a) floodplains
  - (b) coastal areas/beaches and dunes
  - (c) groundwater withdrawal/droughts
- (2) geologic hazards
  - (a) landslides and steep slopes
  - (b) sinkholes and karst formations

1. **Hydrologic Hazards:**

(a) **Floodplains.** Federal statutes have focused on the importance of flood hazards prevention and protection of natural floodwaters retention areas, especially floodplains. The National Flood Insurance Act of 1968 (43 U.S.C. § 4001, et. seq.) and the Federal Disaster Relief Act of 1974 (42 U.S.C. § 5121, et. seq.) authorized federal standards for flood hazard mitigation. Through the National Flood Insurance Program (NFIP), communities must adopt floodplain management regulations that are consistent with federal and local studies and maps

showing floodways, flood events (10-year, 50-year, 100-year, and 500-year) and flood prone areas. Flood insurance is made available in participating communities, normally at reduced rates, and mandatory for any loan from a federally related institution for purchase or development in flood prone areas.

Development of floodplains is also regulated through the Section 404 permitting process of the Clean Water Act (33 U.S.C. § 1344), the Coastal Zone Management Act (16 U.S.C. § 1451), the Endangered Species Act (16 U.S.C. § 1531) as well as state statutes and regulations, and local ordinances and codes.

Local governments, in order to receive federal aid and make flood insurance available to the community, must adopt the Federal Flood Hazard Prevention Program.

The types of flooding we can expect in Alabama and along the Gulf Coast include:

(i) coastal flooding caused by tropical storms, hurricanes, and winter stormfronts. High tides, heavy rain, and the storm surge are contributors to the flood events.

(ii) riverine flooding along major and secondary stream segments may occur gradually caused by upstream events or rapidly (flash flooding) caused by heavy and local rainfall over a short period of time.

(b) Coastal Areas Including Beaches and Dunes. Flooding, wave damage, and shoreline erosion are problems inherent in coastal areas. The coastal floodplains and areas subject to direct effects of high tides, storm surges, and large waves are rated the Coastal High Hazard Areas by FEMA on the flood insurance rate map in determining specific building code restrictions and requirements. Coastal flooding can also reach far inland covering other low lying areas, making evacuation a critical issue for coastal communities and planning.

Coastal statutes and ordinances impose restrictions on development of beaches and dunes, recognizing that the natural dune system provides a protective barrier to coastal storm hazards. (See ADEM Admin. Code Reg. 335-8, et seq.)

(c) Groundwater Withdrawal. Communities that depend on groundwater as their primary water supply are directly affected by demand for and withdrawal of groundwater. Saltwater intrusion along coastal communities and other areas near saltwater accumulations can contaminate a water supply when encouraged by high demand and individual well consumption. The droughts we have experienced also restrict groundwater recharge, adding additional pressure on water supplies.

ADEM regulations limit water withdrawal from wells in coastal areas and outside the coastal area but within the 50-year capture zone to 50 gallons per minute (ADEM Admin. Code Reg. 335-8-2-.09).

2. Geologic Hazards:

(a) Landslides and Steep Slopes. According to the U.S. Geological Survey, landslides and hazardous events associated with steep slopes occur more frequently in the northern part of Alabama and are normally associated with rockslides, highway development, and residential development. Heavy or prolonged rainfall on unvegetated slopes or exposed slopes can cause severe erosion that may result in landslide events. Flooding and stream bank erosion can result in bankslides and bluff damage.

Construction stormwater regulations (existing and proposed) require erosion control practices for any land disturbing activities to prevent erosion and stabilize soils. Communities may also adopt erosion control ordinances to prevent these problems.

Flood regulations (44 C.F.R. § 60.4) provide specific references to “mudslide” and “mudflow”-prone areas. Matters which must be addressed for a development in such areas include a determination of the soil types and geology, indentifying groundwater and surface water problems, slope, weights of proposed structures, designs to be made to protect against mudslides, limiting on and off site disturbances, and conduct drainage, vegetation and maintenance to protect slope stability.

(b) Sinkholes and Karst Formations. As water flows through cracks and fractures in limestone formations, the edges are dissolved and widened. Karst is a permeable limestone easily penetrated by surface and groundwater. EPA v. City of Forest Green, 921 F. 2d 1394 (8<sup>th</sup> Cir. 1991) cert. denied, Work v. Tyson Foods, Inc., 502 U.S. 956 (1991). According to the EPA:

“Karst terrain consists of rock – such as limestone, dolomite, or gypsum – that slowly dissolve when water passes through it. The dissolving rock leaves underground voids, tunnels, and caves. Sometimes these underground spaces can grow so large that their “ceilings” will collapse, forming large sinkholes.”

EPA document 530-K-97-003, May, 1997, Sensitive Environments.

Karst formations are normally overlain with varying depths of soil which can give way or sink as the karst is dissolved. Karst formations and associated sinkholes may be unstable foundations for structural development, susceptible to contamination by surface discharge, and unsuitable for discharge or storage of waste. According to the EPA:

“Facilities located in karst areas may have an increased chance of hazardous waste spills because sinkholes can form suddenly. These spills can contaminate the groundwater making it difficult to clean up since the hydrogeology is complex in these areas. Engineers do not have good methods to protect hazardous waste management facilities against sinkholes collapse.” *Id.*

Karst formations exist in parts of Alabama, near Huntsville, Auburn, and in Southeast Alabama near Andalusia. The groundwater flowing through these formations are used for drinking water. The formations could also support regulated and protected species.

One Kentucky community, Lexington, has passed an ordinance to control development in sinkhole areas in the BlueGrass Karst Region in Northeast Kentucky. Ordinance for the Control of Urban Development in Sinkhole Areas SRA 85-2: Article 6-7(1): Sinkholes (Lexington, Kentucky). The ordinance addresses nonbuildable sinkhole-related areas, surface drainage, prohibited filling of sinkholes, and requires plans and hydrogeologic testing.

C. **Open Space Planning**

“Open Space” is a term used to describe undeveloped and unimproved surface areas. In the planning process open space may include existing farm lands, timberlands, riparian buffers, neighborhood parks, greenbelts, coastal and riverine shorelines, and other environmentally sensitive areas.

Open Space is defined in Article II, Paragraph 2.2.420 of the Fairhope Zoning Ordinance as:

“2.2.420 *Open Space*: An area open to the sky which may be on the same lot with a building. The area may include, along with the natural environmental features swimming pools, tennis courts or any other recreational facilities. Streets, structures for habitation, and the like shall not be included.

a. *Open Space, Permanent Usable, in Planned Unit Development*: (1) privately-owned and occupied area of a separate lot, outside of any buildings on the lot, (2) privately-occupied open space assigned to an individual dwelling unit in a project and not occupied by the dwelling, (3) public open space. Any spaces not occupied by buildings or privately-owned lots or privately occupied space. This public open space may consist of access driveways, off-street parking spaces, pedestrian walkways, play areas, landscaped areas, sports areas and any other areas suitable for the common enjoyment of the residents of the project.”

Open Space has received attention as developments proceed without a coordinated and acceptable land use plan, and as unimproved properties are developed without concern for long term effects of density, recreation, weather or the downstream effects of development.

A Comprehensive Plan for Land Use may be proposed and adopted by a community according to the Alabama Code to guide development, land use and reuse of property considering concerns of city planners, citizens, and at times, landowners. Alabama Code § 11-52-8. Examples of local land use plans include:

Fairhope Comprehensive Land Use Plan

Comprehensive Plan for the City of Mobile, as amended May 19, 1998

The Mobile Planning Commission has adopted a comprehensive plan for the City of Mobile. Mobile also has a zoning ordinance, subdivision ordinance, and a land use ordinance.

“Planning” has been distinguished from “zoning” by the Alabama Supreme Court as follows:

“Broadly speaking, ‘planning’ relates to the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly within the police power. ‘Zoning’ is primarily concerned with the regulation of the use of property, to structural and architectural designs of buildings, and the character of use to which the property or the buildings within classified or designated districts may be put.” *Roberson v. City of Montgomery*, 233 So. 2d 69, 72 (Ala. 1970).

Planning and review procedures for open space are sanctioned by Ala. Code § 11-52-11. The planning commission has the authority to require submission and approval both public and private plans addressing, among other things, parks, ground or open spaces, before construction.

In Wisconsin, the Town of Dunn’s land use plan was developed 20 years ago to address what was described as “burgeoning and haphazard development that threatened agriculture and the rural

character of the town.”

The town developed a plan to maintain their idea of the town’s heritage. They wanted to keep taxes low by encouraging the agricultural base. They wanted to discourage growth, protect open space and environmentally sensitive areas. They enacted land use controls, subdivision restrictions and allotted funds for acquisition of land and conservation easements.

The town now purchases development rights. They found that conservation easements work better than zoning.

The town created a land trust to permanently protect farmland and open spaces.

The town works with the resident for education, recycling and cleanup programs.

The benefits of open space have been recited in the Tennessee Tax Code § 67-5-1001 et seq., entitled “Classification and Assessment - Agricultural, Forest and Open Space.”

The Tennessee Legislature recited reasons for protecting open space:

“(1) The existence of much agricultural, forest and open space land is threatened by pressure from urbanization, scattered residential and commercial development, and the system of property taxation. this pressure is the result of urban sprawl around urban and metropolitan areas which also brings about land use conflicts, creates high costs for public services, contributes to increased energy usage, and stimulates land speculation;

“(2) The preservation of open space in or near urban areas contributes to:

- (a) The use, enjoyment and economic value of surrounding residential, commercial, industrial or public use lands;
- (b) The conservation of natural resources, water, air, and wildlife;
- (c) The planning and preservation of land in an open condition for the general welfare;
- (d) A relief from the monotony of continued urban sprawl; and
- (e) An opportunity for the study and enjoyment of natural areas by urban and suburban residents who might not otherwise have access to such amenities;

“(3) Many prime agricultural and forest lands in Tennessee, valuable for producing food and fiber for a hungry world, are being permanently lost for any agricultural purposes and that these lands constitute important economic, physical, social, and esthetic assets to the surrounding lands and to the people of Tennessee;

“(4) Many landowners are being forced by economic pressures to sell such agricultural, forest, or open space land for premature development by the imposition of taxes based, not on the value of the land in its current use, but on its potential for conversion to another use.”

Other planning options appear in zoning or subdivision regulations which allow planned unit developments (PUD’s) or planned mixed use districting (PMUD’s). Each of these classifications encourage clustering of structures, flexibility of design and use of open space.

In the Fairhope Zoning Ordinance, Article VI, paragraph 6.1, open space is addressed as a part of PUD’s:

“The intent of a planned unit development is to permit such flexibility and provide performance criteria for unified development which:

\* \* \*

(4) Enhance the appearance of the area through preservation of natural features, the provision of underground utilities and the provision of recreation areas and open space in excess of existing zoning and subdivision requirements.”

Mobile and other municipalities have similar provisions in their zoning ordinances. Another flexible planning classification is called the planned residential development (PRD) which is described in the Baldwin County Zoning Regulations, in Article 23. PRD’s are discussed in a recent case, *Fort Morgan Civic Association Inc. v. Baldwin County Commission*, 2003 Ala. Civ. App. LEXIS 7 (January 10, 2003).

Open space is further encouraged by:



- (1) The statutory recognition of conservation easements in Alabama:
  - (a) Conservation Easements, Ala. Code § 35-18-1, et seq.; and
  - (b) Forever Wild Amendment, Alabama Constitution of 1901; Amendment 543
- (2) Flood Hazard Zoning Ordinances:
  - (a) Mobile Ordinance no. 65-082, 1993 “Ordinance Establishing Control of Stormwater Drainage Facilities and Land Disturbance Activities and to Establish Land Use and Control Measure in Special Flood Hazard Areas; and
  - (b) Flood Ordinance of the City of Fairhope, Ordinance No. 668;
- (3) Restrictions on Use of Beaches and Dunes
  - (a) ADEM ADMIN Code Reg. 335-8 (Coastal Regulations)
  - (b) Gulf Shores Zoning Ordinance, Article I, Section 8-11, Coastal Construction Setback Line
  - (c) Town of Dauphin Island Zoning Ordinance
- (4) River Riparian Protection

The City of Trussville established a Cahaba River Overlay District within which, by zoning ordinance, stream and riverside setbacks, buffers and riparian zones have been encouraged and required to protect the River from chemical, pesticide and sedimentation runoff, and to preserve floodplain areas.

D. **Environmentally Sensitive Areas**

Environmentally Sensitive Areas (ESA's) has been described to include almost any type of regulated or recognized natural resource, and is often a convenient phrase used to emphasize target areas for protection.

ESA's have been described to include:

essential habitat for threatened and endangered species

wetlands sometimes referred to as environmentally important

scientifically recognized rare ecological communities

steep slopes

flood prone areas

riparian habitats and corridors

fisheries and wildlife habitat

hardwood bottomland habitats

coastal areas, dunes and barrier islands

historic and cultural properties

This list is by no means exhaustive and such ESA's may also be included in another description pertaining to a particular program, ordinance, regulation or statute:

For example:

1. Linear projects or pipelines regulated by the Office of Pipeline Safety and the U. S. Department of Transportation, Research and Special Programs Administration are now required by final rule codified in 49 CFR Part 195 to consider the effects of a hazardous liquid pipeline release on drinking water and ecological areas which the regulations refer to as “Unusually Sensitive Areas” (“USA”).

USA’s include

- (a) drinking water sources;
- (b) sole source aquifer recharge area;
- (c) ecological resources such as a multi-species species assemblage area;
- (d) migrating bird concentration area; and
- (e) an area containing imperiled species

2. Clean Water Act

- (1) Requirements of the Clean Water Act (“CWA”) § 404 refer to “waters of the United States” (33 CFR § 328) which include wetlands, mudflats, etc.

The CWA §404(b)(1) guidelines refer to wetlands as “Special Aquatic Sites” (40CFR § 230.3). The U. S. Army Corps of Engineers during the CWA § 404 permit application process must consider other sensitive areas and consult with other agencies that exercise jurisdiction over sensitive areas such as endangered and threatened species and their habitat (USFWS), historic and cultural sites (SHPO), coastal resources (ADEM) and fish and wildlife species and their habitats (USFWS, NMFS, and State Conversation Department).

(2) Clean Water Act, § 303(d) Total Maximum Duty Loads for Impaired Waters.

Total maximum daily loads (“TMDL”) of pollutants must be established by each state for impaired waters within the state’s boundaries necessary to implement the state water quality standards. 33 U.S.C. § 1313(d). This is § 303(d) of the Clean Water Act, originally enacted as part of the 1972 Federal Water Pollution Control Act amendments. These impaired waters are considered environmentally sensitive to any additional pollutant load beyond the TMDL from any source.

Though dormant for many years, litigation in recent years has focused on the obligations of EPA and the states to (1) identify those waterbodies that do not meet the state’s water quality standards and water use classifications, (2) prioritize those waters, (3) determine the TMDL for pollutants that allow the state to meet those standards, and (4) implement a program to utilize the load allocations in the permitting process. These were matters largely ignored until cases of significance including:

(a) Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996). The Sierra Club filed a citizen’s suit objecting to all aspects of the Georgia program including the listings of impaired waters, prioritization of the number of TMDLs proposed, and the timetables proposed. The court ordered a shorter timetable for determination of TMDLs, within five (5) years, among other things.

(b) Edward W. Mudd, II et al. v. John Hankinson, et al., CV-97-5-0714-M and Alabama Rivers Alliance, Inc. v. John Hankinson, et al., CV 97-5-2518-M. Consent degree entered establishing a schedule for establishing TMDLs in Alabama

to be prepared by EPA.

(c) Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). Northern District of California held that § 303 authorized EPA to establish TMDLs for waters impaired by non-point source pollution.

Alabama, through ADEM, like other states under consent orders, has listed and identified impaired waters, proposed and will propose TMDLs for listed waters, or if unable or unwilling to do so, EPA will have one year in which to do so. ADEM has a five-year schedule from 1998 to submit the TMDLs. Currently, ADEM is working with EPA on Mobile Bay studies.

(d) Statutory Authority: 33 U.S.C. § 1313(d) (§ 303(d) of the Clean Water Act) provides the procedures for identifying waters which remain polluted even after technological standards have been applied and to establish limits or waste loads within which water quality standards can be met.

(i) EPA Regulations: 40 C.F.R. Part 130 were first issued in 1985, revised in 1992, and again in 2000, effective October, 2001.

(ii) ADEM Regulations: ADEM Admin. Code Reg. § 335-6-10, Water Quality Criteria; § 335-6-11, Water Use Clarification.

(e) 40 C.F.R. § 130.2 Definitions

(i) Total maximum daily load (TMDL). A TMDL is a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody

and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. TMDLs must be established for waterbodies on Part 1 of the list of impaired waterbodies and must include the following eleven elements:

- (1) The name and geographic location of the impaired waterbody;
- (2) Identification of the pollutant and the applicable water quality standard;
- (3) Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;
- (4) Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards;
- (5) Identification of source categories, source subcategories or individual sources of the pollutant;
- (6) Wasteload allocation;
- (7) Load allocations;
- (8) A margin of safety;

- (9) Consideration of seasonable variations;
  - (10) Allowance for reasonably foreseeable increases in pollutant loads including future growth; and
  - (11) An implementation plan.
- (ii) Waste Load Allocation: The portion of a TMDL's pollutant load allocated to a point source of a pollutant for which an NPDES permit is required. For waterbodies impaired by both point and nonpoint sources, wasteload allocations may reflect anticipated or expected reductions of pollutants from other sources if those anticipated or expected reductions are supported by reasonable assurance that they will occur.
- (iii) Load Allocation: The portion of a TMDL's pollutant load allocated to a nonpoint source, stormwater source for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, groundwater, or background source of pollutants.
- (iv) Impaired Waterbody: Any waterbody of the United States that does not attain and maintain water quality standards (as defined in 40 C.F.R. Part 131) throughout the waterbody due to an individual pollutant, multiple pollutants, or other causes of pollution, including any waterbody for which biological information indicates that it does not attain and maintain water quality standards. Where a waterbody receives a

thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

- (v) Effects on Land Use: For existing industries, the establishment of TMDLs following the identification of specific polluted waters where existing water quality standards, water use classification and NPDES limits have not been successful means more stringent permit limits, additional costs to meet the new standards, and limits.

Monitoring is a component of the water quality standards that would be required to insure compliance with the new standards and loads.

A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits for upgrading public drinking water systems until the state complied with § 303(d) as a water quality limited segment, the geographic description of an area to be designated as a listed water. Friends of Wild Swan v. EPA (D. Mont. CV-97-35-M-DWM, 10-13-00)

In Headwaters, Inc. v. Talent Irrigation District, 52 ERC 1001 (9<sup>th</sup> Cir. 2001), a citizen suit was filed alleging



discharges to an irrigation ditch without an NPDES permit.

Defendant had applied an aquatic herbicide to the irrigation canals. The court found that, although the herbicide was discharged without a permit, the canals were “waters of the United States” subject to Clean Water Act jurisdiction, which includes § 303(d).

Nonpoint source pollution and construction (NPDES) Stormwater permits could likely see more stringent limits in permits and regulations. As TMDLs for pollutants such as siltation and sediment are developed, activities affecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDLs must address all pollution including nonpoint source pollution according to the court in Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are discussed, and have a costly effect on municipal sewage treatment and stormwater drainage systems.

3. Endangered Species Act, 16 U.S.C. § 1519, 16 C.F.R. Part 17, addresses environmentally sensitive areas, the habitat of sensitive species, and protections of the species and habitat.

4. Floods: Floodplains, floodways, flood prone areas, mudslide prone areas and their associated hazards and benefits have been described as environmentally sensitive areas. National Flood Insurance Act, 42 U.S.C. § 4001; and Executive Order. 11988 - May 24, 1977, 42 F.R. 26951.

5. Alabama Statutes: In Alabama, ESA's are addressed in the statutes addressing

(1) Coastal resources: Preservation, Development, etc. of Coastal Areas, Ala.

Code § 9-7-11 et seq.; ADEM ADMIN CODE Reg. 335-8-1 et seq.;

(2) Wild life resources: Department of Conservation and National Resources,

Ala Code § 9-2-1 et seq.; Wildlife and Fisheries, § 9-11-1; Marine Resources, § 9-12-1; Public Lands, § 9-15-1

(3) Alabama Water Resources, Ala. Code § 9-10B-3, addressing water quantities and capacities

(4) ADEM Water Quality Regulations

1. ADEM ADMIN CODE Reg., 335-6-10; Water Quality Criteria

2. ADEM ADMIN CODE Reg., 335-6-11, Water Use Classification

3. ADEM ADMIN CODE Reg., 335-6-12

NPDES Stormwater Regulations (Phase I and Phase II) construction sites; and

ADEM ADMIN Code Reg. 335-6-6, NPDES direct discharges.

E. Substantive Environmental Laws with Incidental Land Use Effects.

1. National Environmental Policy Act, 42 U.S.C. § 4321. For every major federal action that significantly effects the quality of the human environment (42 U.S.C. § 4332(2)(c)), a detailed Environmental Impact Statement (EIS) describing environmental impacts of the proposed action and alternatives to the proposed action must be in accordance with the regulations and procedures established by the Council on Environmental Quality regulations, 40 C.F.R. pt. 1500, et seq.

Although one case, Vermont Yankee Nuclear Power Corp. v. NRDC, 8 E.L.R. 20288, (U.S. Sup. Ct., April 3, 1978), the U.S. Supreme Court noted that NEPA is a procedural requirement rather than a substantive law. However, the requirement to prepare an adequate Environmental Impact Statement would definitely have an effect on land use decisions.

2. The Clean Water Act, 33 U.S.C. § 1251, et seq. The Clean Water Act has several sections and programs that effect land use.

(a) Clean Water Act § 303 (33 U.S.C. § 1313(b)) provides procedure for identifying waters which remain polluted even after technological standards have been applied. Limits or waste loads must be established by each state (or failure to do so by EPA) which meet current state and water quality standards. EPA regulations at 40 C.F.R. pt. 130 address the Total Maximum Daily Loads (TMDL) for receiving waters. A TMDL is a written quantitated plan and analysis for obtaining and maintaining water quality standards in all seasons for a specific water body. For existing industries, the establishment of TMDLs following the identification of a specific polluted water where existing water quality standards, water use classifications, and NPDES limits have not been successful means more stringent permit limits and additional cost to meet the new standards. A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits

for upgrading the public drinking water system until the state complied with Section 303(d) as a water quality limited segment. Friends of Wild Swan v. EPA, D. Mont. CV-97-35-M-DWM, 10-13-00. As TMDLs for pollutants such siltation and sediment are developed, activities effecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDL procedures must address all pollution, including non-point source pollution, according to the court in Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are discussed, and have a costly effect on the municipal sewage treatment and stormwater drainage systems.

(c) Clean Water Act § 319, Non-Point Source Pollution and Watershed Management. The Clean Water Act § 319 directed that states consider the effects of non-point source pollution and establish watershed management plans. After coordination with various stakeholders, including local governments, watershed users, landowners, and citizens, a plan for each watershed should be drafted and implemented. Although education and information are big parts of the management directive, we expect that the implementation stage will also include direct land use controls.

(d) Clean Water Act § 402:33 U.S.C. § 1342. In the event that a development will produce or need to discharge pollutants directly to navigable waters, including wetlands, from a pipe or another point source, an owner, developer, or contractor must first obtain a general or individual National Pollutant Discharge Elimination System (NPDES) permit. These discharges may be from commercial or industrial operations directly to surface waters, or from sewage and waste from municipal water treatment facilities or from stormwater runoff. ADEM administers the NPDES program in Alabama, subject to EPA regulations (40 C.F.R 122), rules

and regulations found at ADEM Admin. Code Reg. 335-6-6, the provisions of the Alabama General Stormwater Permit for Construction Sites, and the proposed ADEM Admin. Code Reg. 335-6-12 (expected to be effective in January 23, 2003).

(e) Clean Water Act § 404 (33 U.S.C. § 1344) and Regulations found at 33 C.F.R. § 320 and 40 C.F.R. § 230. These refer to the prohibitions against dredging or filling “waters of the United States” without a permit. Wetlands or other water bodies, including certain floodplains, cannot be dredged or filled without first applying for a Section 404 permit.

2. Clean Air Act (42 U.S.C. § 7401). Air quality data, air emission limitations, and monitoring data are required for any construction and operating permits. Ozone non-attainment and air emission limits will be limiting factors for any business.

ADEM is the regulatory agency in Alabama administering the Clean Air Act and the requirements of the Alabama Air Pollution Control Act (Ala. Code § 22-28-1) and the ADEM regulations (§ 335-3).

3. Endangered Species Act (16 U.S.C. § 1531, et seq. and Regulations at 50 C.F.R. § 17.3). Any land disturbing activity, hazardous activity or development may be required to obtain a wild life survey to confirm the existence or nonexistence of federally listed or state protected species. The study is normally required as part of many land use permit procedures. In addition, the non-game regulations of the Alabama Department of Conservation and Natural Resources, Rule 220-2-.92, should be consulted. These regulations provide certain procedures for permitting and protection of state protected species which may pose an additional obstacle to certain siting and operational activities.

4. Historic Properties. The National Historic Properties Act, 16 U.S.C. § 470, requires federal agencies to consider historic and cultural properties effected by land use

activities. State law also protects certain state historic properties and burial grounds. The Alabama State Historical Preservation Officer (SHPO) will be required to review properties, permit applications, and development plans as part of other permitting activities to determine the existence and preservation requirements of cultural resources and historic properties of state and national significance. Regulations requiring cultural resources surveys of areas impacted by any land use project are found at 40 C.F.R. § 1502.

5. National Flood Insurance Act (42 U.S.C. § 4001) and Flood Regulations 40 C.F.R. pt. 60.

F. **Planning for Particular Activities**

(1) **Solid Waste Facility Siting:**

- (a) The Alabama Solid Waste Disposal Act, Ala. Code §22-27-1
- (b) ADEM Regulations, ADEM ADMIN Code Reg. 35-13-1

The state and local governments are required to adopt a solid waste management plan to address the location of a solid waste landfill. Municipalities are authorized to determine the location of landfill sites pursuant to Ala. Code §22-27-47 and § 22-27-48.

*See Alabama Disposal Solutions - Landfill, L.L.C v. Town of Lowndesboro*, No. 2000294, Ala. Ct. Civil Appeals, May 31, 2002.

Siting considerations must comply with the requirements of ADEM regulations, 335-13-4-.01 et seq. including:

- Landfills must “prevent adverse effects on health and the environment
- Consider the effects on floodplains and cannot restrict the flow of a 100 year flood

- Cannot result in the washout of solid waste from a flood
- Endangered and threatened species and their critical habitats must be considered
- The landfill cannot be sited within 10,000 feet of an airport
- Geologic hazards must be avoided including faults, seismic impact zones, and unstable areas
- Hydrology and geology evaluations must be made
- Historic and cultural sites must be considered
- No site shall be located on beaches and dunes or in wetland areas.

Other planning considerations should include the design of the site and disposal facility (335-13-4-11); environmental justice concerns, and the effects on neighboring communities. Aesthetics, fear of polluting groundwater and surface waters, and unstable geologic formations are issues normally raised.

Landfill permit applications are subject to notice and public hearing requirements.

A recent notice from ADEM's Land Division described an application for a major modification of BFI's Brundidge Landfill site in Pike County increasing volume and service area to include other states east of the Mississippi River. ADEM Notice dated 1/16/03.

(2) Hazardous Waste Facility Siting

- (a) Federal Statutes: Resource Conservation and Recovery Act (RCRA)  
42 W.S.C. § 6901, and the Hazardous Materials Transportation Act,  
42 U.S.C. § 1801.

- (b) Alabama Code § 22-30-1, “Hazardous Waste Management and Minimization Act,” and ADEM ADMIN. Code Reg. 335-14.

In Alabama, ADEM is authorized under RCRA to administer the hazardous waste program which involves generation, transportation, treatment, storage and disposal of hazardous wastes. Siting considerations are described in federal regulations, 40 CFR Part 264, that include prohibitions of locating new sites within 200 feet of a seismic fault, prohibition of siting in the 100 year floodplains, ban siting in salt domes, mines or caves. Other consideration must address karst formations, waterways, wild and scenic rivers, endangered species, hydrogeology and proximity to residential areas.

Ala. Code § 22-30-5.2 also lists restrictions on hazardous water sites. No more than one commercial site per county is allowed, social and economic impacts on the community must be considered, costs of public services must be considered as well as, protection of the public and the environment.

ADEM ADMIN Code Reg. 335-14-5 lists requirements and standards for owners and operators of disposal facilities, and 335-14-8 provides the permitting requirements.

According to ADEM waste disposal guidance, there is only 1 commercial hazardous waste disposal facility located in Emelle, Alabama operated by Waste Management, Inc. which accepts hazardous wastes from all over the state and other area. Numerous private hazardous wastes sites (landfill and incineration) are located in each county that must obtain ADEM permits and maintain compliance with the regulations.

G. **Brownfields Sites -- Land Use and Reuse of Environmentally Impaired Property**



1. Federal Legislation: Land use or redevelopment of actual or perceived contaminated sites continue to be problems for communities. Like other regulatory restrictions on land uses, soil and ground water contamination impose strict liability and psychological barriers to redevelopment opportunities for these sites.

Congress and the Alabama Legislature recently recognized the desire to redevelop used and possibly contaminated sites by providing legislation designed to protect developers, purchasers and certain organizations who desire to pursue redevelopment or revitalization of contaminate properties.

The 2002 amendments to CERCLA, the Small Business Liability Relief and Brownfields Revitalization Act (Pub. Law 107-118) 42 U.S.C. §§ 9601-9675, provide reference to brownfields, liability protection by exemptions for qualified purchasers and developers of brownfield sites, and a grant program to encourage the assessment, cleanup and state programs for revitalization.

A “Brownfield Site” is defined as:

“real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” 42 U.S.C. § 9601(39).

Each site is a potential prospect for development, but must be evaluated on a site specific basis as any other property to determine the impact of prior operations, land uses in the area, and the environmental condition of the surface and subsurface of the property. Brownfields can usually be found in historically old industrial areas or downtown districts. The fear of discovery contamination and the resulting cleanup costs work to keep many properties off the market. Strict liability statutes, such as CERCLA, limit lending for redevelopment. To encourage investment and reuse of contaminated sites, EPA initiated the Brownfield Action Agenda in 1995 focusing on pilot Brownfield projects with federal funding, clarification of liability issues, and to facilitate job training

in the environmental field and cleanup of the sites. Funding was authorized by Section 311 of CERCLA.

EPA later initiated the Brownfields Job Training and Development Demonstration Pilot Program in 1998, and recently (December, 2000) awarded \$1.8 million to nine states under the program. Alabama also received funding for Brownfields pilots in such communities as Birmingham and Prichard.

The Brownfield Amendments provide important changes for development. New forms and exemptions to owner and operator liability include the definition and qualification of a bona fide prospective purchaser.

The term “bona fide prospective purchaser” (42 U.S.C. § 9601 (40)) means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(a) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(b) Inquiries

(i) In general

The person made all appropriate inquiries in to the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standard and practices in accordance with clauses (ii) and (iii).

(ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.

(iii) Residential use

In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(c) Notices

The person provides all legally required notices with respect to the discovery of release of any hazardous substances at the facility.

(d) Care

The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to --

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(e) Cooperation, assistance, and access

The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility

(including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(f) Institutional control

The person --

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(g) Requests; subpoenas

The person complies with any request for information or administrative subpoena issues by the President under this chapter.

(h) No affiliation

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through--

(1) any direct or indirect familial relationship; or

(2) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

- (ii) the result of a reorganization of a business entity that was potentially liable.

## 2. Contiguous Property Exclusion

The exclusion of an owner of property contiguous to contaminated property not owned by the contiguous owner has been added. 42 U.S.C. § 9607 (q) A contiguous owner will not be considered a CERCLA owner or operator solely because of the contamination of:

### (a) Contiguous properties

- (i) Not considered to be an owner or operator

#### (1) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release for threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if --

- (a) the person did not cause, contribute, or consent to the release or threatened release;

- (b) The person is not--

- (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual,

corporate, or financial relationship that is created by a contract for the sale of goods or services): or

(II) the result of a reorganization of a business entity that was potentially liable;

(c) the person takes reasonable steps to --

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(d) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(e) The person--

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(f) The person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(g) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(h) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of the section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

The Brownfields Amendments provide revitalization funding, grants and loans to further encourage community redevelopment. Grants for characterization, site assessments, remediation, and loan assistance to site owners. 42 U.S.C. § 9604 (k). Guidelines recently issued have been provided to communities encouraging applications under the new grant assistance program. See

Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund and Cleanup Grants,  
October 2002.

3. State Legislation

Prior to recent brownfields legislation, ADEM participated in EPA sponsored brownfield programs and initiatives such as the Pilot Brownfield program and the Targeted Brownfield Assessment program.

The Alabama Land Recycling and Economic Redevelopment Act (Code of Ala. § 22-30E-1 *et seq.*) and the ADEM Admin. Code Reg. 335-15-1 *et seq.* provide procedures for the Alabama Brownfield Redevelopment and Voluntary Cleanup program.

Eligible properties and participation may result in limitation of liability of an owner from state and third party claims for cleanup costs, damages or equitable relief from preexisting releases. 335-15-4-02.

The applicant of an eligible property must submit a voluntary cleanup plan, 335-15-4-.04, may be required to provide financial assurances of cleanup 335-15-5, and record a notice of restricted use if the property has been cleaned up to standards less stringent than unrestricted residential use. 335-15-6.