WATERS, WETLANDS, COASTAL REGULATIONS AND COMPLIANCE

Presented to
Baldwin County Bar Association
May 23, 2022

Materials
Prepared and Presented by:

Neil C. Johnston (Sr.), Esq
HAND ARENDALL HARRISON SALE LLC
Merchants Plaza
104 St. Francis Street, 3rd Floor
Mobile, AL 36602
251-432-5511
njohnston@handfirm.com

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ATTACHMENTS

(Including PowerPoint)

WATERS, WETLANDS, COASTAL REGULATIONS AND COMPLIANCE

WHAT ARE "WATERS OF THE UNITED STATES"?

IN 2014 WE WERE TOLD
"THIS TIME IT'S CLEAR!"

REALLY! BUT WE FOUND THAT NOT TO BE TRUE!

IN 2015 WE WERE TOLD
"THIS IS THE FINAL RULE . . . FOR CLARITY!" – WRONG"

IN 2016-2018 WE WERE TOLD
"GO BACK TO PRE-2015 WHEN IT WAS CLEAR!"

IN 2020 – WE HAD . . . THE
"NAVIGABLE WATERS PROTECTION RULE" → VACATED IN 2021!

AND REPLACED BY NEW PROPOSED RULE PUBLISHED DECEMBER 2021
(AGAIN – "GO BACK TO PRE-2015"!)

"IN 2022 . . . WHAT NOW?!"

A. GENERAL.

As a real estate lawyer representing real estate brokers, agents, owners, developers, contractors, consultants, or surveyors, or even someone working for a regulatory agency, you are expected to know and advise clients to always maintain their property and work in full compliance with any law, regulation, rule, internal memo, ordinance, permit, permit conditions, approval, license, etc., that may exist (whether you know about it or not). You are also expected to process all the changes and personal, political and subjective feelings of the "government." This includes all the internal memos (regulatory guidance), directives, and evolving interpretations made along the way.

You are expected to provide competent, knowledgeable, legal and up-to-date advice to your client, customer or applicant. How you do this is critical, but so is the way some of the rules are "made up" or changed without notice, or with notice but without emphasis or attention to the importance of the changes, or how they are or will be applied or interpreted.

Knowing the rules, regulations and people is not enough. You must be part of the constantly changing processes. The practice of real estate law in coastal Alabama is in constant motion and begs for innovation, creativity, initiative and flexibility . . . **AND an**

online presence or social distancing! Real estate issues include water, wetlands, coastal resources, protected species (animals, reptiles, fish, birds, plants), beaches and dunes, infrastructure, etc.

We are unable to describe all of the changes, differences, and/or the status of the next round interpretations, guidance and lawsuits, but we have provided some of those matters that should be of interest to you to illustrate the dynamics of water, coastal and natural resources, wetlands interpretations, **clarity issues**, and problems of compliance and enforcement of environmental laws.

"**Here we go again**" is the simple phrase that involves that constant change and innovation of the economy, personalities, interpretations, politics **and you**, especially since we thought all of this ("WOTUS") was "cleared up" in 2014!?! . . . no wait . . . it was CLEARER in 2015!?!, but then in 2016, 2017 and 2018 . . . then in 2020 with the Final Rule (Navigable Waters Protection Rule) which turned out **not to be Final** and was vacated on August 30, 2021, by the federal district court in Arizona in *Pascua Yaqui Tribe v. EPA*, No. 20-00266 (D. Ariz. Aug. 30, 2021). . . and then, thank goodness, in November 2021 EPA and the Corps issued a NEW proposed WOTUS Rule which was published in 86 FR 69372 on December 7, 2021, not yet finalized, and to revise the definition of "Waters of the United States" ("WOTUS") by "going back" again to "pre-2015 rules."

We are in the cycle of numerous Presidential Executive Orders directed to environmental and climate (i.e., real estate) agencies, numerous changes to the Clean Water Act § 404 regulations pertaining to dredge and fill activities in "Waters of the United States" ("WOTUS") as well as new definitions of regulated jurisdictional waters and wetlands, changes to water quality certifications (CWA § 401 [***See*** 85 Fed. Reg. 42210 (July 13, 2020)]), and reissuance of the NWPs by Final Rule January 13, 2021 (effective March 15, 2021, to March 14, 2026), and the Alabama General Permits for Minor Structures (issued and effective October 1, 2021, expiring October 1, 2026).

B. HOW TO PREPARE FOR COMPLIANCE – DUE DILIGENCE / BASELINE CONDITIONS / PRELIMINARY AND EVOLVING CHECKLIST.

1. Water Checklist (A Work in Flow Motion). [Tab 1]

2. Real Estate Contracts / Disclosures / Prior and Existing Site Conditions.

(a) **Disclosure of Wetlands.**

(b) **Disclosure of Flood History, Flood Risks, Sea Level Rise.** (*See* Hawaii Revised Statutes – "Mandatory Seller Disclosure in Real Estate Transactions Law" – 2021 § 508D-15.)

(c) **Other Disclosures.**

3. **What About Title Insurance or Schedule B II Exceptions to Title Insurance Policies?** What about wetlands, title insurance, and Schedule B II Exceptions to title?

(a) **Wetlands and Title to Real Property.** The existence of wetlands or other aquatic resources on real property does not affect the title to the real property; however, the "uses" and values of the real property may be affected by the presence or absence of jurisdictional or non-jurisdictional wetlands or other aquatic resources.

(b) **Exceptions to Title.** Title insurance companies have issued title commitments, reports and title insurance policies including requirements and exceptions to "title" addressing wetlands, tidally influence properties and riparian rights. In many reports, commitments and policies, several exceptions to title insurance coverage similar to the following have been appearing in mass:

> "(1) Any adverse claim based on the assumption that (1) said land or any part thereof is now or at any time has been below the ordinary high water mark of River or Bay; (2) some portion of the land has been created by artificial means or has accreted to such artificially created portion; or (3) some portion of the land has attached to the land by an avulsive movement of River or Bay."
>
> "(2) Any portion of the land described in Schedule A which may constitute wetlands or tidelands and any restriction on use or development arising out of a determination that the land, or some portion thereof, may be subject to provisions of the Alabama Coastal Preservation Statutes, or any other governmental authority."
>
> "(3) Rights of the United States, State of Alabama, or other parties in and to the bed, shore and waters of Bay, River, Bayou and all other unnamed lakes and waterways located within the boundaries of the property described in Schedule 'A'. The policy to be issued pursuant hereto will insure only such riparian and littoral rights as legally accrue by reason of ownership in fee simple of property adjoining."
>
> "(4) Any portion of subject property which may be affected by accretion, reliction, erosion and avulsion."

"(5) This policy, when issued, will not insure against the rights of other parties in and to any drainage canals or sloughs that may traverse the property described in Schedule 'A'."

"(6) No title is insured to any portion of land lying below the mean high water line of River or Bay as it existed in December 1819 or such other location of the mean high water line as may have subsequently existed further upland."

"(7) The rights, if any, of the public to use as a public beach or recreation area any part of the land lying between the Bay abutting the property described in Schedule A and the natural line of vegetation, the bulkhead line, the most extreme high water line or any other legally established boundary line separating the publicly used area from the upland private area."

"(8) This policy . . . will include the following Exceptions . . .:

(i) Rights of other parties, the United States of America or State of Alabama, in and to the shore, littoral or riparian rights to the property described in Schedule 'A' lying adjacent to creek.

(ii) This policy does not insure any of the lands described in Schedule 'A' that would be below mean high tide.

(iii) All rights of the United States Government and the State of Alabama in and to the navigable waters and the land beneath any of the navigable waters within the property described in this title policy, and all rights of the United States Government and of the State of Alabama in and to any of the lands described that may be on or below mean high tide.

(iv) Terms, conditions, provisions and restrictions of all permits and licenses of Federal, State and local government, including applicable agencies and departments and private and quasi governmental agencies having jurisdiction over the real property, including but not limited to restrictions on construction of any areas delineated by government agencies as wetlands."

(c) *See McMaster v. Strickland*, 409 S.E.2d 440 (Court of Appeals, S.C. 1991). Title, marketability and title insurability **are not affected by the presence**

of wet areas or wetlands on the owner's real property. Wet areas or wetlands may affect the use or value of the property, but not the title, and not the marketable title, and not the insurability for title insurance purposes.

Why, then, do title insurance companies continue to include exceptions or disclaimers for wetlands if wetlands do not affect title, marketable title or the insurability of title?

Example of a Wetland "Schedule B II" Exception:

> "Any portion of the land described in Schedule 'A' which may constitute wetlands or tidelands and any restriction on use or development arising out of a determination that the land, or same (sic) portion thereof, may be subject to provisions of the Alabama Coastal Preservation Statutes (sic), or any other governmental authority."

(d) **Objections to Exceptions.** Attached as Tab 2-A are certain objections to these type of exceptions I have made many times. Rarely will a title commitment only have one exception. Most of the time, three or more wetlands, tidal and riparian exceptions appear as shown by paragraph 3(b)(8) above. In one instance, I did receive some supporting comments from a title underwriter's legal department that are described on the attached Tab 2-B.

4. What Are Jurisdictional Wetlands? . . . Anybody?

5. Article by Neil C. Johnston (Sr.) – "Liquid Real Estate – Coast-to-Coast – Wet & Wild" Presented to American College of Real Estate Lawyers ("ACREL"). This article is even more relevant today with emphasis on water and constant change. [Tab 3]

C. COMPLIANCE / ENFORCEMENT.

1. Questions.

How do you know if you have a regulated activity requiring a permit or subject to special requirements?

How do you know if you have wetlands ("really"), jurisdictional wetlands, or if the property is subject to an existing permit, or contains mitigation or restricted lands, or has an existing violation and may be subject to a regulatory enforcement action?

Buying, selling, developing or just owning real estate is much more complicated than "just doing it."

How do you determine if you need one or more "Wetlands" or "Coastal" permits, certificates or approvals?

(a) **Search and maintain records.** (What records?!)

(i) **Owner's records** (including title documents, tax records, Revenue Commissioner, plans, surveys, aerials, reports, permits, electronic documents);

(ii) **County Probate Court records** – www.baldwincountyal.gov; www.mobilecountyal.gov; and Baldwin County Commission records through the "new" Citizenserve Online Portal – https://baldwincountyal.nextrequest.com;

(iii) **State records** such as www.ADEM.state.al.us; www.OGB.state.al.us; www.gsa.state.al.us; ADCNR – https://lands.dcnr-alabama.gov;

(iv) **Federal records** such as www.EPA.gov; www.sam.USACE.army.mil/; www.usfws;

(v) **Other records** may be obtained by written request to the Agency:

Federal requests are made pursuant to the Freedom of Information Act ("FOIA") www.foia.gov, and

State and Local requests are best made by reviewing the procedures and forms on the particular agency website if the records are not readily available online. (*See* Ala. Open Records Act – Ala. Code § 36-12-40).

(b) **Inspect, delineate, survey and assess the surfaces and subsurfaces of the property. [NOTE: EPA amended the "Standards and Practices for All Appropriate Inquiries" on March 13, 2022, to update and reference ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process."] [*See* Tab 4]**

(c) **Investigate** whether any activity on the property was required to have one or more permits, licenses or approvals, and determine the type; determine if any violations exist (and have been resolved); and the compliance history; and the present status, records, and notice (and **transfer**) requirements.

(d) **Transfer the Permit.** If the property has or had one or more permits, licenses or approvals, obtain a copy, determine the status (what was

permitted, what was the permitted activity, was it accomplished and completed, and was it a permit you wish to have?), and have the permits, licenses and approvals transferred as part of the transaction process.

(e) **If a violation exists,** or a prior violation exists, determine who is or was liable, and if the violation should have been or should be or can be cured. Who has the duty (if any exists) to disclose the violation or give notice to "the agency?"

(f) **Determine** if the laws and regulations have changed since the permit was issued, and if any new requirements now affect the title or use of the property.

(g) **ATF [Not "WTF"].** If no permits, licenses or approvals exist but activity requiring a permit was done without a permit, can an "after-the-fact" permit be obtained? (For CWA § 404 permits – *See* **ATF permit procedures: 33 CFR § 326.3(a).**

(h) **Mitigation.** If wetlands, streams or other mitigation is required, determine the extent, cost of mitigation credits and locate a wetlands, streams or other mitigation bank (such as the Hell's Swamp Mitigation Bank in Mobile County) or some alternative in the property's watershed or proximity.

If the wetland mitigation has already occurred onsite or mitigation bank credits have been purchased,

(i) obtain all records and evidence from the property owner;

(ii) transfer the permit properly and the mitigation approval and certificate;

(iii) check and confirm the Corps was notified of the transfer;

(iv) confirm that the authorized (permitted) work was completed, mitigated, and is in full compliance; or

(v) determine what, if anything, needs to be done.

If onsite mitigation was required, confirm all mitigation accomplished is still in existence and successful, all required monitoring and reports have been made, and no additional mitigation activity or cost is necessary. **[NOTE: Onsite mitigation may also restrict development and use of that part of the property.]**

(i) If I obtain a CWA § 404 permit from the Corps and invest capital, begin work and comply, can my permit be revoked and my work be ordered removed? [*See*, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C.C.A., 2013), *cert. denied* March 24, 2014.]

(ii) If the property has onsite dedicated/restricted mitigation areas (wetland restoration, preservation or wetland creation), can I move, relocate or substitute other areas as the mitigation site, or obtain a permit to fill some or all of the existing mitigation site?

2. **Examples of Compliance Issues.**

(a) **"Trust Me."** Contractor you hire assures you "Trust me (and pay me now). I have all the permits you need."

(b) **Transfer the Problem**. Developer conveys stormwater, detention pond and liability to POA in subdivision.

(c) **Environmental Covenants / Restrictions / Conservation Easements.** All or a portion of the property is encumbered by statutory, state or federal **environmental covenants, restrictions, conservation easements, or is an existing mitigation site**.

(d) **Past Wetlands Violations. Property does have wetlands**, sensitive areas, cultural sites, endangered species; however, some of the wet/aquatic sites on the property were filled without a permit many years ago.

What is the status of the fill, restoration and mitigation; was the violation resolved and case closed; does the purchaser inherit the problems?

(e) **Permits Issued in the Past, Activities Took Place, But Were the Activities in Compliance With the Permit Terms? Property has been permitted in the past** or is subject to permit conditions not yet fulfilled.

(f) **Consultant, representing your client (landowner/developer), delineated wetlands boundaries** by placing flags at each interval along the edge between the upland/wetland boundaries. Surveyor, using the consultant's flags and plot points, provides a survey. **What can go wrong?**

(i) Corps grants permit, but other agency requirements/conditions require applications for approval, consent, certifications, and may involve extensive administrative proceedings.

(ii) Consultant failed to use current wetlands delineation procedures, or made conservative or biased judgment call regarding locations, failed to delineate all of the property (may cause delay in obtaining approvals).

(iii) Wetlands delineation conducted but no jurisdictional determination ("JD") requested or issued; or if the JD was requested and issued but,

no permitted activity is conducted, and jurisdictional determination expires.

(iv) Mitigation banks out of wetlands or streams mitigation credits.

(v) Wetlands Rapid Assessment Procedure ("WRAP") conducted to determine the functional value of wetlands to be filled determines very high values and functions.

(vi) Client's project fails to comply with ADEM's Coastal Regulations ("ACAMP") or local wetland ordinances.

(g) **Governmental Agency** – Should you question what the agency tells you?

- filling coastal wetlands
- building pile-supported structures on restricted area
- filling wetlands on prior/existing mitigation wetlands sites

(h) **Are government agencies also required to apply for, and comply** with permit conditions? Yes.

3. 2021 Nationwide Permits ("NWPs") Issued March 15, 2021, Effective Until March 14, 2026.

(a) **Reissued NWPs.**

(i) The 2021 Final NWPs were described and published in 86 FR 2744 (January 13, 2021). There are General Conditions for each NWP as well as Regional Conditions.

The 2021 NWPs were effective on March 15, 2021 for a 5 year period expiring March 14, 2026, replacing the 2017 Nationwide Permits which expired March 14, 2021.

Numerous modifications, changes, limits, NEW 2021 "clarity," "clarifying" language, and NEW NWPs were issued.

Each NWP, before being publicly advertised, proposed and published for Public Comments, undergoes extensive review, comment and study during the reissuance process that results in hundreds of pages of a record, a "Final Decision" document, and others. General Conditions and Regional Conditions, prohibitions and restrictions are also added to the package. These documents can be and should be reviewed.

(ii) **General and Regional NWP Conditions**. The 2021 NWPs also have General Permit Conditions, and in some instances, Regional Conditions are imposed. There are changes to these conditions that should also be reviewed. **[NOTE: Each NWP may also be subject to State conditions and consistency certification requirements, such as CWA § 401 Water Quality Certification and Coastal Zone Management Act – Consistency Certification.]**

4. **Regional General Permits for Minor Structures and Activities in Alabama (Issued/Effective October 1, 2021, Until October 1, 2026.**

(i) **Alabama –Regional General Permits for Minor Structures and Activities Within the State of Alabama Located Within the Boundaries of the Mobile District, U.S. Army Corps of Engineers** proposed June 3, 2021, reauthorized and effective October 1, 2021, to expire October 1, 2026 (five years).

(ii) **ADEM and ADCNR Special Conditions and General Conditions** are described after each permit.

5. **County and Municipal Ordinances.**

(i) **Baldwin County Zoning Ordinance.**

- **Section 2.3.25** Planning District 25 (Fort Morgan)
- **Section 2.3.25.3(f)** Dune Walkovers (New) **[*See* Excerpt Tab 5]**
- **Section 2.3.25.3(g)** Planning & Zoning Considerations in the Coastal High Hazard Areas and Flood Hazard Areas in Planning District 25 (Fort Morgan) **[*See* Excerpts Tab 6]**
- **Section 12.6** Coastal Areas **[*See* Excerpts Tab 7]**

(ii) **Baldwin County Coastal Area Program Ordinance – Resolution # 2015-011**

- "Establishing Beach and Dune Protection and Management Regulations for Baldwin County, Alabama" **[*See* Tab 8]**

(iii) **Baldwin County Flood Damage Prevention Ordinance** (effective April 19, 2019)

- **See Section F, Page 17** – Coastal High Hazard Flood Areas (Coastal "V" Zones and Coastal "AE" Zones) **[*See* Excerpts Tab 9]**

Tab 1

HAND ARENDALL HARRISON SALE

Materials
Prepared and Presented by:

Neil C. Johnston (Sr.), Esq.
Hand Arendall Harrison Sale LLC
Post Office Box 123 (36601)
Merchants Plaza
104 St. Francis Street, 3rd Floor
Mobile, Alabama 36602
(251) 694-6247
njohnston@handfirm.com

WATER DUE DILIGENCE

WORKING CHECKLIST
(INTENDED TO BE UPDATED AND EXPANDED BY "YOUR" EXPERIENCES)

DRAFT AS OF MAY 23, 2022
"WORK IN PROGRESS"

A. GENERAL MATTERS – REAL ESTATE AND WATER

1. Topography / Geology / Hydrogeology

- Physical and Natural Conditions of the Surface and Subsurface of the Site and Surrounding Sites – Changes Due to Natural Causes or Unnatural Causes
- Drainage / Riparian Flow – Onsite / Downgradient / Upgradient / Obstructions / Diversions
- Soil Conditions; Erosivity; Slope; Vegetation; Contamination (Karst Formations – Sink Holes); Buried "Surprises

2. Water, Water Supply and Water Resources: Location, Status, Type and Claims of Ownership

3. **Past, Present and Expected Future Conditions and Uses of the Site and Water Resources**

4. **Existing Land Use Requirements / Regulations / Zoning / Flood Classifications – FEMA Flood Zones / Flood Risk Factor**

5. **Utilities, Infrastructure, Easements (Location, Age, Purpose, Capacity)**

6. **Environmentally Sensitive Areas**

7. **Community / Political / Regulatory Relations**

8. **Ownership / Contracts / Rights / Transfers / Reservations of Water**

9. **Federal, State, and Local: Laws, Regulations, Ordinances, Treaties, Permits and Agencies – Presidential Executive Orders**

10. **Extraordinary Climatic Events, "Climate Change," Disasters and Restoration**

11. **Extraordinary World "Emergencies" (i.e., COVID-19, Economic Sanctions, War)**

B. STATUS OF WATER AND WATER SUPPLY

1. **Types of Waters**

   a. **"Waters of the United States" (WOTUS)** [The *NEW* 2020 Final Rule ("Navigable Waters Protection Rule") became effective June 22, 2020, until vacated by the recent cases: *Navajo Nation v. Regan*, 2021 WL 4430466 (D.Ariz. Sept. 27, 2021); and *Pascua Yaqui Tribe v. EPA*, 2021 WL 3855977 (D.N.M. August 30, 2021); Now, EPA and the Corps have proposed a "NEW" Proposed Rule as of November 21, 2021, to reestablish the pre-2015 definition of WOTUS – *See* 867R 69372 Dec. 7, 2021]

      (i) **Wetlands, etc.** [See (a) Final Rule, 85 FR 22250 (April 21, 2020); 33 CFR 328; and 40 CFR 120, but no longer in

effect; (b) *See* New Proposed WOTUS Rule – 867R 69372 Dec. 7, 2021]

b. Surface Waters

- waterways / canals / diversions
- streams, creeks (perennial, intermittent, ephemeral)
- percolation / artesian / springs
- snow / iceberg / glacier
- rainwater

c. Groundwaters

- flowing
- aquifer
- percolating
- mineral
- salt / brine
- contaminated (New – PFAS "Forever Chemicals")

d. Rain / Stormwater / Normal Storm Events / Extraordinary Storm Events

- 20 year
- 50 year
- 100 year
- 500 year

e. Gray Water

- used

- dishwasher, clothes washer, bathing
- HVAC - condensation

f. Black Water

- sewage
- industrial

g. Flood Waters / Flood Risk Factor / Flood Zones - FEMA

- natural events
- 20 – 500 year events
- extraordinary storm events
- tidal surge
- nuisance flooding / rising tides / sea level rise
- soil subsidence

h. Salt Waters / Brine / Brackish Water (now being sold for commercial use in Texas)

i. "Waters of the State" (Ala. Code 1975 § 22-22-1; § 33-5-3; § 9-10B-3; § 9-11-80) and Coastal Waters (Ala. Code 1975, § 9-7-10)

j. Navigable Waters / Riverine / Estuarine

2. Rights to Waters / Ownership / Access

a. Riparian / Littoral

b. Prior Appropriation

c. Regulated / Modified Riparian

d. Private

e. Public / State / Federal / International

f. Reserved / Grandfathered

g. Tribal

h. Common Law

C. TITLE TO WATER, WATER RIGHTS AND EVIDENCE OF RIGHTS

1. **Patent / Deed / Common Law / Prior Rights / Treaty**

2. **Jurisdiction and Local Rights**

   - Permits / Conditions / Restrictions
   - Statutes, Regulations, Ordinances

3. **Types of Waters and Proof of Rights**

4. **Submerged Land**

   - Riparian Rights
     - Regulations (ADCNR – 220-4-.09; ADEM – 335-8)
   - Ownership
     - Tidal / Nontidal
     - Equal Footing Doctrine
     - Submerged Lands Act
     - Accretion / Reliction / Avulsion
     - Navigational Servitude

5. **Agreements Affecting Waters and Titles**

   - Treaties
   - Compacts

- Judicial Allocation / Determination of Rights / Curtailments / Diversions [Adjudications / Decrees]
- Reservations
- Leases / Transfers
- Certificates / Permits / Banks

6. Coastal Issues

- Riparian Rights (wharfage, navigation, public use / public trust, unobstructed view, natural flow)
- Interdunal Swales
- Coastal Wetlands
- Coastal Barrier Islands Act
- Federal and State Coastal Programs
  - Regulations
  - Consistency
  - Delegation of Jurisdiction over "Coastal Beaches and Dunes" by ADEM to Dauphin Island, Baldwin County (Fort Morgan Area), Gulf Shores, Orange Beach
  - Permits
- Beaches and Dunes / Renourishment / Erosion / Accretion
- Tides / Rising Tides / Sea Level Rise / **Roll Tide Roll!**
- Storm Surge / Flood Zones – Classifications
- Easements
  - Submerged Lands Lease and Riparian Easement (Alabama Department of Conservation and Natural Resources)

- Flowage / Flooding Easements
- Pipelines / Powerlines
- Stormwater / Sewerage / Ditches
- Conservation Easements
- Access

D. WATER ENDORSEMENTS AND EXCEPTIONS– TITLE INSURANCE

1. Federal Navigational Servitude / Filled Land so Long as Full Compliance with Determinations and Licenses
2. ALTA Endorsement 41-06 Water – Buildings Adopted 12-02-2013
3. Schedule B II Exceptions (etc., etc., etc.)

E. FLOOD ISSUES (BE AWARE OF THE TYPE / TIME OF ANY FLOOD SURVEY OR STUDY CONDUCTED)

1. **Flood History**
   - Flood Insurance Recent Changes / Costs / Community Ratings
   - Flood "Risk Factor" (by First Street Foundation https://riskfactor.com)
2. **Base Flood Elevation (Survey – Certificate)**
3. **Flood Hazard Insurance Rate Map (FIRM)**
   - Revisions
     - Letter of Map Revision (LOMR)
     - Conditional Letter of Map Revision (CLOMR)

- Flood Zone Classifications
  - Storm Surge / High Velocity Zones ("V" / "VE")
- Floodway
- Floodplain
- Flood Prone Areas
- Encroachments or Pile-Supported Structures – Flood – No Rise Certificate

4. Statutes / Ordinances

- National Flood Insurance Act of 1968
- Bigger – Waters Flood Insurance Reform Act of 2012
- Homeowner Flood Insurance Affordability Act of 2014
- State Compliance / Emergency Management
- Local Compliance / Ordinances / Zoning and Subdivision Regulations
- Bank Requirements:
  - Dodd-Frank Wall Street Reform and Consumer Protection Act – Risk Retention Rule
  - Flood Insurance Rule Regarding Exemptions and Escrows

F. EXISTING LAND USE AND WATER REGULATIONS:

1. State / Federal Statutes / Regulations;

2. Local Building and Subdivision Codes, Zoning Restrictions and Planning, Water Codes, and other Local Ordinances;

3. Health and Safety Regulations;

4. Special or Conservation Districts / Locations, Watershed Districts, Water Districts;

5. Groundwater;

6. Existence of Hazardous, Toxic or Regulated Conditions such as Waste Disposal Deposits, or Spills; Existence of USTs; Existence of Wetlands, Endangered Species, Historical Properties, Sink Holes, Wells, Floodplains, Sewage Treatment/Disposal; and

7. Condition and Availability of Access (to the Site, any Water Surface, any Water Source).

G. SURROUNDING CONDITIONS

1. Past and Existing Land and Water Commitments and Uses

2. Demand For and Availability of Water-Existing Sources; Possible Sources; Economics

3. Surface and Subsurface Drainage – What Are the Upstream or Uphill Uses of Water?

4. Location of Waterways, Water Wells, Disposal Activities

5. Existing Air and Water Quality

H. UTILITIES AND RESOURCES

1. What are Available Utilities

2. Transportation – Routes / Requirements, Pipeline, Rail, Highway, Waterways, Air

3. Water Use, Sources, Treatment Facilities

4. Discharge / Treatment Facilities

5. Disposal Facilities

I. COMMUNITY RELATIONS

1. Neighbors, Environmental Justice
2. Existing Organizations
3. Regulatory Agencies
4. Local Government
5. Existing Businesses

J. ENVIRONMENTALLY SENSITIVE AREAS (AND UNUSUALLY SENSITIVE AREAS)

Environmentally Sensitive Areas (ESAs) have 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, including aquatic resources.

ESAs have been described to include:

a. Essential Habitat for Threatened and Endangered Species
b. Wetlands described as "Special Aquatic Sites" 40 CFR § 230.3), Streams and other Aquatic Resources of National Importance (ARNI)
c. Scientifically Recognized Rare Ecological Communities
d. Steep Slopes
e. Riparian Habitats and Corridors
f. Fisheries and Wildlife Habitat
g. Hardwood Bottomland Habitats

h. Coastal Areas, Dunes and Barrier Islands

i. Historic and Cultural Properties

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

For example:

a. Linear Projects or Pipelines Regulated by the Office of the Pipeline Safety and the U.S. Department of Transportation, Research and Special Programs Administration are required by 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").

USAs include:

(i) drinking water resources

(ii) sole source aquifer recharge area

(iii) ecological resources such as a multi-species assemblage area

(iv) migrating bird concentration area

(v) an area containing imperiled species.

b. "Waters of the United States" (WOTUS) [What's This?!]

K. OTHER

Existing Buildings (Commercial / Residential)

a. History of Use / Flooding / Age of Infrastructure and Type of Materials

b. Water Supply and Source [Guaranties, Certificates, Permits, Contracts, Title and Rights]

c. Compliance of Federal / State/ Local Laws – Permits / Transfers

d. Disposal / Reuse

Tab 2-A

HAND ARENDALL
LLC ATTORNEYS

MEMORANDUM

TO:

FROM: Neil Johnston

DATE: June 28, 2013

RE: Transaction
Draft Title Commitment by Title, Inc. – File No.

Draft Title Commitment by Title, Inc., File No. Concerning Schedule B, Section II, Items # 32, 33, 34, 35, 36, and 37. I will address each item separately:

1. As regards **Item # 32**,

> **Any adverse claim based on the assumption that (1) said land or any part thereof is now or at any time has been below the ordinary high water mark of River or Mobile Bay; (2) some portion of the land has been created by artificial means or has accreted to such artificially created portion; or (3) some portion of the land has attached to the land by an avulsive movement of River or Mobile Bay**

This exception is objectionable. First, because it is excepting "any" "adverse claim" which is not based on fact, but based on speculation. If there is an adverse claim, let us know what that is and we will address it. If not, delete it. This language also uses the terms "ordinary high water mark of River or Mobile Bay" which is the term used in non-tidally influenced navigable water bodies, not those that are open and tidally influenced. In addition, it provides "any adverse claim that some portion of the land was created by artificial means or has accreted to any artificially created portion." If you have evidence of this, please let us know. If not, delete this as pure speculation. In addition, there is also language

excepting any adverse claim that some portion of the "land," which I assume you're talking about the Tracts I and II, by an avulsive movement of River or Mobile Bay. If you know of any such avulsive movement, please identify it so that we can provide you with information to the contrary. If this is "the assumption" and speculative, it should be deleted.

I have attached for you a copy of the letter dated October 31, 2007, that I wrote to P.C. regarding similar underwriting requirements and language. I point out the same things that I have been pointing out to you and other title companies for many years that the language used by title companies is erroneous, perpetuating erroneous terminology, and further attempts by the underwriter and "title insurance" companies not to provide coverage even though that's what you're in business to do.

Specifically, you and the underwriter have been dealing with these issues for many years and should be aware of the proper interpretation and use of descriptive terms as well as how the "mean high tide line" is determined. As I point out in the October 31, 2007, letter, if you are assuming that matters go back to 1819, and determine the proper boundaries at that time, we will then claim that boundary which will probably be a mile or so east of the present boundary along Mobile Bay and substantially south into River. The use of accretion and avulsion are also wrong, misleading and illustrate that whoever came up with this language does not understand or use these terms except to throw them in a general, broad and overreaching exception. As stated in 2007 letter,

> "As regards the next two 'assumptions' that some of the land has accreted or has attached by an avulsive movement, accretion is the slow addition of land by erosive forces or other forces which does change the boundary line and should be insurable, and an avulsive movement is the sudden erosive or addition of land which does not change the boundary line. This exception should be deleted."

That 2007 response is applicable here as well as the other responses contained in the 2007 letter.

2. Please explain how something characterized as "wetlands tide lands" or a "restriction on use or development" or that any part of the land which may be subject to Alabama statutes or other governmental authority has anything to do with insuring the title to the property. Needless to say, this should be deleted. In addition, there is language in **Item # 33** that makes reference to "the Alabama Coastal Preservation statutes." If there are such things, please identify those and explain why those affect title to the property and why you would not insure coastal properties because these statutes exist. Again, the description is wrong, misleading, confusing and attempts to not provide insurance. Please delete **Item # 33** in its entirety.

3 **Item # 34**. As you know, this exception is confusing. First of all there are no "unnamed lakes" within the boundaries of the described "south side" Tracts I and II. predecessors, as well as now LLC, and then LLC, at time of this closing (by July 12, 2013, if not further extended) will own and have fee simple title to all of the lands described including any that may be canals that were excavated out of uplands,

and any that may now be tidal or overflow lands. The United States, State of Alabama, and the public do not have any right of title to the bed or shore of any waterbottoms of these lands. I'm not sure why the statement is made in the last sentence of this Item # 34 regarding "rights as legally accrue." Perhaps your explanation to me about what this item actually means or better description of it would help me out. Otherwise, this should be deleted.

4. Item # 35. Why are there numerous attempts to describe the same thing? And why is there no insurance coverage for property that is owned in fee simple that may have been acquired by accretion, reliction (not sure how erosion comes into the equation) and avulsion, if in fact those have occurred and the boundaries have changed? At what point in time are you referring and what particular property are you talking about? Have you just provided an exception for 250 acres, one acre, property that does not exist, or is this another "assumption"? This should be deleted.

5. Item # 36. Again, this is an attempt to continue to repeat over and over some type of exception that apparently the underwriter or does not understand. The drainage canals or sloughs were excavated out of upland areas that, though wet, are owned in fee simple, the bottoms of those canals and sloughs are owned in fee simple, and other parties do not have rights thereto. Perhaps you can identify who those "other parties" are. Please delete Item # 36.

6. **Item # 37.** I'm not sure I want to mess with **Item # 37** since if we go back to December, 1819, when Alabama became a state, may have gained title to certain lands now beneath navigable waters but that were uplands back then (please note that wetlands and federal jurisdiction over any areas not in commerce in 1819 do not constitute navigable waters and the use of the term "navigable waters" and the Federal Water Pollution Control Act and the Clean Water Act amendments thereto, specifically § 404 of the Clean Water Act, did not exist). As I mentioned to you, in December of 1819, the lands lying below what you call the "mean high water line" of River and Mobile Bay are close to a mile east of the present Mobile Bay shoreline of Tracts I and II, and River would be substantially south of Tracts I and II. We will agree for you to insure title out into Mobile Bay if you are going to use the 1819 date and we will be glad to provide you with old aerials, maps and otherwise so that you can give title insurance over what are now the water bottoms of Mobile Bay and portions of River. Please let me have your answer to this so that we can determine whether you will provide proper coverage or whether this item will be deleted. Incidentally, as mentioned earlier, "mean high water line" is not a term of art or law in Alabama for tidally influenced aquatic resources.

Suggestion. We have talked through several of these matters and, of course, one of the problems we see is that there are six exceptions that basically say the same thing or attempt to do so. Someone certainly must have stayed up late one night trying to describe these matters in a way that could be understood by everyone and failed to even come close. I mentioned to you

that we run into this situation constantly and it is extremely frustrating, but we did have a recent experience attempting to consolidate and provide better language even though the best thing in this situation is to delete every one of them. As my father stated many times, "if you don't understand it don't sign it," and in this case, if you don't understand it don't try to explain it six different ways.

Perhaps the following language will cure concerns "Exception – 'To Insureds claim to land below the mean high tide line of Mobile Bay and River as such existed in December, 1819, when the State of Alabama was admitted to the Union.'"

NCJ:lhm

HAND ARENDALL L.L.C. ▪ LAWYERS

Neil C. Johnston
Real Estate, Land Use & Timber Section
Direct Dial (251) 694-6247
Direct Fax (251) 544-1618
njohnston@handarendall.com

3000 AMSOUTH BANK BUILDING ▪ 107 SAINT FRANCIS STREET ▪ MOBILE, ALABAMA 36602 ▪ (251) 432-5511
Post Office Box 123 ▪ Mobile, Alabama 36601 ▪ Facsimile: (251) 694-6375

October 31, 2007

Mobile, Alabama

Re: LLC
Tract (File No.
Tract (File No.

Dear

Confirming our recent discussion, we raised concerns and questions regarding certain Schedule B, Part II exceptions regarding Mobile Bay that appear in the Barnes title insurance policy and the Lewis title commitment.

A. **Tract**

More specifically, our questions concern Schedule B, Part II of the title commitment for the tract, Exceptions numbered 7, 8, 9 and 10.

I will address each separately:

1. Exception No. 7 states as follows:

> Title to any portion of the land below the normal high water level and rights of the public and others entitled thereto in and to the surface of that portion of the described premises within the bounds of Mobile Bay.

Mobile Bay is a tidally influenced water body with state lands confined to the navigable waters to the "mean high tide line" not the normal high water level as described in this exception. The title insurance company, or the underwriter, has attempted to describe riparian rights in four different exceptions in different ways, using different terminology, none of which is appropriate in south Alabama or on tidal navigable waterways. The "rights of the public" can

be no more than "riparian" or "littoral" as restricted by law or regulation. There is no need to attempt to describe the riparian or littoral rights in more than one way. The "described premises" refer to the property description that is not part of Mobile Bay. Please check the description. We suggest that this exception be deleted or rewritten properly.

2. Exception No. 8 recites as follows:

> No title is insured to any portion of the land lying below the mean high water line of the Mobile Bay as it existed in December 1819, or such other location of the mean high water line as may subsequently have existed further upland.

Once again, the title insurance company is using terms which do not apply by describing the land between public and private as the "mean high water line." Why are you reaching back to 1819 (the year that Alabama became a state) other than to attempt to recite the time frame of the Equal Footing Doctrine, or the Public Trust Doctrine? Can you show where the 1819 Bay limits were located? This is the same as Exception No. 7 and should be deleted. The exception only reaches one way, "upland," when there could be land and title acquired "waterward" by accretion.

3. Exception No. 9 provides as follows:

> Any adverse claim based on the assumption that (1) said land or any part thereof is now or at any time has been below the ordinary high water mark on Mobile Bay; (2) some portion of the land has been created by artificial means or has accreted to such artificially created portion; or (3) some portion of the land has attached to the land by an avulsive movement of Mobile Bay.

This exception is objectionable because it is excepting an "adverse claim" not based on fact but based on an "assumption." It also uses the terms "ordinary high water mark" which is typically used with non-tidally influenced navigable water bodies. It does not matter whether or not some time in the past the land was below the mean high tide line if it is not in that location now or within the time period for determining the mean high tide line, usually over an 18.6 year average.

As regards the next two "assumptions" that some of the land has accreted or has attached by an avulsive movement, accretion is the slow addition of land by erosive forces or other forces which does change the boundary line and should be insurable, and an avulsive movement is the sudden erosive or addition of land which does not change the boundary line. This exception should be deleted.

4. Exception No. 10 reads as follows:

> The rights, if any, of the public to use as a public beach or recreation area any part of the land lying between the Mobile Bay abutting the property described in Schedule A and the natural line of vegetation, the bulkhead line, the most extreme high water line or any other legally established boundary line separating the publicly used area from the upland private area.

This is the exception for riparian rights of the State of Alabama, United States and any other party entitled thereto, but there should not be any reference to a public beach which does not exist, a recreation area which does not exist, a natural line of vegetation which is not the determining factor nor is the "most extreme high water line." Although an exception similar to this would be customary, the way Exception No. 10 is worded is objectionable and should be deleted.

B. _____ Tract

It is interesting to note that the exceptions contained in the Title Policy (Nos. 10, 11 and 13) are very similar to the first three exceptions discussed above, and Exception No. 14 is different. There is no No. 12. Same comments apply. Exception No. 14 provides:

> Rights of other parties, the United States of America or State of Alabama, in and to the shores, littoral or riparian rights to the property described and lying adjacent to Mobile Bay.

We would like to discuss these with you in more detail. Please call me if you have any questions.

Yours very truly,

Neil C. Johnston
For the Firm

NCJ:lhm
693097_1

Tab 2-B

Subject: RE: interesting title review
From:
Date: 07/05/2013 01:44 PM
To:

here are my thoughts on the letter from Nell Johnson.

Item 32. I think that the exception should say any adverse claim based upon an "assertion" not and "assumption" as stated. He says that this is based upon speculation, which is not the case. Title companies base their insurance on a review of the public records and what those records disclose. There is no way to ascertain from the public records whether accretion, or avulsion has occurred., or the exact location of the "mean" or "ordinary high water mark". Since I am not versed in the Alabama law with respect to specific issues, I will respond generally.

Accretion is the slow and imperceptible addition of land resulting from natural causes. If land is filled and land accretes to it neither the filled land or the accreted land vest in the upland owner. Likewise, if someone builds an adjacent jetty or if other activity such as dredging etc. occurs that causes land to accrete it is not the result of natural causes. Avulsion is the sudden addition of land that may occur because of strong storms or other factors. It is sudden, not imperceptible and is usually refers to a sudden relocation of a stream or river. In most cases the land that is added by such avulsion remains in the original owner and not to the property to which it has suddenly attached. Since we have no way of determining whether any of these natural forces have occurred over time, but the distinct possibility exists that they have given the volatile nature of tidal waters, we are not willing to simply assume that none of this has occurred and that no one will assert a claim. I suspect that if Mr. Johnson was asked to opine by a client that none of these events had occurred he would decline to do so for the very same reason that we decline to do so. What fee would he charge to assume such a risk? Similarly we have no way of determining an adequate risk premium for this and thus will not insure. I am assuming that land lying beneath navigable or tidal waters in the state vest in the State itself? This is the case in most states

With respect to the location of the "ordinary high tide" which he refers to as the "mean high tide" I think his terminology is probably correct. Most cases refer to this as "mean" as opposed to "ordinary" although the Alabama cases may be different. He also refers to the term of 18.6 years which I also believe is correct. The City of Los Angeles case determined the method for determining the location of the "mean high tide" below which the state would have title. The case determined that it would take measuring the tides over that long period of time to get an accurate location because you would have to consider every potential combination of moon phases and neap tides along with other varying factors and that it took 18.6 years for a whole cycle to complete. Obviously, tides are not being measured every day along Mobile Bay for 18.6 years to scientifically determine the exact location of the "mean" high water mark which is the demarcation line of ownership. "Ordinary high water mark" generally refers to generally where the water flows to but is not scientifically determined. Because of the lack of certainty we are not willing to guarantee its location or that all of the property to be insured lies above it. This is not speculation as he suggests but common sense.

As to Item 33, I tend to agree with him. We are not insuring land lying below the "mean high water line" and the policy excludes governmental regulations. So unless Alabama Coastal Preservation statutes actually relate to the status or vesting of title a violation of them would not be covered because of the exclusion.

Item 34. I am not sure why this one is in there either if we have already excepted to any portion of the land lying below the mean high water mark or the possibility that it was artificially created, or accreted or the result of avulsion, shouldn't that be enough? It looks to me as if Items 33, 34, 35, and 37 can come out as redundant, unless you think they add something that Item 32 does not cover. You don't have to stab, shoot and then poison the guy to kill him.
Be happy to answer any questions. You may want to talk to this guy yourself after talking to the agent as sometimes the message gets garbled as it passes around the circle.

Tab 3

LIQUID REAL ESTATE

COAST-TO-COAST – WET & WILD

Neil C. Johnston (Sr.)
Hand Arendall LLC

WATER DUE DILIGENCE

It is "high tide" to focus the real estate due diligence efforts on liquid real estate assets that are vital to each deal, from coast (west) to coast (east) to coast (gulf). We will emphasize certain aspects and the importance of an overwhelming real estate asset, "WATER," that has many diverse legal and practical characteristics critically tied to each parcel of real estate. This requires the due diligence efforts to examine the source and demand for continuous water supply; the status and opportunity for litigation (water wars); the existence and extent of water rights (riparian, prior appropriation, natural flow or a hybrid such as "regulated riparian"); the ability and value of transfer rights; interbasin transfers and water compacts; the existence, age and cost of infrastructure for wastewater, stormwater and drinking water; the history of floods, the National Flood Insurance Program and climate change; as well as coastal flooding, extraordinary storm events, and sea level rise; and wetlands, especially with the 2015 EPA/Corps Final WOTUS Rule ***to clarify*** (i.e., expand) the definition of "Waters of the United States."

What real estate is not dependent upon water? What is the value of the liquid real estate assets?

LIQUID REAL ESTATE

COAST-TO-COAST – WET & WILD*

*Neil C. Johnston (Sr.)***
Carolyne Jones
Lilly Middleton

WATER DUE DILIGENCE

"No Water . . . No Development"[1] **"No water, no growth: Towns confront development hurdle."**[2] These are just a couple of news headlines, one on the west coast and one on the east coast, highlighting the dramatic relationship of water to real estate.

A. General Comments to Highlight the Importance of Water Due Diligence.

Dirt lawyers are water lawyers by nature, and our tendency to focus primarily on the location of the real estate must change to include **in-depth due diligence analyses of all things water**. It's **"high tide"** for **real estate due diligence** to focus on water as the primary real estate asset and as the critical link to a viable, resilient and sustainable real estate project.

The complexity and the necessity for current awareness of water issues affecting each real estate project vary by region and local conditions. The water issues and supply requirements will also be influenced by climate change and global conditions. Unpredictable weather patterns affect project risks and requirements for water. The "water and real estate" relationship is further complicated by the various federal, state and local laws, ordinances, and rules, all of which are subject to individual and judicial interpretations.

Water issues, including use and supply requirements, are recognized far beyond the boundaries of a single parcel of real estate, or the boundaries of a landowner, city, state or country. The focus on water becomes much more acute when there are more consumers than the existing supply can continue to accommodate due to an increase in users, natural events affecting replenishment, waste, contamination or other factors. This is especially true when historical

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* Originally printed as a presentation for the March, 2015, ACREL Mid-Year Meeting in Scottsdale, Arizona; updated October, 2015.

** Neil C. Johnston (Sr.) was elected a 2013 Fellow of the American College of Real Estate Lawyers (ACREL), and is a member of Hand Arendall LLC in Mobile, Alabama, www.handarendall.com, with the assistance of Carolyne Jones, Esq. and Lilly Middleton.

[1] *No Water, No Development,* LA TIMES (April 7, 2008), http://www.latimes.com/opinion/editorials/la-ed-thirst7apr07-story.html.

[2] Dorothy Pellett, *No Water, No Growth: Towns Confront Development Hurdle,* BURLINGTON FREE PRESS (Nov. 26, 2014), http://www.burlingtonfreepress.com/story/news/local/2014/11/26/water-growth-towns-confront-development-hurdle/19522639/.

human water use for development of the real estate has established a particular scheme of water supply consumption and those waters no longer accommodate continued economic, population and industrial growth.

This paper will highlight some of the **water related topics** every real estate lawyer should include in their **real estate (and water) due diligence investigation**. Beyond rhetoric and policy, critical issues to investigate include (1) water rights and consumptive uses, (2) existing and future water supply, (3) "water wars" and litigation for water supply including any related settlement, agreement or compact, (4) transfer rights, (5) floods, floodplains and flood insurance, (6) climate change and sea level rise, and (7) wetlands.

There are many other water related topics not covered in depth in this paper, but all can have a surprising and costly impact to the real estate. Other "water" related terms and phrases include high water, ordinary high water mark,[3] flood waters, base flood elevation, storm surge, stormwater, surface water, groundwater, water quality, wastewater, navigable waters of the United States,[4] and "waters of the United States."[5] These are just some of the dynamic terms that will affect and define coastal real estate and inland properties as well as the life of any real estate sale, purchase, development or redevelopment.

Personal and professional experiences involving liquid real estate events occur every day, at the tap, involving the sewer or septic systems,[6] influenced by the weather,[7] and accentuated by the bills associated with their cost and maintenance. Many "liquid events" are taken for granted, but all are "real." When these events are recognized as a bundle, they become driving forces of real estate deals and operations.

B. General Comments Regarding Consumptive Uses – Know Your Rights.

A thorough description of the rules of water rights and consumptive uses is beyond the scope of this paper; however, a brief description of riparian rights and prior appropriation rights are highlighted for information purposes. **[NOTE: Riparian rights and prior appropriation rights to surface waters have evolved and have been modified by legislation and judicial decisions. In practice, each state and local rule must be investigated to determine what rule, modification, hybrid standard, or statutory requirement is in use.]**

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[3] 7 C.F.R. § 328.3(3) (1993).
[4] *Id.* at 329.4.
[5] *Id.* at 328.3(a).
[6] Email from Lee McDonald, Building Manager, Maintenance, The Retirement Systems of Alabama to author (December 15, 2014, 3:41 p.m. CST) (on file with author) (notifying tenants that due to a maintenance issue, the RSA Battle House Tower in Mobile, Alabama will shut off domestic water on Tuesday night, December 16, 2014 from 9:00 PM to 11 PM).
[7] Jon Erdman, Nick Wiltgen, & Linda Lam, *Recap: Storm Fueled by 'Pineapple Express' Brought Hurricane-Force Winds to California, Oregon, Washington,* THE WEATHER CHANNEL (Dec. 17, 2014), http://www.weather.com/forecast/regional/news/california-rain-flood-threat-drought-relief-middec2014.

1. Riparian.

Traditional, common law riparian rules of natural flow and reasonable use of surface waters have been used and continue to be used in the "East."[8] The historic perception in the East is that water is abundant and will be available in abundant amounts for the riparian real estate owner from surface waters in creeks, streams, rivers and lakes,[9] subsurface waters in aquifers, underground rivers and streams, and even supplies trapped in impervious formations and salt domes.

2. Prior Appropriation.

In the West, the rules of use of surface water, due primarily to arid conditions, restricted and shallow watercourses and interstate waterways, were developed by those who first homesteaded the land and claimed the water by priority in time and right, known as "prior appropriation."[10] The prior appropriation rules have evolved over time. Use and distribution of water supply are now controlled and modified by statute through water districts, agencies, permits, licenses, interstate and intrastate compacts and agreements.[11]

3. Modified, Hybrid Water Rights Based on Reasonable and Beneficial Use.

Each rule of use or right to use surface water has been further tempered by reasonableness and uses that benefit the adjacent lands.[12] The modified rules of use are different in each state and may be a hybrid water rights system such as used in California which is a blend of prior rights, riparian rights, and reasonable and beneficial use,[13] or a more traditional right to use the natural in-stream flow of water modified by reasonable and beneficial uses arguably used in Hawaii.[14] Further modification of water use rights are imposed by legislation and judicial decisions.

C. Due Diligence and Water Supply – What is Enough?

Commerce, industry and people have historically located and continue to gravitate to areas where water can be seen and used. The riparian areas along rivers, streams and lakes are easy to spot. But why, in other cases, would someone locate where water is scarce? Economics and growth are the controlling factors. The more water you have to supply can be marketed to support a developing community with more businesses and a growing consumption, at least in theory. Can this supply be sustained and replenished forever? No, not without looking ahead, changing consumption uses, imposing conservation measures, and recognizing the true value of

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[8] James H. Griggs, *Water Laws of Alabama*, Bulletin 89C, 2d Revision 1978, Geological Survey of Alabama.
[9] Heather Elliott, *Alabama's Water Crisis*, 63 ALA. L. REV. 383, 390 (2012).
[10] A. Dan Tarlock, Law of Water Rights and Resources, §§ 5:1, et seq. (2010).
[11] *Id.* at § 5.70.
[12] *Id.*
[13] *Id.* at § 3.70.
[14] *Id.* at § 3.71.

water. Changing weather patterns and increased competition for the water supply will continue to have dramatic impacts locally and beyond.

Due diligence should include identifying the availability, age, capacity and cost of obtaining the necessary water supply, and removing, treating or reusing the grey water and the black (waste) water. The existence and ability of the infrastructure to function properly should also be examined. Do you have the necessary water supply available and the proper infrastructure to transport the supply? The proper infrastructure to transport the usable water from the source to the property and to remove wastewater and stormwater must be committed or in place.

Western states have been experiencing limited supplies for many years. Extended drought conditions and reduction in the amount of snow melt recharge of surface flows have also stressed water supplies. Western states and communities have long recognized the need for conservation and cooperation, and when that fails, there is always somebody to sue.[15] These climatic conditions, however, are not limited to the West. Drought conditions, population growth and heavy appetites for water have also strained the "abundant" supplies of water in the East and Southeast. In order to address the challenges, states and communities have controlled water use rights and allocation of supply by statute,[16] used interstate and interbasin water use agreements, and lobbied Congress to approve intricate interstate water compacts.[17] Understanding the controlling factors of water supply and the parties involved is part of the **due diligence** process.

D. Due Diligence and Water Wars – Why Can't We Just Get Along?

We also find more history of water supply litigation, the "Water Wars," in the West.[18] One of the early Water Wars occurred in the early 1900s concerning the initial development of the first Los Angeles Aqueduct and the early need for more water supplies to support economic growth of Los Angeles. The process involved colorful politics at the local, state and federal levels, transfers of water rights, diversion of waters from one watershed to another at the expense of Owens Valley and damages to landowners and the Owens Valley water resources, particularly Owens Lake which eventually dried up. The Los Angeles Aqueduct cost millions of dollars and years of litigation.[19] The thirst for more water lead to diversions from Mono Lake in the 1930s which lowered the lake levels until locals sued and eventually won, forcing the diversion of water from Mono Lake to cease.[20]

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[15] *Id.* at § 10.

[16] *State Water Withdrawal Regulations*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 23, 2014), http://www.ncsl.org/research/environment-and-natural-resources/state-water-withdrawal-regulations.aspx.

[17] Tarlock, *supra* note 10, at § 10.24 and § 10.35.

[18] *Id.*

[19] http://en.wikipedia.org/wiki/California_Water_Wars.

[20] *Id.*

California, Colorado, Arizona and other western states have experienced their share of litigation to claim allocations of water supplies in common river basins, such as the Colorado River Basin, which includes Wyoming, Colorado, Utah, Nevada, New Mexico, Arizona, California and Mexico.

Water wars are not exclusive to the West. Eastern and southeastern states, particularly Alabama, Georgia and Florida, are also attempting to utilize the same surface water supply that is the primary water supply for Atlanta. The tri-state water supply originates in several watersheds and river basins that contribute to the flow of the Alabama, Coosa and Tallapoosa Rivers ("ACT") through Alabama, and the Apalachicola, Chattahoochee and Flint Rivers ("ACF") providing needed instream flow to Apalachicola Bay and the Gulf of Mexico. As the City and suburbs of Atlanta have grown, so have their appetites for water, setting up the western style "Water War".[21] The droughts of the West have moved East[22] with reduced rainfall, lower recharge of surface waters and ground waters, and overconsumption by Atlanta. The result is lower instream flow in the downstream portions of the river systems in Alabama, and the southwest part of Georgia and Florida, below Atlanta, adversely affecting businesses, fisheries, oyster populations and tourism. The three states have been in constant litigation for more than 20 years over the amount of water use, in stream flows, allocations by the U.S. Army Corps of Engineers and terms of attempted settlements.[23] The litigation continues with the new claims filed by Florida against Georgia with the United States Supreme Court.[24] Also, in this interesting mix of water disputes is the allocation of water for tribal lands and uses. Treaties and allocation agreements approved by Congress reiterate, reallocate and recalculate amounts, uses and values of tribal water rights. In Arizona, for example, by H. R. 1065, Congress approved legislation to settle tribal water rights claims of the White Mountain Apache Tribe in 2009.[25]

The **due diligence** list should include an analysis of any threat to the future water supply, the existence of any multi-state disputes, agreements or transfers that could jeopardize the real estate project.

E. Due Diligence and Transfers of Water Rights.

The **Due Diligence** list should include an analysis of the water rights associated with the real estate and whether the rights can be transferred, severed or reserved. Common in the West, diversion canals were used to transport water from one location to another to be used for farming, flood control, domestic use or storage. Dams and levees were built to channel waters to

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[21] *Mapping the Future of Alabama Water Resources Management: Policy Options and Recommendations*, ALABAMA WATER AGENCIES WORKING GROUP, 114-17 (Dec. 1, 2013), http://adeca.alabama.gov/Divisions/owr/awawg/pages/default.aspx.

[22] *See* Elliott, *supra* note 9 at 388.

[23] Cullen Manning, *Water Wars: The Battle Rages On*, 34:2 WATER LOG 5 (2014).

[24] *Florida v. Georgia*, 134 S.Ct. 1509 (2014).

[25] White Mountain Apache Tribe Water Rights Quantification Act of 2010, P.L. 111-291, Title III, 124 Stat. 3064 (2010); http://www.cagrd.com/documents/acquisitions/WMAT%20Settlement%20and%20Leases%2011.1.12.pdf.

desired areas, provide storage capacity and protect adjacent floodplains used for farming, grazing or other business development. Transbasin and interbasin transfers, as well as leasing, conveying or severing the water rights from the real estate[26] are permitted in western states and regulated by state statutes.[27]

In the "eastern" riparian states, water rights associated with the real estate could not be severed or reserved, and were generally restricted to the adjacent or riparian real estate. In a state like Alabama, interbasin water transfers occurred but without authority and were considered illegal unless the transfers were continuous for a prescriptive period of 20 years or more.[28] A survey of state withdrawal regulations was published in 2013 by the National Conference of State Legislatures,[29] and an in depth discussion of interbasin transfers primarily in western states can be found in *Law of Water Rights and Resources* by A. Dan Tarlock.[30]

The **due diligence** list should include an examination of state law and the public records to determine the status of water rights associated with the real estate, whether the water rights exist, have been severed, and can be transferred.[31]

F. Due Diligence and "Real" Flood Waters and Floodplains.

Flood assets and criteria should also be on the **due diligence** list. The examination should include an in-depth look at the flood history of the real estate, the flood history of the upstream and downstream real estate, the compliance history with the requirements of the National Flood Insurance Program (NFIP), the flood prevention requirements of the state and community where the real estate is located, the local flood ordinances, and the flood risk ratings of the community. Communities and properties that have experienced extraordinary storm events that have resulted in flash flooding, flood waters, or coastal storm surges should be identified. Each community should be participating in the National Flood Insurance Program and if not, the reasons should be examined.[32]

In general, the National Flood Insurance Act of 1968 established the National Flood Insurance Program[33] to assist individuals and participating communities with damages sustained by catastrophic flooding of real estate and improvements in flood prone areas, floodplains and adjacent real estate. Since community participation was initially voluntary, the program was not used by many communities, continuing the necessity of federal aid in flood damaged

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[26] *Guidelines for Transferring Ownership of Water Rights*, STATE OF NEVADA (Revised April 2014), http://water.nv.gov/forms/forms09/ROC_Guidelines09.pdf.
[27] *See* NCSL, *supra* note 16; *see also* Colo. Rev. Stat. Ann. § 35-92-103, et seq.
[28] *See* Elliott, *supra* note 9 at 390.
[29] *See* NCSL, *supra* note 16.
[30] *See* A. Dan Tarlock, *supra* note 10.
[31] *See Water Right Transfers and Real Property Transactions,* STATE OF OREGON WATER RESOURCES DEPARTMENT (January 30, 2007), http://www.oregon.gov/owrd/docs/transfer-propertytransactions.pdf.
[32] 42 U.S.C. § 4001.
[33] *Id.*

communities. The Flood Disaster Protection Act of 1973[34] amended the NFIP and required participation by communities and purchase of flood insurance by owners of buildings in flood hazard areas as a prerequisite to receive federal aid and loans from federally insured banks. The NFIP was amended again in 1979 to establish the Federal Emergency Management Agency (FEMA), and amended in 1994 by the National Flood Insurance Reform Act.[35] More recently, the NFIP was amended by the Homeowners Flood Insurance Affordability Act of 2014 to preserve discounted insurance rates during a phase-in period of revised flood risk assessments following recent storm events such as Hurricane Sandy.[36] The NFIP regulations[37] provide the requirements each participating community must follow and require to reduce flood damages and qualify for federal aid and discounted flood insurance premiums for owners of real estate.

Some of the flood terms focusing on real estate include regulatory floodway, floodplains, base flood elevations, Flood Insurance Rate Map (FIRM), flood zones, Special Flood Hazard Area, Letter of Map Revision (LOMR), 100 year flood, 500 year flood, coastal high hazard area, and storm surge.[38]

Flooding is a natural process often manipulated by activities in or near the floodplain or floodway. Answers to important flood questions will reveal the story. Is the property located in a coastal or other special flood hazard area? What is the history of flooding of the property, the community and the existing buildings, and what were the causes? Is the property located in a flood zone and if so, which one? Have any Flood Insurance Rate Maps or Flood Hazard Boundary Maps been recently revised or are any in the revision process? What are the state and local flood statutes and ordinances, and building code requirements?

Even if the real estate has no known history of flooding, upland development, channeling stormwater, and intense storm events can change history. Upstream or downstream encroachment by discharging fill in the floodplain and floodway will displace the floodplain's capacity to hold and disperse flood waters resulting in rising flood waters with increased velocities and damages.

Floodplain encroachments and fill are regulated but not prohibited by several laws and agencies. Permits to fill can be obtained.[39] For instance, the floodplains should be (but are not always) delineated as wetlands, probably jurisdictional wetlands, under Section 404 of the Clean Water Act,[40] and should have local building restrictions if located within the jurisdictional boundaries of a National Flood Insurance Program community. Additional requirements and restrictions may be imposed by a state coastal zone management program, or the activity in the floodplain could be impacted by the presence of a federal endangered or threatened species or a

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[34] *Id.* at § 4054.
[35] *Id.* at § 4001.
[36] *Id.*
[37] 44 C.F.R. §§ 59-80.
[38] *Id.*
[39] *Permit for Floodplain Development*, FEMA (Dec. 23, 2014), https://www.fema.gov/floodplain-management/permit-floodplain-development, 44 C.F.R. § 60.3.
[40] 33 U.S.C. § 1344.

state protected species that is dependent upon the waterway or the periodic flooding of the floodplain and would be jeopardized by the floodplain encroachment. Even though these restrictions exist, encroachments do occur and can be permitted.

Flood Insurance Rate Maps ("FIRM") which impose the base flood elevation levels in and near the floodplain are used to determine building code requirements, identify flood risks and set flood insurance rates. The FIRMs are revised periodically, especially following severe storm events, intense flooding and hurricanes. The proposed FIRM revisions will usually be submitted for public review. In the event a proposed revision will adversely affect the existing use of a landowner, the proposed revisions can be appealed[41] or influenced by political pressure.[42]

Due diligence of flood issues, especially for real estate in or near floodplain areas, should be sensitive to the histories of the real estate and improvements, the information and designations made on Flood Insurance Rate Maps and any past or proposed revisions to those maps.

G. Due Diligence and Flood History - Floods Happen!

Example 1: The Mississippi River Floods of 2011. In an area south of Cairo, Missouri, and south of the convergence of the Ohio River and the Mississippi River, the levee system built to channel waters of the Mississippi was threatened with possible and multiple breaches if the pressure from the rising flood waters was not given some relief. The U. S. Army Corps of Engineers made the decision to use authority, previously used only once in 83 years, to activate part of the Birds Point–New Madrid Floodway control mechanism authorized by the Flood Control Act of 1928.[43] The Corps deliberately caused a breach in the levee system to relieve the pressure and floodwaters threatening the levee system by exploding the west bank levee. The floodwaters inundated over 100,000 acres of public and private land, resulting in lawsuits by landowners who lived and worked in the floodplain.[44]

Example 2: Colorado Floods of September, 2013. Extraordinary and record rainfall caused record flooding in many counties along the Front Range of the Rocky Mountains including the Big Thompson River drainage basin. The National Weather Service rated the storm a 1,000 year event and many communities experienced 50 year and 100 year events. The community of Lyons, northwest of Boulder, experienced a 500 year event. Floodwaters and flash flooding caused incredible damages, washing out roads, undermining fill areas, covering the floodplain areas and cutting new channels as the waters moved through drainageways. Ten

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[41] 44 C.F.R. § 65.9.

[42] Bill Dedman, *FBI Investigates FEMA Flood Map Changes after NBC News Report*, NBC NEWS (Dec. 23, 2014), http://www.nbcnews.com/news/investigations/fbi-investigates-fema-flood-map-changes-after-nbc-news-report-n62906.

[43] 33 U.S.C.A. § 702.

[44] Brian Lee and Alice M. Noble-Allgire, *High Water in the Nation's Breadbasket – A Takings Analysis of the Government's Response to the Mississippi River's Great Flood of 2011*, PROB. & PROP., Jan./Feb. 2012 at 28.

people died, 15 counties were declared federal emergency areas, and damages were estimated at three billion dollars.[45]

Jeff Masters, a meteorologist, remarked about the Colorado storms, "**These are the types of rains one would expect on the coast in a tropical storm, not in the interior of North America.**"[46]

David Gochis, a scientist at the National Center for Atmospheric Research, was quoted as saying, "**We've never seen an event like this before, where there were so many critical factors that came together and focused heavy rainfall along the mountain front for such a long time.**"[47]

The September, 2013, storms and flooding in Colorado will no doubt cause communities to update and revise flood protection and planning (including revisions to FIRMs). Property values, developments and basic infrastructure have all been affected. **Is this an example of trends to come? Is this event a result of climate change?**

Example 3: September, 2015. Hurricane Joaquin and 17 Inches of Rain in South Carolina.

Example 4: Remnants of Pacific Hurricane Patricia in October, 2015 (200 mph sustained winds when landfall on West Coast of Mexico) traveled northeast overland to Texas, Louisiana, Mississippi and on October 26, Alabama (talk about "ROLL Tide") causing extraordinary rain and flooding.

H. Due Diligence and Climate Change / Sea Level Rise.

Flooding and beach erosion caused by sea level rise which is linked to climate change have been the subject of many articles.[48] The Gulf Coast and the East Coast are experiencing higher tides especially during storm events causing frequent flooding of low lying areas and beach erosion. During an excellent presentation at the Annual Meeting of ACREL in Boston, Massachusetts, on October 17, 2014, the effects of Hurricane Sandy and climate change were discussed.[49]

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[45] Bear Jack Gebhardt and Stephen Johnson, *The 500-Year Flood, One Year Later – Nine Lessons (re)learned*, 15 STORMWATER NO. 5, July/Aug. 2014, at 14.
[46] *Id.* at 15.
[47] *Id.*
[48] *Climate Change Handbook for Regional Water Planning*, CALIFORNIA DEPARTMENT OF WATER RESOURCES (Dec. 23, 2014), http://www.water.ca.gov/climatechange/CCHandbook.cfm; Pam Hunter, *Diving New Sources of Water*, 273 ENR No. 10, Oct. 13, 2014, at 20; Nadine M. Post, *Boston Prepares to Live with Floodwater From Rising Tides*, 273 ENR No. 10, Oct. 13, 2014, at 10.
[49] Katherine Bachman and Celeste Hammond, *Climate Change – Mother Nature Can't be Ignored! Regulatory and Legal Tools for Responding to Climate Change/Post Sandy*, 2014 ACREL Annual Meeting in Boston: *One if by Land and Two if by Sea: Rising Markets and*

The West Coast is experiencing and will continue to experience increased tidal flooding from sea level rise and storms such as those experienced in August, 2014, as Hurricane Lowell followed by Hurricane Marie racked the California coastlines of Orange and Los Angeles Counties.[50]

Hurricane storm surge models for certain East and Gulf Coast communities can be viewed on the Weather Underground website.[51] The storm surge models use the National Hurricane Center's "SLOSH" model.[52]

Real estate lawyers and developers should take notice of these changes. Sea level rise may be a slow process, but planning and awareness are essential now.

Proactive communities such as Boston, Massachusetts, are implementing methods to address sea level rise along the waterfront, and rebuilding sewer and road infrastructures to be more coastal "resilient."[53]

I. Due Diligence and Wetland Real Estate Assets . . . for Clarity.

1. General Wetlands Due Diligence.

Due diligence into the issues pertaining to wetlands provides an excellent example of the complex overlapping jurisdictions of multiple agencies, regional differences and evolving law.

Everyone involved with real estate is expected to know the rules pertaining to the Clean Water Act and Wetlands. Everyone is expected to design, maintain, construct, hold and develop real estate containing wetlands in compliance with any law or regulation or permit that may exist. Attorneys are expected to provide knowledgeable, legal and up-to-date real estate advice and keep up with wetlands law. How this is done is critical, but so is the way the rules are "made up" or applied or interpreted. Knowing the rules, regulations and people involved (the agencies and consultants) are not enough. Everything done related to the real estate, especially involving wetlands, is in constant motion and begs for innovation, creativity, initiative and flexibility.

Raising Equity (Oct. 16-19, 2014), http://www.acrel.org/Private/Draw-Publications.aspx?Action=DrawOneArticle&ArticleID=3288&ArticleType=Seminar.

[50] Jeffrey Thomas DeSocio, *Hurricane Marie Brings High Surf, Coastal Flooding to SoCal Coast*, LOS ANGELES NEWS/FOX 11 LAKTTV (Aug. 26, 2014), www.myfoxla.com/story/26372220/hurricane-marie-brings-high-surf-coastal-flodding-to-SoCal-Coast.

[51] *Where is Your Weather,* WEATHER UNDERGROUND (Dec. 23, 2014), www.wunderground.com.

[52] *Sea Lake and Overland Surge from Hurricanes,* NATIONAL WEATHER SERVICE (Dec. 23, 2014), http://slosh.nws.noaa.gov/sloshPub/index.php?L=7.

[53] *See* Post, *supra* note 48.

It is difficult to describe all of the changes, differences, and **New CLEAR Stuff** about waters, wetlands and wet real estate, but here are some wetland matters that should be of interest. These comments will illustrate the dynamics of water, natural resources, wetlands interpretation, clarity issues and problems of compliance and enforcement of real estate laws. **"New CLEAR Stuff"** is the simple phrase that involves that constant change and innovation of the economy, personalities, interpretations, politics and water. **[NOTE: To be clear, you must first be confusing. This will be clear in a moment. Just ask Congress, or a better idea – ask EPA!]**

2. Due Diligence – Wetland Delineation and Jurisdictional Determination.

The processes of land development and land use, especially wetlands, are complicated by the evolution of laws, regulations and politics defining the character and relationship of water to the surface and subsurface. Additional **due diligence** issues to be considered prior to acquisition and development include many layers of regulations, restrictions and permitting requirements related to wetlands and adjacent waterways.

As ridiculous as it may sound, each and every parcel of real estate should be investigated and delineated for the character and existence of wetlands and other sensitive environmental characteristics (in addition to other matters covered by an environmental site assessment) to determine existence of wetlands or "waters of the United States,"[54] and then to determine whether the wet real estate is subject to federal, state or local jurisdiction.

[NOTE: The real estate budget process should include cost items (and attorneys' fees) related to the wetland investigation, wetland delineation and jurisdictional determination, wetland permitting, and wetland mitigation and monitoring.]

Unfortunately, the process of evaluating real property has become increasingly more complicated and subjective. To ignore this process, creates substantial investment and regulatory risk. The risk is the changing law and opinions of agencies such as the EPA.[55]

The **real estate wetland delineation** should be conducted by a qualified and experienced professional. At present, the 1987 Wetland Delineation Manual,[56] forms and the 2010 Regional Supplement[57] are still to be used as well as other reference guides, plant lists and amendments.

If any part of the real estate is delineated wetlands, the next step is to **determine** if the wetlands are **jurisdictional** and subject to the Clean Water Act and regulations requiring permits to develop. The initial **jurisdictional determination** can be and should be made by the

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[54] 33 C.F.R. § 320; 40 C.F.R. § 230. [Subject to "possible" implementation of NEW "WOTUS" Rule, 80 Fed. Reg. 37054 (June 29, 2015).]

[55] *See, e.g., Sackett v. EPA,* 132 S.Ct. 1367 (2012).

[56] *Corps of Engineers Wetlands Delineation Manual,* US Army Corps of Engineers, Waterways Experiment Station (Jan. 1987), http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

[57] *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0),* US Army Corps of Engineers, Engineers Research and Development Center (Nov. 2010), http://el.erdc.usace.army.mil/elpubs/pdf/trel10-20.pdf.

consultant to then be verified by the U.S. Army Corps of Engineers in the District where the real estate is located.[58] The Jurisdictional Determination process has also become more complex and time consuming.

Jurisdiction is one of the most litigated issues regarding wetlands next to compliance/enforcement. Developers tend to limit the jurisdictional reach of Section 404 of the Clean Water Act. On the other hand, the agencies, especially the Corps and the EPA, are constantly attempting to expand the jurisdictional reach. The following comments will illustrate this constant tug of war.

3. EPA Clears the Way.

To make matters **clear** so there are no misunderstandings or confusion in determining which waters, wetlands and wet real estate assets are subject to federal jurisdiction under the Clean Water Act, the EPA, in the spring of 2014, proposed "**clarifying rules**" to amend the existing definition of "**waters of the United States**"[59] contained in the Clean Water Act Regulations 33 CFR 320 (Corps) and 40 CFR 230 (EPA). The proposed **clarifying rule** is actually another attempt by the EPA and the Corps to expand federal wetlands jurisdiction. The comment period was originally scheduled to expire July 21, 2014, but was twice extended to and eventually did expire November 14, 2014. Stay tuned. On October 9, 2015, the Sixth Circuit Court of Appeals issued a nationwide preliminary injunction against the EPA and Corps from implementing the WOTUS Rule.[60]

4. Brief Comments Regarding CWA § 404 Permits.

If a delineation and determination are made that jurisdictional wetlands exist and will be impacted, and if the real estate development requires the discharge of fill material into those wetlands, an application for a CWA § 404 permit from the Corps will be necessary. Depending on size, location and other factors, an individual permit, a general permit or a nationwide permit will be needed.[61] The filing of the application may also include public notice, interagency review and comment, substantial reporting and analysis, and mitigation of impacts.[62] All permits

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[58] Regulatory Guidance Letter, No. 08-01, "Jurisdictional Determinations," June 26, 2008; William L. Want, *Law of Wetlands Regulation*, § 4.3.1, App. 8-193 (2014).

[59] Definition of "Waters of the United States" Under the Clean Water Act – Proposed Rule, 79 FR 22188, No. 76, April 21, 2014; Final Rule 80 Fed. Reg. 37054 (June 29, 2015).

[60] **Rumor:** The proposal is overly broad, is NOT CLEAR and exponentially expands federal jurisdiction over most if not all real estate. A confidential source informed the author that the 2014 proposed Rule would not be finalized, but on June 29, 2015 the Final Rule was published in a substantially different form than the proposed rule, to be effective August 28, 2015. **The WOTUS Rule was stayed from implementation by the Sixth Circuit Court of Appeals on October 9, 2015.** *See* In re Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), Nos. 15-3799/3822/3853/3887 (6th Cir. Oct 9, 2015).

[61] 33 C.F.R. §§ 232, 325, 330.

[62] *Id.* at § 325.

("projects") must also have a CWA § 401[63] water quality consistency certification from the state environmental agency.[64] If the project is in the coastal zone, a coastal zone management program consistency certification[65] from the state agency will be required before the permit, if issued, becomes effective.

Due diligence should include an examination of each agency website (EPA, Corps, USFWS, state agency) to obtain all permit and violation history of the property, whether any restriction exists, and if the permit can be transferred.

5. Due Diligence Looking for Clear Regulatory Lines.

(a) CLEAR Lines – Wetlands / Jurisdiction.

When do you need a Clean Water Act § 404 (33 U.S.C. §1344) permit or an 1899 Rivers and Harbors Act § 10 (33 USC § 403) permit, what needs to be included as part of the permit application, and what are the costs to do so, and to comply? What are wetlands and what are jurisdictional wetlands?

The **due diligence examination** must consider the regulations and permitting requirements pertaining to waters and wetlands for each real estate project. This brief description of the elusive **clear line** will highlight several key federal laws, controlling and confusing federal cases, and a brief discussion of some attempts by EPA and the Corps to "write their own rules" to **clear** things up.

(b) What Has Congress Done to Make the Water Law Clear?

1899 Rivers and Harbors Act § 10 (33 U.S.C. § 403)
1948 Water Pollution Control Act
- 1972 Amendments – Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1251, et seq.)
- 1977 Amendments – Clean Water Act (33 U.S.C. §1344)
- 1981 Amendments – Municipal Waste Water Treatment Construction Grant Amendments
- 1987 Amendments – Water Quality Act
- 1994 Amendments – Ocean Pollution Reduction Act

National Environmental Policy Act of 1969 (42 U.S.C. § 4321)
Endangered Species Act of 1973 (16 U.S.C. § 1531)
Coastal Zone Management Act of 1972 (16 U.S.C. § 1451)
Oil Pollution Act of 1990 (33 U.S.C. § 2701)
Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1201)

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[63] 33 U.S.C. § 1341.
[64] 33 C.F.R. § 325.2(b)(1).
[65] *Id.* at § 325.2.

[NOTE 1: However, No new federal legislation has passed defining the extent of federal jurisdiction over "navigable waters" or "waters of the United States" in quite some time although many proposed bills have been considered.]

[But NOTE 2: The EPA and the Corps have been busy defining the bounds of their jurisdiction with the most recently proposed New rule for "clarification" of the definition of "waters of the United States." 79 Fed. Reg. 22148, and the Final WOTUS Rule published June 29, 2015, and enjoined October 9, 2015.][66]

(c) We Have Asked the U.S. Courts (for Clarity) and This is What We Got.

Clarity, under the cloud of environmental regulations, especially the Clean Water Act § 404, has been anything but clear.

(i) Expansion of CWA Jurisdiction.

N.R.D.C. v. Callaway, 392 F.Supp. 685 (D.C. Cir. 1975), was the first case to expand the Federal Water Pollution Control Act jurisdiction beyond traditional navigable waters "to the maximum extent permissible." This case was intended to send the clear message that the federal agencies (the Corps and the EPA) had broad jurisdiction under the Federal Water Pollution Control Act and the Clean Water Act Amendments. The law should apply to "other waters." We are still waiting on a **clear** description of these "other waters."[67]

In ***Avoyelles Sportsmen's League, Inc. v. Marsh***, 715 F.2d 897 (5th Cir. 1983), 5000 acres of Louisiana hardwood bottomlands were to be cleared and converted to agriculture by using heavy equipment. Jurisdiction was expanded and interpreted to cover swamplands (including hardwood bottomlands) and to prohibit "mechanized land clearing" that moved more than an incidental amount of dirt. Removal of stumps and bulldozing dirt (grading) constituted discharges of fill material requiring a permit.

In ***U.S. v. Riverside Bayview Homes, Inc.***, 474 U.S. 121 (1985), the jurisdiction was expanded to cover adjacent wetlands and waters.

(ii) Contraction of Jurisdiction.

One of the leading cases that actually contracted the federal jurisdiction of the CWA was ***SWANCC v. U.S. Army Corps of Engineers***.[68] The Court determined that non-navigable, isolated, intrastate waters and wetlands were not jurisdictional. Any proposed use of real estate requiring the discharge of fill material did not require a CWA § 404 permit. The Court also determined that a clause that appeared without proper notice procedures or authority, "the

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[66] *Supra* at notes 59 and 60.
[67] *Supra* note 59, at 22189, 22211 and 22261.
[68] Solid Waste Authority of Northern Cook County (SWANCC) v. U. S. Army Corps of Engineers, 531 U.S. 159 (2001).

Migratory Bird Rule," was invalid.[69] This U.S. Supreme Court decision, a landmark case, was so **clear** that the Corps and the EPA determined that a **Clarifying Guidance** issued January, 2003,[70] was needed to explain to their field personnel how to apply jurisdictional authority and identify what constituted an "isolated" wetland.

(iii) Two Steps in Another Direction.

Then, in ***Rapanos v. U.S.***, 547 U.S. 715 (2006), the U.S. Supreme Court had to determine what constituted waters of the United States, specifically regarding wetlands that were near man-made drains which conveyed surface water that eventually emptied into traditional RHA § 10 navigable waters. Five of the Justices found that the wetlands at issue were not "navigable waters," while disagreeing over the precise test to determine such. There was no **CLEAR** majority with four of the Justices: Scalia, Thomas, Alito, and Chief Justice Roberts deciding for the plurality; Justices: Breyer, Stevens, Souter, and Ginsburg in dissent; and Justice Kennedy, the lone wolf, setting forth support for the plurality with a twist from *SWANCC*- "significant nexus."[71] The plurality opinion, authored by Justice Scalia, expressed the opinion that jurisdiction extended beyond traditional navigable waters to "relatively permanent, standing or flowing bodies of water." Justice Kennedy discerned his significant nexus standard, which held jurisdiction extended to waters that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as navigable."[72] Justice Breyer authored the dissent, which argued that the Rapanos wetlands were part of "waters of the United States" as defined under the CWA.[73] **[NOTE: You just have to read the opinions. This is just not clear.]**

In another wetlands enforcement case, ***Sackett v. EPA***, 132 S.Ct. 1367 (2012), the Supreme Court unanimously determined that the compliance order given by the EPA demanding the removal of fill material discharged into wetlands (a misinterpretation by the EPA) by the Sacketts was a final agency action. The Court determined there was no adequate remedy other than APA review, so the Sacketts could dispute the compliance order in court. The Sacketts disputed the jurisdictional determination that their property was wetlands. The Court found the EPA's action was final, because the agency had determined rights or obligations, and legal consequences would flow from the issuance of the order, including penalties and limiting the ability of the Sacketts to obtain a permit from the Corps. The compliance order was also the consummation of the EPA's decision-making process, and it only indicated the possibility of an "informal discussion" which did not suffice to make an otherwise final agency action nonfinal. The Court concluded that compliance orders will remain an effective means of securing prompt voluntary compliance when there is no substantial basis to question the validity of the order.

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[69] *Id.* at 167.
[70] January 15, 2003 Joint Memorandum Providing Clarifying Guidance on *SWANCC*, 68 Fed. Reg. 1991, 1995.
[71] Rapanos v. U.S., 547 U.S. 715, at 759 (2006).
[72] *Id.* at 780.
[73] Want, *supra* note 58, at 43.1.1.

[NOTE 1: The Fifth Circuit Court of Appeals in *Luminant Generation v. EPA*, Case No. 12-60694 (5th Cir. July 3, 2014), rejected a pre-enforcement challenge of a Notice of Violation issued by the EPA.]

[NOTE 2: *Sackett's* comments – Supreme Court Justice Alito, in his concurrence, criticized Congress for not explicitly defining what Congress meant by "waters of the United States" in the Federal Water Pollution Control Act of 1972, as well as failing to clarify the meaning subsequently. Furthermore, Justice Alito stated "But far from providing clarity and predictability, the agency's [EPA's] latest informal guidance [2011 Guidance] advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff."][74]

(d) EPA and Corps – Trust Us – We Are Clear.

It is interesting to note that the U.S. Supreme Court in *SWANCC* (2001) and again in *Rapanos* (2006) suggested that Congress intended the Clean Water Act to be limited in application. However, rather than amending the regulations to address jurisdiction as suggested by Chief Justice Roberts in *Rapanos*, the Corps and the EPA have issued a series of nonregulatory, nonbinding interpretations and "guidance":

1) January 15, 2003 Joint Memorandum Providing Clarifying Guidance on *SWANCC*, 68 Fed. Reg. 1991, 1995.[75]

2) Draft Guidance 2007- Finalized December 2, 2008, "Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos*" (73 Fed. Reg. 19594, April 10, 2008 and 33 CFR part 332).

3) RGL 07-01 "Practices for Documenting Jurisdiction under Sections 9 & 10 of the Rivers and Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act," June 5, 2007.[76]

4) RGL 08-02 "Jurisdictional Determinations," June 26, 2008.[77]

5) 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act. (Withdrawn September, 2013, and never finalized).[78]

[NOTE 3: The intent and purpose of these guidelines appear to be attempts to again expand the reach of the agencies' jurisdictions for permitting, compliance, enforcement **and . . . CLARITY. (What's up with that?!)]**

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[74] *Sackett*, 132 S.Ct. at 1375.
[75] Want, *supra* note 58, at 4.31.
[76] Want, *supra* note 58, at App. 8-168.
[77] *Id.* at App. 8-193.
[78] 76 Fed. Reg. 24479 (May 2, 2011).

The 2011 Proposed Guidance issued in draft in April, 2011, if finalized would have superseded (1) the January 15, 2003 Joint Memorandum (68 Fed. Reg. 1991, 1995) which provided "**clarifying guidance**" on *SWANCC*, (2) the 2007 draft Guidance on *Rapanos*, and (3) the 2008 Joint Guidance memo on *Rapanos*.

The agencies again opted to forgo rulemaking in favor of more subtle jurisdictional expansion using revised guidance.

"This draft guidance [2011] document is intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks force of law."

"The proposed [2011] Guidance is consistent with the principles established by the Supreme Court cases and is supported by the agencies' scientific understanding of how waterbodies and watersheds function."[79]

The 2011 Guidance would have significantly expanded the jurisdiction over "waters of the United States" under all CWA programs that use that term including Section 303 (TMDL) and water quality standards, Section 311 oil spill program, Section 401 state water quality certification process, Section 402 NPDES, and Section 404 Dredge and Fill. The 2008 Guidance addressed Section 404 only. In addition, the proposed 2011 Guidance addressed the "other waters" described in the EPA's regulations 40 CFR 230.3(a)(3) and the Corps' regulations 33 CFR 328.3(a)(3). At the same time, the EPA and the Corps were working on a draft rule proposal to "clarify" the definition of wetlands on their wish list and decided to withdraw the 2011 proposed Guidance in September, 2013.

6) 2014 Proposed Rule – "Waters of the United States."

On April 21, 2014, the Corps and the EPA published a proposed rule to provide a "**CLEAR**" Definition of "Waters of the United States" in the Federal Register for public notice and comment.[80]

As of December 20, 2014, the extended comment periods have expired, the agencies are quiet, and the rumor is that the proposed rule would not be finalized. The WOTUS Rule was finalized June 29, 2015, and EPA and the Corps enjoined from implementing the Final Rule by the Sixth Circuit Court of Appeals on October 9, 2015.[81]

(e) Due Diligence and Wetland Compliance Checklist.

Each parcel of real estate still faces the challenges of federal wetland jurisdiction and must be part of the initial examination. Selling, developing or just owning real estate is much more complicated than "just doing it."

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[79] *Id.*

[80] 79 Fed. Reg. 22188 (April 21, 2014).

[81] *Supra* at note 60.

The **Compliance Attention List** should include:

1) Maintenance of records pertaining to the real estate and water issues or events, including permits.

2) Inspect and assess the property's surface and subsurface conditions. **[NOTE: New Rules regarding environmental site assessments, due diligence and requirements of the All Appropriate Inquiries Standards and Procedures under CERCLA in order to qualify for the defenses of innocent landowner, contiguous property owner, or bona fide prospective purchaser have been finalized requiring ASTM E1527-13 Phase I Environmental Site Assessment standards.]**[82]

3) Investigate whether any activity on the real estate was required to have a permit, the type, violation and compliance history, present status, records, and notice (and transfer) requirements.

4) If the property has or had a permit, have the permit transferred as part of the process. If a violation exists, determine who is liable, and if the violation should be or can be cured.

5) Determine if the laws and regulations have changed since the permit was issued.

6) If no permit exists but is needed, can an "after-the-fact" permit be obtained, and if mitigation is required, determine the extent, cost and locate a mitigation bank (such as the Hells Swamp Mitigation Bank)[83] or some alternative.

7) If a Clean Water Act § 404 permit from the Corps is issued and capital is invested, work begins and is in full compliance, can the permit be subsequently revoked by the EPA by CWA § 404(c)?[84]

8) Beware of the contractor you hire who assures you "Trust me (and pay me now). I have the permits."

9) Beware of problems you inherit with wetlands, engineering and capacity deficiencies.

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[82] 40 C.F.R. § 312, 78 Fed. Reg. 79319 (Dec. 30, 2013).
[83] *Starts with You,* HELL'S SWAMP MITIGATION BANK (Dec. 23, 2014), www.hsmbank.com.
[84] Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, 714 F.3d 608 (D.C. Cir. 2013), *cert. denied,* Case No. 13-599 (U.S. Mar. 24, 2014).

10) Beware of encumbrances such as environmental covenants and conservation easements.

11) If the property does have wetlands, the property may also have other sensitive areas, cultural sites, and endangered species issues.

12) Beware of existing or past permits and permit conditions not yet fulfilled.

CONCLUSION

There are many other fascinating "Liquid Real Estate" issues that time and space did not permit describing. Coastal Zone Management Act requirements and restrictions, riparian and littoral non-consumptive rights to use waters and to "wharf out," aquatic endangered and threatened species and habitat, use of waters in conjunction with exploring for, mining and producing natural resources, causes and effects of polluted or contaminated water sources, and more.

Tab 4

ASTM E1527-21

RULE

Standards and Practices for All Appropriate Inquiries

Posted by the **Environmental Protection Agency** on Mar 13, 2022

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Content

Action

Direct final rule.

Summary

EPA is taking direct final action to amend the Standards and Practices for All Appropriate Inquiries to reference a standard practice recently made available by ASTM International, a widely recognized standards developing organization. Specifically, this direct final rule amends the All Appropriate Inquiries Rule to reference ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and allow for its use to satisfy the requirements for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act.

Dates

This rule is effective on May 13, 2022, without further notice, unless EPA receives adverse comment by April 13, 2022. If EPA receives such comment, we will publish a timely withdrawal in the Federal Register informing the public that this rule will not take effect.

Addresses

Submit your comments, identified by Docket ID No. [EPA-HQ-OLEM-2021-0946] at *https://www.regulations.gov.* Follow the on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI and multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

For Further Information Contact

For more detailed information on specific aspects of this rule, contact Patricia Overmeyer, Office of Brownfields and Land Revitalization (5105T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460-0002, 202-566-2774, or *Overmeyer.patricia@epa.gov.*

Supplementary Information

Throughout this document, "we," "us," and "our" refer to the EPA.

Table of Contents

I. Why is the EPA using a direct final rule?

EPA is publishing this direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comment given that this action will provide flexibility for grant recipients and other entities that may benefit from the use of the ASTM E1527-21 standard. We believe that this action is reasonable and can be promulgated without consideration of public comment because it allows for the use of a generally accepted business standard developed by a recognized standards developing organization. The standard was reviewed by EPA and determined to be equivalent to the Agency's all appropriate inquiries requirements. This action does not disallow the use of the previously

recognized standards (ASTM E1527-13 or ASTM E2247-16), and it does not alter the requirements of the previously promulgated All Appropriate Inquiries Rule. In addition, this action will potentially increase flexibility for some parties who may make use of the new standard, without placing any additional burden on those parties who prefer to use either the ASTM E1527-13 standard, the ASTM E2247-16 standard, or follow the requirements of the All Appropriate Inquiries Rule when conducting all appropriate inquiries.

Although we view this action as noncontroversial, in the "Proposed Rules" section in this issue of the Federal Register, we are publishing a separate proposed rule containing the clarification summarized above. That proposed rule will serve as the proposal to be revised if adverse comments are received. If EPA does not receive adverse comment in response to this direct final rule prior to April 13, 2022, this rule will become effective on May 13, 2022, without further notice. If EPA receives adverse comment, we will publish a timely withdrawal of this direct final rule in the Federal Register, informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time and before April 13, 2022.

II. Does this action apply to me?

This action offers certain parties the option of using an available industry standard to conduct all appropriate inquiries. Parties purchasing potentially contaminated properties may use the ASTM E1527-21 standard practice to comply with the all appropriate inquiries requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This rule does not require any entity to use this standard. Any party who wants to claim protection from liability under one of CERCLA's landowner liability protections may follow the regulatory requirements of the All Appropriate Inquiries Rule at 40 CFR part 312, use the ASTM E1527-13 "Standard Practice for Phase I Environmental Site Assessments," use the ASTM E2247-16 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property," or use the standard recognized in this direct final rule, the ASTM E1527-21 standard, to comply with the all appropriate inquiries provision of CERCLA.

Entities potentially affected by this action, or who may choose to use the newly referenced ASTM standard to perform all appropriate inquiries, include public and private parties who, as bona fide prospective purchasers, contiguous property owners, or innocent landowners, are purchasing potentially contaminated properties and wish to establish a limitation on CERCLA liability in conjunction with the property purchase. In addition, any entity conducting a site characterization or assessment on a property with funding from a brownfields grant awarded under CERCLA Section 104(k)(2)(B)(ii) may be affected by this action. This includes state, local, and Tribal governments that receive brownfields site assessment grants. A summary of the potentially affected industry sectors (by North American Industry Classification System (NAICS) codes) is displayed in the table below.

Industry category	**NAICS code**
Real Estate	531
Insurance	52412
Banking/Real Estate Credit	522292
Environmental Consulting Services	54162

Industry category	NAICS code
State, Local and Tribal Government	926110, 925120
Federal Government	925120, 921190, 924120

The list of potentially affected entities in the above table may not be exhaustive. Our aim is to provide a guide for readers regarding those entities that EPA is aware potentially could be affected by this action. However, this action may affect other entities not listed in the table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled FOR FURTHER INFORMATION CONTACT.

III. What should I consider as I prepare my comments for the EPA?

Direct your comments to Docket ID No. EPA-HQ-OLEM-2021-0946. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov* , including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

A. Submitting CBI: Do not submit any information through *www.regulations.gov* or email that you consider to be CBI or otherwise protected. You can only submit CBI to EPA via U.S. mail at: HQ EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20460. Clearly mark all information that you claim to be CBI. For CBI submitted on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted along with the comment that includes CBI. The version of the comment that does not include CBI will be included in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. Tips for Preparing Your Comments: When submitting comments, remember to:

• Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

The *www.regulations.gov* website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit.

If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *https://www2.epa.gov/dockets/commenting-epa-dockets.*

C. *The docket:* All documents in the docket are listed in the *www.regulations.gov* index. Certain types of information claimed as CBI, and other information whose disclosure is restricted by statute, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material, such as ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" will not be placed in EPA's electronic public docket but will be publicly available only in printed form in the official public docket. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the HQ EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20460. Please note: Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only, and walk-ins are not allowed. Visitors to the Reading Room must complete docket material requests in advance and then make an appointment to retrieve the material. Please contact the EPA Reading Room staff at (202) 566-1744 or via the Dockets Customer Service email at *docket-customerservice@epa.gov* to arrange material requests and appointments.

IV. Statutory Authority

This direct final rule amends the All Appropriate Inquiries Rule setting Federal standards for the conduct of "all appropriate inquiries" at 40 CFR part 312. The All Appropriate Inquiries Rule sets forth standards and practices necessary for fulfilling the requirements of CERCLA section 101(35)(B) to obtain CERCLA liability protection and for conducting site characterizations and assessments with the use of brownfields grants per CERCLA section 104(k)(2)(B)(ii).

V. Background

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act ("the Brownfields Amendments"). In general, the Brownfields Amendments to CERCLA provide funds to assess and clean up brownfields sites; clarify existing and establish new CERCLA liability provisions related to certain types of owners of contaminated properties; and provide funding to establish or enhance State and Tribal cleanup programs. The Brownfields Amendments revised some of the provisions of CERCLA Section 101(35) and limited liability under Section 107 for bona fide prospective purchasers and contiguous property owners, in addition to clarifying the requirements necessary to establish the innocent landowner liability protection under CERCLA. The Brownfields Amendments clarified the requirement that parties purchasing potentially contaminated property undertake "all appropriate inquiries" into prior ownership and use of property before purchasing the property to qualify for protection from CERCLA liability.

The Brownfields Amendments of 2002 required EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries. EPA promulgated regulations that set standards and practices for all appropriate inquiries on November 1, 2005 (70 FR 66070). In the final regulation, EPA referenced, and recognized as compliant with the rule, the ASTM E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." In December 2008, EPA amended the All Appropriate Inquiries Rule to recognize another ASTM standard as compliant with the rule, ASTM E2247-08 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property." Both standards, the ASTM E1527-05 and the ASTM E2247-08, were subsequently revised by ASTM International. EPA referenced the revised ASTM E1527-13

standard on August 15, 2013 (78 FR 49690) and referenced the revised ASTM E2247-16 Standard on September 15, 2017 (82 FR 43310) as compliant with the All Appropriate Inquiries Rule. Currently, the All Appropriate Inquiries Rule (40 CFR part 312) allows for the use of the ASTM E1527-13 standard or the ASTM E2247-16 standard to conduct all appropriate inquiries, in lieu of following requirements included in the rule. Once this action is final, the All Appropriate Inquiries Rule also will allow for the use of the ASTM E1527-21 standard.

Recently, ASTM International published a revised standard for conducting Phase I environmental site assessments. This standard, ASTM E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," was reviewed by EPA, and determined by EPA to be compliant with the requirements of the All Appropriate Inquiries Rule.

VI. What action is the EPA taking?

This direct final rule amends the All Appropriate Inquiries Rule to allow for the use of the recently revised ASTM International standard, ASTM E1527-21, to satisfy the all appropriate inquiries requirements under CERCLA for establishing the bona fide prospective purchaser, contiguous property owner, and innocent landowner liability protections.

With this action, parties seeking liability relief under CERCLA's landowner liability protections, as well as recipients of brownfields grants for conducting site assessments, will be considered in compliance with the requirements for all appropriate inquiries, if such parties comply with the procedures provided in the ASTM E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." EPA determined that it is reasonable to promulgate this clarification as a direct final rule that is effective immediately, rather than delay promulgation of the clarification until after receipt and consideration of public comments. EPA made this determination based upon the Agency's finding that the ASTM E1527-21 standard is compliant with the All Appropriate Inquiries Rule, and the Agency sees no reason to delay allowing for its use in conducting all appropriate inquiries.

The Agency notes that this action does not require any party to use the ASTM E1527-21 standard. Any party conducting all appropriate inquiries to comply with CERCLA's bona fide prospective purchaser, contiguous property owner, and innocent landowner liability protections may continue to follow the provisions of the All Appropriate Inquiries Rule at 40 CFR part 312, use the ASTM E1527-13 standard or use the ASTM E2247-16 standard. This action merely allows for the option of using ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" by those parties purchasing potentially contaminated properties in lieu of following the specific requirements of the All Appropriate Inquiries Rule.

The Agency notes that there are no legally significant differences between the regulatory requirements and the ASTM E1527-21 standard. To facilitate an understanding of the slight differences between the All Appropriate Inquiries Rule and the revised ASTM E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," as well as the applicability of the E1527-21 standard to certain types of properties, EPA developed, and placed in the docket for this action, the document "Comparison of All Appropriate Inquiries Regulation, the ASTM E1527-13 Phase I Environmental Site Assessment Process, and ASTM E1527-21 Phase I Environmental Site Assessment Process." The document provides a comparison of the two ASTM E1527 standards.

This action includes no changes to the All Appropriate Inquiries Rule other than to add an additional reference to the new ASTM E1527-21 standard. EPA is not seeking comments on the standards and practices included in the rule published at 40 CFR part 312. Also, EPA is not seeking comments on the

ASTM E1527-21 standard. EPA's only action with this direct final rule is recognition of the ASTM E1527-21 standard as compliant with the all appropriate inquiries requirements and, therefore it is only this action on which the Agency is seeking comment.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and is therefore not subject to OMB review. This action merely amends the All Appropriate Inquiries Rule to reference ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and allow for its use to satisfy the requirements for conducting all appropriate inquiries under CERCLA. This action does not impose any requirements on any entity, including small entities. Therefore, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), after considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not contain any unfunded mandates or significantly or uniquely affect small governments as described in Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104-4). This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this action is exempt from review under Executive Order 12866, this rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* , nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994).

This action does involve technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) (NTTAA) apply. The NTTAA was signed into law on March 7, 1996, and, among other things, directs the National Institute of Standards and Technology (NIST) to bring together Federal agencies as well as state and local governments to achieve greater reliance on voluntary consensus standards and decrease dependence on in-house standards. It states that use of such standards, whenever practicable and appropriate, is intended to achieve the following goals: (a) Eliminate the cost to the government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulations; (b) provide incentives and opportunities to establish standards that serve national needs; (c) encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and (d) further the policy of reliance upon the private sector to supply government needs for goods and services. The Act requires that Federal agencies adopt private sector standards, particularly those developed by standards developing organizations (SDOs), whenever possible in lieu of creating proprietary, non-consensus standards.

This action is compliant with the spirit and requirements of the NTTAA. This action allows for the use of the ASTM International standard known as Standard E1527-21 and entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." By taking this action, EPA is fulfilling the intent and requirements of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113.

The Congressional Review Act, 5 U.S.C. 801 *et seq.* , generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register . This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule is effective on May 13, 2022 unless EPA receives adverse comment by May 13, 2022.

List of Subjects in 40 CFR Part 312

Administrative practice and procedure, Hazardous substances.

Barry N. Breen,
Acting Assistant Administrator, Office of Land and Emergency Management.
For the reasons set out in the preamble, 40 CFR part 312 is amended as follows:

Part 312 Amended

Regulatory Text
1. The authority citation for part 312 continues to read as follows:

Authority:

Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(3)(B).

Subpart B Definitions and References

Regulatory Text
2. Section 312.11 is amended by adding paragraph (c) to read as follows:

§ 312.11 References.

* * * * *

(c) The procedures of ASTM International Standard E1527-21 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." This standard is available from ASTM International at *www.astm.org,* 1-610-832-9585.

[FR Doc. 2022-05259 Filed 3-11-22; 8:45 am]
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CFR

40 CFR Part 312

Abstract

Federal Register for Monday, March 14, 2022 (87 FR 14174) [FRL-9334-02-OLEM]

Topic(s)

Administrative Practices and Procedures; Hazardous Substances

More Details

Tab 5

(g) A water storage tank/tower may be allowed as a conditional use under the OR, Outdoor Recreation zoning designation, subject to the approval of the Baldwin County Planning and Zoning Commission.

2.3.25 *Planning District 25.*

2.3.25.1 Effective Date

On June 19, 1992, a majority of qualified electors in Planning District 25 voted to institute County Zoning. On November 16, 1993, the County Commission adopted the Planning District 25 Zoning Map and Ordinances.

2.3.25.2 District Boundaries

A legal description of the boundaries for Planning District 25 may be found under Appendix A.

2.3.25.3 Local Provisions for Planning District 25

(a) Multiple family buildings in the "RMF-6, Multiple Family" district may be erected to a maximum height or seven (7) habitable stories. The required side yards shall be increased by 4-feet for each additional story over two (2) habitable stories. The maximum impervious surface ratio shall not exceed .50.

(b) No PRD development is allowed to exceed maximum height requirements by more than 10-feet or 1 story.

(c) Off-street Parking.

As a supplement to Section 15.2, Parking Schedule, the following off-street parking requirements shall be applicable to single family dwellings and two-family dwellings:

1. Up to Four (4) Bedrooms: Two (2) spaces per dwelling unit.

2. Up to Six (6) Bedrooms: Three (3) spaces per dwelling unit.

3. Seven (7) Bedrooms and more: Four (4) spaces per dwelling unit, plus one (1) additional space per dwelling unit for every bedroom over eight (8).

(d) HDR, High Density Residential District, shall not be available in Planning District 25.

(e) The maximum height of single family and two-family structures shall be limited to two (2) habitable stories.

(f) Dune Walkovers.

1. As used in this section, the following definition shall apply:

Dune walkover. A raised walkway constructed for the purpose of protecting the beach and dune system between mean high tide and the construction control (CCL) line from damage that may result from anticipated pedestrian traffic to the beach, and which is no more than six (6) feet in width for multiple family/commercial/public structures, no more than four (4) feet in width for single family/two family structures, constructed without roof or walls, elevated at least one (1) foot above the dune, and extends seaward of the vegetation line.

2. Site Plan Approval.

A. A site plan approval which meets the requirements of Section 18.2, as well as the standards found herein, shall be submitted to and approved by the Zoning Administrator, or his/her designee, prior to the issuance of a building permit.

B. A recent survey showing the location, size and alignment of all proposed structures and the ADEM CCL and property lines shall be submitted along with the required site plan approval application. Said survey shall be prepared and stamped by a Professional Land Surveyor registered in the State of Alabama.

3. A dune walkover shall be constructed to the following standards:

A. There shall be no more than one (1) dune walkover per parcel.

B. Dune walkovers shall begin at the existing ground level elevation of the principal landward structure.

C. The maximum width of the dune walkover structure shall be no more than four (4) feet for single family/two family structures and no more than six (6) feet for multiple family/commercial/public structures. Maximum widths shall be applicable to all sections of the dune walkover structure, including but not limited to steps, ramps, landings and decks.

D. The minimum elevation from the bottom of floor joists of the dune walkover shall be no less than one (1) foot and no more than three (3) feet above the maximum elevation of the dune system being traversed.

E. No vertical or horizontal structures shall be allowed above thirty-eight (38) inches from the walking surface, i.e., roofs, walls, pergolas, etc.

F. Handrails, if any, shall be no higher than thirty-six (36) to thirty-eight (38) inches above the walking service for Single and Two Family Dwellings.

G. The dune walkover shall terminate ten (10) feet seaward of the vegetative line of the dune.

H. The location and length of the dune walkover is to be coordinated through and approved by the delegated authority of the Alabama Department of Environmental Management (ADEM) and the U.S. Fish and Wildlife Service.

I. No lighting shall be utilized on a dune walkover.

J. No dune walkover construction shall occur during the sea turtle nesting season from May 1 through November 1.

(g) Planning and Zoning Considerations in the Coastal High Hazard Area and Flood Hazard Areas in Planning District 25 (Fort Morgan).

1. Purpose:

A. Fort Morgan contains areas of significant natural beauty, history and unique wildlife. With such assets comes unique vulnerabilities. These vulnerabilities include, but are not limited to, tropical storm damage, flooding, wetland habitat, protected or endangered species, Native American archeological sites and National Historic Landmarks. Further, Act 2015-411, which amends Act 91-719, requires "In performing its functions related to planning and zoning, the Baldwin County Planning and Zoning Commission and the Baldwin County Commission shall specifically consider the historical nature of existing development within the Fort Morgan District, the historical and environmental character of the district, and the unique needs of the district related to hurricane safety and infrastructure for potential evacuation."

B. The most imminent threat is to property and lives subject to tropical storm events. The Coastal High Hazard Area (CHHA) is an area particularly vulnerable to the effects of damage from tropical storm events. The CHHA contains the most vulnerable areas of Fort Morgan and thus protection and oversite is needed and justified to protect future populations and property.

2. Objectives of these considerations in the Coastal High Hazard Area (CHHA) and Flood Hazard Area (FHA) are to:

   A. Limit the amount of infrastructure, both private and public in the Coastal High Hazard Area (CHHA)

   B. Limit the magnitude of public loss and mitigation of private loss and investment

   C. Increase the degree of protection to private property and lives of residents and visitors in storm events

   D. Reduce the risk and exposure of lives and property during storm events

3. Coastal High-Hazard Area Defined:

   The Coastal High-Hazard Area (CHHA) of Baldwin County is: "the area below the elevation of the Category 1 Storm Surge Line as established by a Sea, Lake, and Overland Surges from Hurricane (SLOSH) computerized storm surge model." Baldwin County will use the CHHA Map, provided by National Oceanic and Atmospheric Administration (NOAA), as the delineation of the CHHA and will use the most current SLOSH model to maintain the map. Additionally, in the interest of public safety regarding ingress and egress from and through said hazard areas, any "enclaves" which are not located in either the flood zone or Category 1 storm surge areas, but are surrounded by such hazard areas, will be considered as part of the Coastal Hazard Area. The CHHA Map is attached herein as attachment "A". Because the boundaries of the CHHA are subject to change, site design and building typology in the CHHA will be based on the CHHA line in effect at the time of development. In addition to the CHHA, areas subject to this consideration also

are V-Zones[1] and Coastal Barrier Resources System[2] (CBRS) areas as indicated on the FEMA Flood Maps.

http://noaa.maps.arcgis.com/apps/MapSeries/index.html?appid=d9ed7904dbec441a9c4dd7b277935fad&entry=1

https://alabamaflood.com/map

4. Rezoning Considerations in the Coastal High Hazard Area of Fort Morgan:

   Increases in density and intensity through rezoning or similar land use changes in the Coastal High Hazard Area (CHHA) in Fort Morgan are prohibited.

5. Rezoning Considerations in Flood Hazard Areas of Fort Morgan:

   Increases in density and intensity through rezoning or similar land use changes in the Flood Hazard Areas (FHA) in Fort Morgan should be limited to low density single family uses.

   https://alabamaflood.com/map

6. Development Exemptions and Clustering

   Lots of record, as defined by the Baldwin County Subdivision Regulations, may be developed in accordance with subdivision regulations. When properties contain either CHHA or FHA areas, clustering of development through Planned developments, away from areas of highest hazard exposure is

[1] According to FEMA and the National Flood Insurance Program, any building located in an A or V zone is considered to be in a Special Flood Hazard Area, and is lower than the Base Flood Elevation. V zones are the most hazardous of the Special Flood Hazard Areas. V zones generally include the first row of beachfront properties. The hazards in these areas are increased because of wave velocity - hence the V designation. Flood insurance is mandatory in V zone areas.

[2] The Coastal Barrier Resources Act (CBRA) of 1982 established the John H. Chafee Coastal Barrier Resources System (CBRS), a defined set of coastal barrier units located along the Atlantic, Gulf of Mexico, Great Lakes, Puerto Rico, and U.S. Virgin Island coasts. These areas are delineated on a set of maps that are enacted into law by Congress and maintained by the Department of the Interior through the U.S. Fish and Wildlife Service (Service). Most new Federal expenditures and financial assistance are prohibited within the CBRS. The prohibition that is most significant to homeowners and insurance agents is the denial of Federal flood insurance through the National Flood Insurance Program (NFIP) for new or substantially improved structures within the CBRS. CBRA does not prevent development, and it imposes no restrictions on development conducted with non-Federal funds. Congress enacted CBRA to minimize the loss of human life, wasteful Federal expenditures, and the damage to natural resources associated with coastal barriers.

Tab 6

D. The minimum elevation from the bottom of floor joists of the dune walkover shall be no less than one (1) foot and no more than three (3) feet above the maximum elevation of the dune system being traversed.

E. No vertical or horizontal structures shall be allowed above thirty-eight (38) inches from the walking surface, i.e., roofs, walls, pergolas, etc.

F. Handrails, if any, shall be no higher than thirty-six (36) to thirty-eight (38) inches above the walking service for Single and Two Family Dwellings.

G. The dune walkover shall terminate ten (10) feet seaward of the vegetative line of the dune.

H. The location and length of the dune walkover is to be coordinated through and approved by the delegated authority of the Alabama Department of Environmental Management (ADEM) and the U.S. Fish and Wildlife Service.

I. No lighting shall be utilized on a dune walkover.

J. No dune walkover construction shall occur during the sea turtle nesting season from May 1 through November 1.

(g) Planning and Zoning Considerations in the Coastal High Hazard Area and Flood Hazard Areas in Planning District 25 (Fort Morgan).

1. Purpose:

A. Fort Morgan contains areas of significant natural beauty, history and unique wildlife. With such assets comes unique vulnerabilities. These vulnerabilities include, but are not limited to, tropical storm damage, flooding, wetland habitat, protected or endangered species, Native American archeological sites and National Historic Landmarks. Further, Act 2015-411, which amends Act 91-719, requires "In performing its functions related to planning and zoning, the Baldwin County Planning and Zoning Commission and the Baldwin County Commission shall specifically consider the historical nature of existing development within the Fort Morgan District, the historical and environmental character of the district, and the unique needs of the district related to hurricane safety and infrastructure for potential evacuation."

B. The most imminent threat is to property and lives subject to tropical storm events. The Coastal High Hazard Area (CHHA) is an area particularly vulnerable to the effects of damage from tropical storm events. The CHHA contains the most vulnerable areas of Fort Morgan and thus protection and oversite is needed and justified to protect future populations and property.

2. Objectives of these considerations in the Coastal High Hazard Area (CHHA) and Flood Hazard Area (FHA) are to:

A. Limit the amount of infrastructure, both private and public in the Coastal High Hazard Area (CHHA)

B. Limit the magnitude of public loss and mitigation of private loss and investment

C. Increase the degree of protection to private property and lives of residents and visitors in storm events

D. Reduce the risk and exposure of lives and property during storm events

3. Coastal High-Hazard Area Defined:

The Coastal High-Hazard Area (CHHA) of Baldwin County is: "the area below the elevation of the Category 1 Storm Surge Line as established by a Sea, Lake, and Overland Surges from Hurricane (SLOSH) computerized storm surge model." Baldwin County will use the CHHA Map, provided by National Oceanic and Atmospheric Administration (NOAA), as the delineation of the CHHA and will use the most current SLOSH model to maintain the map. Additionally, in the interest of public safety regarding ingress and egress from and through said hazard areas, any "enclaves" which are not located in either the flood zone or Category 1 storm surge areas, but are surrounded by such hazard areas, will be considered as part of the Coastal Hazard Area. The CHHA Map is attached herein as attachment "A". Because the boundaries of the CHHA are subject to change, site design and building typology in the CHHA will be based on the CHHA line in effect at the time of development. In addition to the CHHA, areas subject to this consideration also

are V-Zones[1] and Coastal Barrier Resources System[2] (CBRS) areas as indicated on the FEMA Flood Maps.

http://noaa.maps.arcgis.com/apps/MapSeries/index.html?appid=d9ed7904dbec441a9c4dd7b277935fad&entry=1

https://alabamaflood.com/map

4. Rezoning Considerations in the Coastal High Hazard Area of Fort Morgan:

   Increases in density and intensity through rezoning or similar land use changes in the Coastal High Hazard Area (CHHA) in Fort Morgan are prohibited.

5. Rezoning Considerations in Flood Hazard Areas of Fort Morgan:

   Increases in density and intensity through rezoning or similar land use changes in the Flood Hazard Areas (FHA) in Fort Morgan should be limited to low density single family uses.

   https://alabamaflood.com/map

6. Development Exemptions and Clustering

   Lots of record, as defined by the Baldwin County Subdivision Regulations, may be developed in accordance with subdivision regulations. When properties contain either CHHA or FHA areas, clustering of development through Planned developments, away from areas of highest hazard exposure is

[1] According to FEMA and the National Flood Insurance Program, any building located in an A or V zone is considered to be in a Special Flood Hazard Area, and is lower than the Base Flood Elevation. V zones are the most hazardous of the Special Flood Hazard Areas. V zones generally include the first row of beachfront properties. The hazards in these areas are increased because of wave velocity - hence the V designation. Flood insurance is mandatory in V zone areas.

[2] The Coastal Barrier Resources Act (CBRA) of 1982 established the John H. Chafee Coastal Barrier Resources System (CBRS), a defined set of coastal barrier units located along the Atlantic, Gulf of Mexico, Great Lakes, Puerto Rico, and U.S. Virgin Island coasts. These areas are delineated on a set of maps that are enacted into law by Congress and maintained by the Department of the Interior through the U.S. Fish and Wildlife Service (Service). Most new Federal expenditures and financial assistance are prohibited within the CBRS. The prohibition that is most significant to homeowners and insurance agents is the denial of Federal flood insurance through the National Flood Insurance Program (NFIP) for new or substantially improved structures within the CBRS. CBRA does not prevent development, and it imposes no restrictions on development conducted with non-Federal funds. Congress enacted CBRA to minimize the loss of human life, wasteful Federal expenditures, and the damage to natural resources associated with coastal barriers.

Tab 7-A

(b) Decks and unroofed porches may project into a required front yard for a distance not to exceed 5-feet and a required rear yard not to exceed 10-feet.

(c) Uncovered steps and handicap ramps may project into a required front, or side yard for a distance not to exceed 5-feet and a rear yard not to exceed 10-feet.

(d) On a corner lot, the side yard from the side lot line which abuts a street shall be a minimum of 20-feet.

(e) Where a subdivision has been approved by the Planning Commission in accordance with the *Baldwin County Subdivision Regulations* prior to the enacting of zoning ordinances with front, rear or side yard setbacks different than the minimums required herein, the setbacks as recorded on the plat shall apply.

(f) All buildings or structures located within coastal high hazard areas (V-zones) shall be located 50-feet landward of the reach of the mean high tide.

Section 12.6 Coastal Areas

Areas of Baldwin County lying seaward of the continuous 10-foot contour are subject to the requirements of the Alabama Coastal Area Management Program as defined in the Alabama Coastal Area Management Plan (ACAMP) and to the ADEM Division 8 Administrative Code.

Section 12.7 Adult Entertainment

Adult entertainment establishments shall comply with the provisions of Act No. 96-458 of the Legislature of Alabama which prohibits certain types of entertainment, attire, and conduct, having certain nudity, or sexual conduct, or the depiction or simulation thereof, upon the premises of an establishment within the unincorporated areas of Baldwin County, Alabama, which is licensed to sell, serve, or dispense alcoholic beverages or otherwise allow the consumption of alcoholic beverages on the premises.

Section 12.8 Highway Construction Setbacks

In accordance with Act No. 94-572 of the Legislature of Alabama enacted April 21, 1994, the following construction setbacks shall apply from any state or county road or highway:

(a) *Principal arterials.* Principal arterials require a setback of 125-feet from the centerline of the right-of-way.

Section 12.3 Utility Structures

Utility structures, including, but not limited to, poles, wires, cross arms, transformers attached to poles, guy wires, insulators, conduits and other facilities necessary for the transmission or distribution of electric power or to provide telephone or telegraph service and pipe lines, vents, valves, hydrants, regulators, meters and other facilities necessary for the transmission or distribution of gas, oil, water or other fluids, may be constructed, erected, repaired, maintained, or replaced within any district in Baldwin County. This is not to be construed to include transportation, communication and utility uses as herein defined.

Section 12.4 Height Modifications

12.4.1 The height limits for the various districts shall not apply to the following structures not used for human habitation: church spires, belfries, cupolas, elevator penthouses, mechanical penthouses or domes, provided that such features are limited to that height necessary for their proper functioning. Further, the height limits for the various districts shall not apply to chimneys, ventilators, skylights, water tanks, parapet walls, cornices, radio and television transmitting and receiving antennas, telecommunications towers, or necessary mechanical appurtenances usually carried above the roof level, provided that such features are limited to that height necessary for their proper functioning.

12.4.2 Public, semipublic or public service buildings, including but not limited to hospitals, schools and churches, when permitted in a district with height limitations of less than 60-feet, may be erected to a maximum height of 60-feet, provided the side yards are increased by one foot for each foot of additional building height above the height limitation for the district in which the building is located.

Section 12.5 Yard Requirements

12.5.1 Every part of a required yard or court shall be open from its lowest point to the sky unobstructed, except for the ordinary projection of sills, cornices, buttresses, ornamental features, chimneys, flues, and eaves, provided such projections shall not extend more than 2-feet beyond the yard area requirements. (For additional provisions see *Section 22.2, Definitions* "Accessory Structure" and "Structure")

12.5.2 Yard requirements shall be modified subject to the following conditions:

(a) Through lots shall provide the required front yard on each street.

Tab 7-B

§ 5.2 General Requirements

§ 5.2.1 Plats Straddling Jurisdictional Boundaries

Whenever access to a subdivision is required across land in another local government planning jurisdiction, the Baldwin County Planning and Zoning Commission may request assurance from the County Engineer, or his/her designee, or other appropriate official, that the access road is adequately improved as per Section 5.5.7, or that surety has been duly executed and is sufficient in amount to assure the construction of the access road.

§ 5.2.2 Wetlands and Waterways

Lots may be platted only where sufficient upland areas exist to provide a building site for the principal structure and necessary ancillary facilities, unless the purpose of the lot is for conservation and no development or building shall occur. Fill may be used only where necessary to provide access to lots where approval for such fill has been received from the Corps of Engineers and other appropriate governmental agencies.

(a) Wetland and/or Stream Delineation - If a proposed subdivision contains wetlands or a stream or is within thirty feet of wetlands or a stream, as shown on the Generalized Wetland Map, the applicant must perform a wetland and/or stream delineation showing jurisdictional and non-jurisdictional wetlands and/or streams within the subdivision boundaries. The wetland delineation shall be performed by a professional wetland delineator .

(b) Jurisdiction Determination and ADEM Permitting

(i) Jurisdictional Determination and USACE 404 Permit - If jurisdictional wetlands are identified in the required delineation and proposed to be filled to provide necessary access to lots, the wetlands shall be subject to Section 404(b)(1) guidelines concerning fill material disposal into jurisdictional wetlands and a USACE permit shall be required. A USACE Jurisdictional Determination shall be submitted with the application and Preliminary Plat approval shall be contingent on receipt of the applicable USACE permits.

(ii) Alabama Department of Environmental Management Permitting

(1) In coastal areas, an ADEM Coastal Area Management Program (Division 335-8) permit may also be required. If an ADEM permit is required, Preliminary Plat approval shall be contingent on receipt of the applicable permit.

(2) Wetlands contained on any property parcel located wholly or partially in the coastal area of Alabama are subject to the regulatory requirements of ADEM Admin. Code 335-8-2-.02 including those wetlands determined to be "non-jurisdictional" by the U.S. Army Corps of Engineers. The term "coastal area of Alabama" generally means the waters and adjacent shorelands lying seaward of the continuous 10-foot contour. Applicants are responsible for communicating with ADEM to determine whether or not a proposed development lies within the coastal area of Alabama.

(iii) If wetland fill and/or stream modification is not proposed, the Baldwin County Planning Director may, at his or her discretion, require the applicant to submit an USACE Jurisdictional Determination after documenting the following:

1. A site visit by a Baldwin County Planning and Zoning Staff member revealed potential wetlands on the site that differ significantly from the delineation supplied by the Applicant;
2. A review of the Generalized Wetland Map reveals potential wetlands on the site that differ substantially from the delineation supplied by the Applicant; or
3. Knowledge of historic stormwater problems in and around the site area.

When a jurisdictional determination is deemed necessary above in this subsection (ii), the Planning Director may, in lieu of a jurisdictional determination, accept a second wetland delineation prepared by a professional wetland delineator who is not affiliated with the specialist responsible for the original delineation.

(c) Filling of Existing Stormwater Management Areas – Where a proposed subdivision contains existing stormwater management areas, which may include non-jurisdictional wetlands, hydric soil areas, existing water features, ditches, etc., that contribute to the stormwater management of the site, the existing stormwater management areas shall not be filled unless comparable and equivalent stormwater management is provided as part of the development and approved by the County Engineer.

The Planning and Zoning Department shall not regulate or protect non-jurisdictional wetlands when comparable and equivalent stormwater management is to be provided.

(d) Display of Wetlands and Existing Stormwater Management Areas on Plat or Site Plan

(i) For jurisdictional wetlands not proposed to be filled, the Applicant shall display a thirty-foot wetland building setback, within which a minimum 15foot natural buffer shall be provided upland of all jurisdictional wetlands. Wetlands to be filled shall be displayed as "To be filled" along with USACE permit number.

(ii) Existing stormwater management areas, which may include non-jurisdictional wetlands, hydric soil areas, existing water features, ditches, etc., that contribute to the stormwater management of the site and are not proposed to be replaced with comparable and equivalent stormwater management shall be protected with a 5-foot natural buffer and a note indicating that the area shall not be filled or modified.

(e) In a minor subdivision (five lots or less with no infrastructure) where no development is proposed, in lieu of a wetland and/or stream delineation and USACE Jurisdictional Determination, the Planning Director may allow the Applicant to display on the plat those wetlands from the Generalized Wetland

Map (provided by the Baldwin County Planning and Zoning Department) along with a 50-foot wetland building setback, and the following plat note: "Any future subdivision or development of lots shall comply with the wetland requirements of the Subdivision Regulations or Zoning Ordinance applicable at the time of such future subdivision or development, which may include completing a wetland delineation and USACE Jurisdictional Determination."

(f) Display of Waterways on the Plat or Site Plan – For jurisdictional streams, the Applicant shall display a thirty-foot minimum natural buffer from top of bank on both sides of the waterway. When wetlands are adjacent to a stream, the stricter (most protective) of the two setback and/or buffer requirements shall apply. These buffers shall be flagged prior to project implementation and protected by appropriate measures during all construction phases. No development other than for recreational purposes shall take place within the waterway natural buffer.

§ 5.2.3 Subdivision Name

The proposed name of the subdivision shall not duplicate, or too closely approximate phonetically, the name of any other subdivision in the area covered by these regulations. The Baldwin County Planning and Zoning Commission shall have final authority to designate the name of the subdivision which shall be determined at the time of Preliminary Plat approval.

§ 5.2.4 Maintenance of Waterbodies,Watercourses, and Impoundments

(a) If a tract being subdivided contains a water body, or portion thereof, the ownership of and responsibility for safe maintenance of the water body shall be such that it will not become a County responsibility. No public roadways will be approved which provide access across dams.

(b) Dams or impoundments including impoundment embankments and the entire spillway and outlet structure along with access at least 20 feet in width to each end of the embankment and outlet structure shall be retained in a common area. Maintenance of such structures shall be the responsibility of the developer or property owner's association. Under no circumstances shall Baldwin County assume such maintenance responsibility.

§ 5.2.5 Utilities

All existing and proposed utility facilities throughout the subdivision shall be shown on the Construction Plans required by Section 4.5.6 of these Regulations. All pressurized underground utility lines located under pavement shall be encased, except for service lines less than 2" in diameter. Minimum cover must be provided over all utility lines as required by the County Engineer. All proposed utilities shall comply with the provisions of the Baldwin County Highway Department Utility Manual, as the same may be amended.

(a) *Water System.*

(1)*Subdivisions with Density Greater than 2 Units per Acre.* Every subdivision with lot density greater than 2 units per acre shall connect to an existing public water supply system capable of providing both domestic water use and fire protection when the existing system borders the subdivision or the system is within one half mile of the subject property and the utility has submitted a statement that they are willing and able to provide service.

(2) *Subdivisions with Density of Less than or Equal to 2 Units per Acre.* Every subdivision with lot density less than or equal to 2 units per acre shall connect to an existing public water supply

system capable of providing both domestic water use and fire protection when the existing system borders the subdivision and the utility has submitted a statement that they are willing and able to provide service.

(3) Where public water service exists, or is installed, fire protection shall be provided for all proposed lots. The water supply volumes and pressures shall be sufficient to serve the subdivision. The design engineer shall submit written report and calculations that include recent flow rate tests of the existing water system that verify the adequacy of the fire protection being provided. A letter must be submitted from the local fire protection authority, indicating that the proposed volumes and pressures are sufficient. If adequate fire flows do not exist and cannot be provided, the minimum lot size must be increased as though public water is not being provided as per Section 5.4(a). The following standards shall apply to the fire protection system:

- Fire hydrants shall be spaced no more than 500 feet apart along each street;
- A fire hydrant shall be located within 500 feet of all proposed lots;
- A fire hydrant shall be provided within 100 feet of where all new roads intersect with existing county roads;
- All fire hydrants shall have a minimum barrel size of 5 inches;
- The water system shall meet all requirements of the current ISO Fire Suppression Rating Schedule Paragraph 340, 614 and 620.A for obtaining full credit.

(b) *Sanitary Sewer System.*

1) Connection to a sanitary sewer system is required only when necessary to meet the lot size requirements of Section 5.4(a) and when necessary to comply with the utility requirements as specified in the Matrix shown in Section 5.1.1 of these regulations. When sanitary sewer is installed, sewer stub-outs, shall be provided for each lot and shall extend to the property line of the said lot.

(2) If no sanitary sewer system is provided, on-site disposal systems may be used after approval is received from the Health Department.

(c) Provision of Broadband Service

If required in Section 5.1.1 of these regulations, the Applicant shall ensure that reliable, high-speed broadband connectivity (minimum 25 megabits per second download speed and 25 megabits per second upload speed) is made available at each lot in the development. The requirements of this section can be accomplished during the Preliminary Plat approval by provision of a letter from a broadband provider certifying that they are willing and able to provide marketable service at the minimum required speeds to each lot in the subdivision. Upon a showing by the Applicant that 1) no broadband providers are willing to provide service to the proposed subdivision or 2) that costs associated with the provision of the broadband service are unreasonable, the Planning Commission may waive the requirements of this section. A letter from the Applicant explaining the need for the waiver shall be made part of the file.

The requirements of this section can be accomplished during the Final Plat approval by provision of a letter from a broadband provider certifying that marketable broadband service, at the minimum required speeds, is available at at least one lot in the subdivision. The Applicant shall act in good faith to coordinate with the broadband provider for the installation of the required infrastructure during the construction phase. Upon a showing by the Applicant that the broadband provider failed to install the required broadband infrastructure or failed to provide the required letter, despite the good faith efforts of the Applicant, the Planning Director may waive the requirements of this section as it related to the Final

Tab 8-A

STATE OF ALABAMA)
COUNTY OF BALDWIN)

RESOLUTION #2015- 011

ESTABLISHING BEACH AND DUNE PROTECTION AND MANAGEMENT REGULATIONS FOR BALDWIN COUNTY, ALABAMA.

WHEREAS, the Baldwin County Commission is committed to the effective management and protection of Baldwin County's beaches and dune resources as per Alabama Department of Environmental Management (ADEM) Admin Code R, 335-8-2.08 Construction and Other Activities on Gulf Front Beach and Dunes; and

WHEREAS, the health, safety and general welfare of Baldwin County, Alabama, and its economy is directly related to the health of the County's beach and dune resources, and the Baldwin County Commission desires to adopt this Beach and Dune Protection and Management Oddinance.

SECTION 1: DEFINITIONS

a. "agency" means any unit, department, or office of federal, state or local government, including subdivisions thereof.

b. "Alabama Coastal Area Management Program" or "ACAMP" (see definition of "management program").

c. "beach" means a sandy shoreline area characterized by low relief, generally of gentle slope, and some vegetation. The beach extends from the waterline to a change in physiographic form such as a dune or bluff, a change in sediment type, such as clay from sand, and/or a change in vegetation type. Gulf beaches are those sand beaches of the mainland and islands in Alabama which are subjected to the direct wave action of the Gulf of Mexico. The upper limit of Gulf beaches is usually a transition from halophytic, succulent, prostrate plant forms such as Hydrocotyle bonariensis (pennywort), Cakile edentula (sea rocket), Iva imbricata (marsh or seashore elder), and Ipomoea stolonifera (seaside morning

glory) to a zone occupied by grasses, shrubs, and the same prostrate forms mentioned above.

d. "construction control line" or "CCL" means the straight line segments formed by connecting plane coordinates (x = 339,869.380 feet; y = 82,413.826 feet) in the vicinity of monument BC-0 to (x = 343,833.777 feet; y = 82,946.329 feet) in the vicinity of monument BC-1 to (x = 344,439.935 feet; y = 83,027.749 feet) in the vicinity of monument BC-2 to (x = 345,229.900 feet; y = 83,267.806 feet) in the vicinity of monument BC-3 to (x = 346,070.573 feet; y = 83,318.732 feet) in the vicinity of monument BC-4 to (x = 347,947.400 feet; y = 83,542.163 feet) in the vicinity of monument BC-5 to (x = 353,678.481 feet; y = 84,097.590 feet) in the vicinity of monument BC-6 to (x = 358,262.949 feet; y = 84,424.908 feet) in the vicinity of monument BC-7 to (x = 361,952.301 feet; y = 84,532.314 feet) in the vicinity of monument BC-7A to (x = 367,652.468 feet; y = 84,352.329 feet) in the vicinity of monument BC-8 to (x = 370,294.079 feet; y = 84,232.401 feet) in the vicinity of monument BC-9 to (x = 370,337.309 feet; y = 84,095.345 feet) in the vicinity of monument BC-10 to (x = 372,723.136 feet; y = 84,013.940 feet) in the vicinity of monument BC-11 to (x = 374,515.213 feet; y = 84,209.778 feet) in the vicinity of monument BC-12 to (x = 381,454.710 feet; y = 83,545.945 feet) in the vicinity of monument BC-13 to (x = 382,099.449 feet; y = 83,460.299 feet) in the vicinity of monument BC-14 to (x = 384,804.496 feet; y = 83,494.181 feet) in the vicinity of monument BC-15 to (x = 388,949.030 feet; y = 83,361.769 feet) in the vicinity of monument BC-16 to (x = 394,023.606 feet; y = 83,282.288 feet) in the vicinity of monument BC-17 to (x = 394,115.430 feet; y = 83,209.569 feet) in the vicinity of monument BC-18 to (x = 396,624.613 feet; y = 83,299.904 feet) in the vicinity of monument BC-19;and

the straight line segments formed by connecting plane coordinates (x = 445,081.633 feet; y = 90,661.100 feet) in the vicinity of monument BC-20 to (x = 445,413.290 feet; y = 90,747.174 feet) in the vicinity of monument BC-21 to (x = 446,891.053; y = 90,727.783 feet) in the vicinity of monument BC-22 to (x = 447,623.180 feet; y = 90,791.160 feet) in the vicinity of monument BC-23 to (x =

448,325.619 feet; y = 90,757.219 feet) in the vicinity of monument BC-24 to (x = 449,391.117 feet; y = 90,946.878 feet) in the vicinity of monument BC-25 to (x = 449,929.915 feet; y = 91,035.782 feet) in the vicinity of monument BC-26 to (x = 451,612.654 feet; y = 91,469.061 feet) in the vicinity of monument BC-27 to (x = 452,665.982 feet; y = 91,901.813 feet) in the vicinity of monument BC-28 to (x = 454,188.522 feet; y = 92,349.654 feet) in the vicinity of monument BC-29 to (x = 455,478.358 feet; y = 92,701.191 feet) in the vicinity of monument BC-30 to (x = 456,856.032 feet; y = 92,874.036 feet) in the vicinity of monument BC-31 to (x = 461,865.947 feet; y = 94,391.131 feet) in the vicinity of monument BC-32 to (x = 463,992.195 feet; y = 94,935.555 feet) in the vicinity of monument BC-33 to (x = 466,038.578 feet; y = 95,534.410 feet) in the vicinity of monument BC-34 to (x = 466,816.191 feet; y = 95,695.196 feet) in the vicinity of monument BC-35 to (x = 467,195.619 feet; y = 95,898.951 feet) in the vicinity of monument BC-36 to (x = 469,282.178 feet; y = 96,648.946 feet) in the vicinity of monument BC-37 to (x = 475,472.539 feet; y = 98,380.947 feet) in the vicinity of monument BC-38 to (x = 476,304.695 feet; y = 98,579.846 feet) in the vicinity of monument BC-39 to (x = 476,948.092 feet; y = 98,722.141 feet) in the vicinity of monument BC-40 to (x = 479,249.115 feet; y = 99,050.021 feet) in the vicinity of monument BC-41 to (x = 479,434.293 feet; y = 99,057.019 feet) in the vicinity of monument BC-42 to (x = 479,907.870 feet; y = 99,097.293 feet) in the vicinity of monument BC-43 to (x = 480,904.364 feet; y = 99,236.552 feet) in the vicinity of monument BC-44 to (x = 488,825.140 feet; y = 100,844.567 feet) in the vicinity of monument BC-45 to (x = 489,712.334 feet; y = 101,001.701 feet) in the vicinity of monument BC-45A to (x = 491,026.916 feet; y = **101,322.132 feet) in the vicinity of monument** BC-46 to (x = 492,439.303 feet: y = 101,623.576 feet) in the vicinity of monument BC-47 to (x = 494,213.397 feet; y = 101,981.671 feet) in the vicinity of monument BC-48.

e. All references to monument numbers in "d" above are noted for convenience only. All official submissions to the Department regarding the "construction control line" must be based upon official state plane coordinates as determined by a registered surveyor.

f. "Department" means the Baldwin County Coastal Area Program

g. "Department approval" means the approval of the Department or the issuance of any Department permit.

h. "dune" (see definition of primary dune system).

i. "dune walkover" means a raised walkway constructed for the purpose of protecting the beach and dune system between mean high tide and the construction control line from damage that may result from anticipated pedestrian traffic to the beach and which is no more than six feet in width, constructed without roof or walls, elevated at least one foot above the dune, and extends seaward of the seaward vegetation line.

j. "endangered species" means any species, including subspecies and varieties, that are in danger of extinction throughout all or a significant portion of their range in Alabama. Endangered species are those whose prospects for survival are in immediate jeopardy and which must have help or extinction or extirpation from Alabama will probably follow. These species are defined by Code of Federal Regulations 50 CFR 17.11 and 17.12, January 1, 1989, as amended and Alabama Act No. 82-424.

k. "existing structure" means a structure the construction of which was initiated prior to October 9, 1985, and for which all required state, local and federal authorizations were obtained prior to October 9, 1985.

l. "footprint" means the ground area covered by a structure when viewed from the top or plan view.

m. "habitable structure" means any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes.

n. "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the State in accordance with the provisions of Chapter 7 of Title 9, Code of Alabama 1975, as amended, setting forth objectives, policies and standards to guide public and private users of lands and waters in the coastal area.

o. "minor structure" means that subset of structures including, but not limited to, a deck, porch, platform, ramp, non-asphaltic parking area, sunshelter, gazebo, or other like object which is not habitable, including sand fences or dune walkovers constructed for the purpose of dune protection.

p. "new structure" means any structure which is not an existing structure.

q. "non-regulated use" means a use which is subject to the management program and which does not require a state permit or which is not required by federal law to be consistent with the management program and may have a significant impact on coastal resources. Non-regulated uses may include, but are not limited to construction on beaches and dunes, and other uses determined by the Department.

r. "person" means any and all persons, natural or artificial, including but not limited to, any individual, partnership, association, society, joint stock company, firm, company, corporation, institution, trust, estate, or other legal entity or business organization or any state or local governmental entity and any successor of the foregoing.

s. "primary dune system" means a ridge or series of ridges of unconsolidated and usually mobile sands lying landward of the upper limit of Gulf beaches which serves as the principal defense against storm wave attack. Vegetatively, this primary protective dune can be characterized by Uniola paniculata (sea oats), Spartina patens (saltmeadow cordgrass), Panicum amarulum (dune panicgrass), Distichlis spicata (saltgrass), Solidago paucifloscculosa (seaside goldenrod),

Hydrocotyle bonariensis (pennywort), and Ipomoea stolonifera (seaside morning glory).

t. "significant impact" means the result of any activity carried out by a person which is known to have more than a negligible adverse effect on the coastal area.

u. "structure" includes but is not limited to a motel, condominium, house, building, bulkhead, deck, pool, parking lot, gazebo or other object the whole or parts of which are arranged by human action including any substantial improvement to an existing structure. This does not include water, oil, gas, electricity, or sewage pipelines or conduits located beneath the surface of lands.

v. "substantial improvement" means

1. Any extension, enlargement, additions or expansion to any structure which increases the height or footprint of the structure and is subject to local building ordinances; or

2. Any repair, reconstruction or improvement of a structure, the cost of which equals or exceeds 50 percent of the fair market value of the structure, either:
(i) before the repair, reconstruction or improvement is started; or

(ii) if the structure has been damaged and is being restored, before the damage occurred.

w. "use" means any human or corporate activity or result therefrom.

SECTION 2: GENERAL PROVISIONS

Construction and Other Activities on Gulf Front Beaches and Dunes.

(1) No person shall remove primary dune or beach sands and/or vegetation or otherwise alter the primary dune system, construct any new structure, or make any substantial improvement to any existing structure, on, beneath or above the surface of any land located between mean high tide and the construction control line within the Baldwin County permitting jurisdiction.

(2) No person shall construct any new structure on, beneath or above the surface of any state owned lands located in the following areas within the Baldwin County permitting jurisdiction:

(a) between mean high tide and a line originating at plane coordinate (x = 339,562.58 feet; y = 83,758.99 feet) and extending South 77° 59' 16" West in Baldwin County;

(b) between mean high tide and Alabama Highway 180 between plane abscissas (x = 399,562.58 feet) and (x = 343,883.777 feet); and

(c) in Sections 2 and 3 of Township 4 South, Range 33 West (Tallahassee Meridian) in Baldwin County.

(3) (a) No person shall construct any new structure or make any substantial improvement to an existing structure, on, beneath or above the surface of any parcel of land owned by a person if any portion of such parcel is intersected by the construction control line and within the permitting jurisdiction of Baldwin County without first having obtained a permit therefore from the Department.

(b) A permit for construction of a new structure may be issued if the Department is satisfied that the proposed structure is not on, beneath or above the surface of any lands located between mean high tide and the construction control line. Dune walkovers may be permissible provided that the applicant notify the Department and request a review to determine if the use is subject to the permitting procedures of this ordinance.

(c) An application for a permit to construct a single family dwelling or duplex pursuant to this rule shall contain:

1. a legal description of the property on which the structure is proposed, as well as the street address;

2. an area map showing the location of the property and proposed structure in relation to roads and other recognized landmarks;

3. a survey of the property and site plan prepared by a duly licensed land surveyor of the State of Alabama showing the location of the

construction control line, as determined from the state plane coordinates, the distance from the nearest construction control line monument to the lot, and the location and dimensions of all proposed structures;

4. a certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the project;

5. an identification of the water supply source and wastewater disposal system; and

6. such other information as the Department may reasonably require to assure compliance with the Department's rules and regulations.

(d) An application for a permit to construct a motel, hotel, condominium, or planned multi-unit development shall contain:

1. all information required by Section 3 (3)(c).

2. an "Environmental Impact and Natural Hazards Study" which will include, at a minimum, the following:

(i) wave height study addressing the flood hazard and erosion potential at the project site using eroded beach profiles for pre and post developed conditions;

(ii) location and delineation of velocity zone; and

(iii) analysis of the project's potential to significantly increase the likelihood that damage will occur from floods, hurricanes, or storms.

3. a "Beach and Dune Enhancement Plan" which includes, at a minimum, the following:

(i) fence placed along the CCL prior to and during construction activities to prevent material and equipment seaward of the line;

(ii) dune walkovers designed to accommodate the anticipated pedestrian traffic from the completed project;

(iii) the placement of sand fences;

(iv) planting of suitable natural vegetation in areas devoid of vegetation; and

(v) a maintenance program for the sand fences and plantings.

(4) Bulkheads, retaining walls, or similar structures shall not be permissible on Gulf beaches or primary dunes unless it can be demonstrated that:

(a) the bulkhead or retaining wall is landward of the CCL and it is necessary to protect and insure the structural integrity of an existing or previously permitted structure; and

(b) there are no other feasible non-structural alternatives, including retreat; and

(c) the structure is in conformance with the County's current building codes.

(5) No person shall operate a motorized vehicle on the beach or primary dune system, except as may be provided by the provisions of this Administrative Code.

(6) Beach cleaning equipment and safety and law enforcement vehicles operating on flat beach sand may be permissible, provided it is demonstrated to the satisfaction of the Department that:

(a) the equipment will not be operated within the primary dune system;

(b) a route of ingress and egress has been designated and approved by the Department;

(c) beach and dune vegetation will not be impacted or destroyed; and

(d) the equipment will be operated only in areas specified by the Department or its contractor.

(7) Septic tanks and other on-site sewage disposal systems shall not be permitted.

(8) The Department has determined that the following activities conducted seaward of the construction control line are not subject to the ACAMP: the placement of items associated with daily recreational use that are of a temporary and removable nature, including but not limited to, chairs, umbrellas, volleyball and similar equipment,

provided the posts are not permanently installed in the ground, and provided these items are removed from the beach prior to major storm events.

SECTION 3: VARIANCES

(1) The Department may grant a variance from any requirement of this Ordinance where the applicant therefore has demonstrated to the satisfaction of the Department that application of the requirement would be unduly restrictive or constitute a taking of property without payment of full compensation in accordance with the Constitution of the State of Alabama or of the United States. Any variance granted pursuant to this Rule may impose conditions and requirements to effectuate to the maximum extent the object of the rule for which a variance is sought without being unduly restrictive or constituting a taking of property without payment of full compensation in accordance with the Constitution of the State of Alabama or of the United States.

(2) An application for a variance pursuant to this rule shall contain, at a minimum, the following information:

(a) a completed application form and any information required for the type of use for which the variance is being sought;

(b) a certified letter indicating specifically from which regulation(s) a variance is sought;

(c) a legal argument and documentation which demonstrates that failure by the Department to grant a variance would constitute a taking of property without just compensation;

(d) a certified copy of the deed or other instrument under which the applicant claims title or possession of the property upon which the project will be carried out;

(e) a demonstration that the project has been planned so as to minimize impacts on the beach and dune area for which the regulation, from which a variance is sought, was adopted and a demonstration that no alternative sites or means to accomplish the desired activity are available; and

(f) other information as the Department or the Baldwin County Commission may require.

SECTION 4:PUBLIC NOTICE AND HEARING

(1) Prior to a decision on the issuance, modification or denial of any permit under this article, the Department shall publish a public notice of the proposed activity for the purpose of soliciting public comment thereon or shall require the applicant for the Department's permit to provide such notice in a manner prescribed by the Department. Said notice shall be published at least (15) days prior to issuance of the Department's decision.

(2) The Department may provide an opportunity for a public hearing on a proposed activity if any person has satisfactorily demonstrated that a relevant and significant issue cannot be effectively or fully communicated to the department in writing or a significant public interest would be served thereby. Any public hearing provided shall be announced at least thirty days prior to the hearing date.

(3) Public notice shall not be required for modifications, and permit extensions or renewals in which the impact is expected to be equal to or less than originally permitted. Editorial changes and permit name changes shall not be subject to the public notice requirements of this article.

SECTION 5: Appeals

Any person aggrieved by the Department's decision to issue, modify or deny any permits under this article may appeal such decision to the Department's Board of Adjustments as established by the County Commission.

BALDWIN COUNTY COMMISSION

CHARLES F. GRUBER
Chairman

10-7-14
DATE

ATTEST:

DAVID A.Z. BREWER
County Administrator

10-7-2024
DATE

Tab 8-B

MEMORANDUM OF AGREEMENT

Baldwin County Commission
and
Alabama Department of Environmental Management

For the purpose of delegating to the Baldwin County Commission the authority to issue Coastal Area Management Program Non-Regulated Use Permits for construction, repair, and reconstruction activities on properties intersected by the construction control line within the geographic jurisdiction of Baldwin County and to administer an enforcement program that enforces the requirements of the County's ordinance(s) pertaining to these activities.

WHEREAS, *Alabama Code§* 22-22A-1, et seq. (1975), states that is the intent of the Alabama State legislature to recognize the unique characteristics of the Alabama coastal region and to provide for its protection and enhancement though a continued coastal area program. The permitting, regulatory, and enforcement functions of the Alabama Coastal Area Management Program are assigned to ADEM; and

WHEREAS, ADEM Division 8 Coastal Program regulated Section 335-8-1-.12 provides that any local government issuing licenses or permits for uses which are subject to the management program may apply to the Department for local program delegation; and

WHEREAS, the Baldwin County Commission has requested delegation for ADEM Admin. Code R. 335-8-2.08 Construction and Other Activities on Gulf Front Beaches and Dunes; and

WHEREAS, the Baldwin County Commission has passed an ordinance regulating construction and other activities on gulf front beaches within the County's jurisdiction; and

WHEREAS, the Baldwin County Commission and the Alabama Department of Environmental Management agree to enter into a cooperative agreement to administer this permitting process which is of common interest and benefit to the citizens of Alabama and the citizens of Baldwin County. The implementation of this delegated program shall be subject to the following:

1. The Baldwin County Coastal Area Program will process permit applications, issue permits, monitor construction activities, and enforce the requirements of its ordinances pertaining to construction, repair, and reconstruction of structures on properties intersected by the Construction Control Line within geographic area for which the County has jurisdiction. The County will process variance applications and provide a right of appeal for a person aggrieved by a local government permit or variance decision.

2. Delegation shall begin on the date on which the Agreement is executed and shall expire five (5) years from the date of execution. Within six (6) months prior to the expiration of this agreement, the County must notify the Department of its intent to either request re-delegation or to allow it's delegated authority to expire. If re-delegation is requested, the County may continue to implement the requirements of this agreement, unless otherwise notified by this Department. Requests for re-delegation shall be made in accordance with ADEM Admin. Code 335-8-1-.12, or equivalent section promulgated hereafter.

3. As a delegated entity, the Baldwin County Coastal Area Program is entitled to financial support through contractual agreement with the State of Alabama to assist the County in its implementation of the delegated portions of this program.

4. The Alabama Department of Environmental Management commits to providing technical assistance to the Baldwin County Coastal Area Program. The County commits to implementation of its delegated authority in a manner consistent with Alabama's Coastal Area Management program and ADEM's Division 8 Regulations through the adoption and enforcement of one or more appropriate County ordinances, which are subject to prior review and comment by the ADEM as provided by Paragraph 7 below. The Baldwin County Coastal Area Program commits that it will not knowingly issue a permit under its ordinance or ordinances for any activity in the coastal area that the Alabama Department of Environmental Management finds to be inconsistent with the Alabama Coastal Area Management Program. Except to the extent the County receives specific written notification from the Alabama Department of Environmental Management that ADEM finds a particular interpretation or enforcement practice under the County's ordinance or ordinances to be inconsistent with the Alabama Coastal Area Management Program, it is mutually understood that the County will enforce its ordinance or ordinances in the manner the County interprets to be consistent with Alabama's Coastal Area Management Program and ADEM's Division 8 Regulations.

5. The Baldwin County Coastal Area Program agrees to submit to the Department upon publication a copy of the public notice for each permit application received for the construction, repair and reconstruction of structures on properties intersected by the Construction Control Line within the geographic area for which the County has jurisdiction

6. ADEM issues Development Greater Than 5 acres Coastal Use Permits for projects that are wholly or partially within the coastal area, greater than 5 acres in size, and meet at least one of the following criteria: the project has areas which could be or have been delineated as wetlands; the project is adjacent to coastal waters; or the project is intersected by the Construction Control Line. The delegate agrees not to issue any building permits, authorization and/or approval of any new commercial or residential development or subdivision of property if that permit, authorization, or approval meets the aforementioned criteria, prior to the applicant presenting documentation from the Department showing that all requirements of the ADEM Division 8 Coastal Program rules have been met.

7. The Baldwin County Coastal Area Program agrees to submit for ADEM review and comment any proposed ordinance or revision pertaining to this delegated program. ADEM shall be provided not less than 30 days to review and comment on the proposed changes, and the County shall provide that the 30 day review shall occur prior to any scheduled County final action on the matter. Passage of a proposed or revised ordinance, or implementation of an existing ordinance, that results in construction, repair, and/or reconstruction of structures that are inconsistent with Alabama's Coastal Area Management Program and ADEM's Division 8 regulations may result in loss of local delegation.

8. The Baldwin County Commission agrees that the Secretary of Commerce or any of his/her duly authorized representatives, the Attorney General of the State of Alabama or any of his/her duly authorized representatives, and the Director of ADEM or any of his/her duly authorized representatives, shall have access to and the right to audit, examine, and make excerpts or transcripts from any pertinent permit files, books, documents, papers, and records of the County related to the construction, repair and reconstruction of structures on properties intersected by the Construction Control Line within the geographic jurisdiction of the County. The Baldwin County Commission agrees to provide access to any or all permit files, documents, papers, records and directly pertinent books related to these activities.

9. Any reports, information, data, etc., given to or prepared or assembled by the Baldwin County Commission under this Agreement which the Department requests to be kept as confidential shall not be made available to any individual or organization by the Baldwin County Commission without the prior written approval of the Department, unless such confidentiality would be contrary to the law of the State of Alabama or the United States.

10. This Agreement may be amended by the mutual written agreement of both parties. Changes which are mutually agreed upon by the Baldwin County Commission and Department shall be incorporated in written amendments to this Agreement.

11. Either the Baldwin County Commission or the Department may terminate this Agreement at any time by giving written notice to the other party of such termination and specifying the effective date thereof, at least 30 days before the effective date of such termination. In the event of cancellation, any pending permit applications, enforcement actions, finished or unfinished studies, reports and other work by the County shall be submitted to the Department.

THIS AGREEMENT shall become effective upon signature of all parties named below.

BALDWIN COUNTY, ALABAMA

By: _____
Charles F. Gruber
Chairman
Baldwin County Commission

Date: _____

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

By: _____
Steven O. Jenkins, Chief
Field Operations Division

Date: _____

ATTEST:

By: _____
David A. Z. Brewer
County Administrator
Baldwin County Commission

Tab 9

SECTION F. COASTAL HIGH HAZARD AREAS (V-ZONES & COASTAL AE ZONES)

Located within the areas of special flood hazard established in Article 2, Section B, are areas designated as Coastal High Hazard areas (V-Zones) and Coastal AE Zones. These areas have special flood hazards associated with wave action and storm surge; therefore, the following provisions shall apply, in addition to the standards of Article 4:

(1) All new construction and substantial improvements of existing structures shall be located landward of the reach of the mean high tide.

(2) All new construction and substantial improvements of existing structures shall be elevated on piles, columns, or shear walls parallel to the flow of water so that:

(a) The bottom of the lowest supporting horizontal structural member (excluding pilings or columns) is located no lower than one foot above the base flood elevation level. All space below the lowest supporting member shall remain free of obstruction.

(b) Open lattice work, breakaway walls, or decorative screening may be permitted for aesthetic purposes only and built in accordance with Article 4, Section F(5) below.

(c) All pile and column foundations and the structures attached thereto shall be anchored to resist flotation, collapse, and lateral movement due to the combined effects of wind and water loads acting simultaneously on ALL building components, both (non-structural and structural). Water loading values shall equal or exceed those of the base flood. Wind loading values shall be in accordance with the most current edition of the Baldwin County adopted building code.

(3) All new construction and substantial improvements of existing structures shall be securely anchored on pilings, columns, or shear walls.

(4) A registered professional engineer or architect shall certify that the design, specifications and plans for construction are in full compliance with the provisions contained in Article 4, Section F(2), (3), and (4) herein.

(5) For all new construction and substantial improvements in VE Zones and Coastal AE Zones, the space below the lowest horizontal-supporting member must remain free of

obstruction. As an alternative, the space may be constructed with non-supporting breakaway walls, open wood or vinyl latticework, or insect screening which must be designed to break away or collapse under wind and water loads without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system. The following design specifications are required:

(a) No solid walls shall be allowed, and;
(b) Material shall consist of lattice or mesh screening only.
(c) If aesthetic lattice work, breakaway walls, or screening is utilized, any enclosed space shall not be used for human habitation, but shall be designed to be used only for parking of vehicles, building access, or limited storage of maintenance equipment used in connection with the premises.
(d) For the purpose of this section, a breakaway wall shall have a design safe loading resistance of not less than 10 and no more than 20 pounds per square foot. Breakaway wall enclosures shall not exceed 299 square feet. Use of breakaway walls which exceed a design safe loading resistance of 20 pounds per square foot (either by design or when so required by local codes) may be permitted only if a registered professional engineer or architect certifies that the designs proposed meet the following conditions:
    (i) Breakaway wall collapse shall result from water load less than that which would occur during the base flood, and;
    (ii) The effects of wind and water loads acting simultaneously on all building components (structural and nonstructural) must be taken into account. Water loading values used shall be those associated with the base flood. Wind loading values used shall be those requirements by state or local building codes.

(6) Enclosures below elevated buildings shall be useable solely for storage, parking of vehicles, or building access. Such space will not be used for human habitation and not finished or partitioned into separate rooms.

(7) Prior to construction, plans for any structure using lattice, breakaway walls, or decorative screening must be submitted to the Building Official/Floodplain Administrator for approval.

(8) Any alteration, repair, reconstruction or improvement to any structure shall not enclose the space below the lowest floor except with lattice-work, breakaway walls, or decorative screening, as provided in this Section.

(9) Obtain the elevation (in relation to mean sea level) of the bottom of the lowest structural *member* of the lowest floor (excluding pilings and columns) of all new and substantially improved structures in VE Zones and Coastal AE Zones. The Floodplain Administrator shall maintain a record of all such information.

(10) The Building Official/Floodplain Administrator shall approve design plans for landscaping/aesthetic fill only after the applicant has provided an analysis by an

engineer, architect, and/or soil scientist, which demonstrates that the following factors have been fully considered:

(a) Particle composition of fill material does not have a tendency for excessive natural compaction;
(b) Volume and distribution of fill will not cause wave deflection to adjacent properties; and
(c) Slope of fill will not cause wave run-up or ramping.

(11) Under the buildings or structures, no fill may be used except for minor site grading for drainage purposes. Nonstructural fill may be used on coastal building sites for minor landscaping and site grading for drainage purposes to the extent that the fill does not interfere with the free passage of floodwaters and debris underneath the building or cause changes in flow direction during coastal storms. Changes to site grades, other than those prescribed, must be avoided as they can cause additional damage to buildings on the site or to adjacent buildings.

(12) Prohibit man-made alteration of sand dunes or mangrove stands which would increase potential flood damage.

(13) Permit recreational vehicles in VE Zones and Coastal AE Zones if they meet all of the requirements of Article 4, Section B(4)(d).

Tab 10

WATERS, WETLANDS, COASTAL REGULATIONS AND COMPLIANCE

Presented to
Baldwin County Bar Association
May 23, 2022

Materials
Prepared and Presented by:
Neil C. Johnston (Sr.), Esq
HAND ARENDALL HARRISON SALE LLC
Merchants Plaza
104 St. Francis Street, 3rd Floor
Mobile, AL 36602
251-432-5511
njohnston@handfirm.com

HAND ARENDALL HARRISON SALE

WETLANDS, WATER AND COASTAL ISSUES

1. **Definitions**

NEW **a) Waters of the United States (WOTUS)**
2021 – New – Proposed Final Rule / Definition of "Waters of the United States," 86 FR 69372, December 7, 2021

b) Waters of the State – Ala. Code § 9-106-3, § 9-11-80, § 33-5-3(a)
   i. Coastal Waters – Ala. Code § 9-7-10
   ii. ADEM Admin. Code Reg. 335-8 (Alabama Coastal Area Management Program – ACAMP) – [Local Delegation of Authority – Baldwin County Coastal Area Program Resolution #2015-011]
   iii. ADCNR "State Owned Submerged Lands" Admin. Code Reg. 220-4-.09

Wetlands, Water and Coastal Issues (cont'd)

2. **Agencies**

Federal

- U. S. Army Corps of Engineers
- EPA
- USFWS
- NOAA / OCRM
- U. S. Coast Guard

State

- ADEM
- ADCNR
- NRCS
- State Docks
- SHPO

Local

- Baldwin County
- Municipalities
- Watershed
- Planning & Zoning
- Coastal Programs

Wetlands and Water Issues (cont'd)

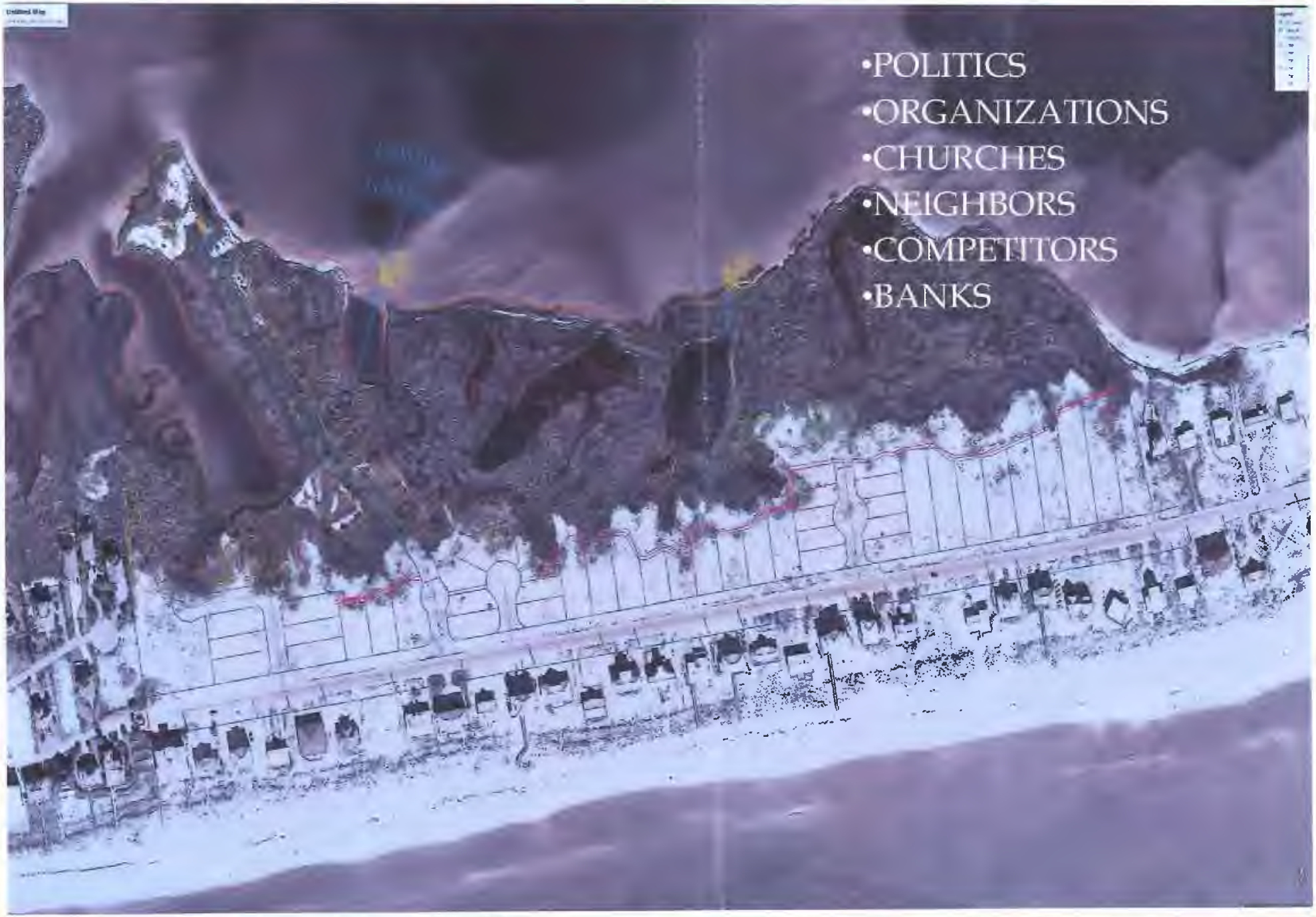
3. **Permits**
4. **Enforcement**
5. **Title/Title Insurance**
   - Schedule B Exceptions
   - Ordinary high tide
   - Riparian/Littoral rights
   - Coastal Preservation
   - Ordinary high water
   - Mean high tide line
   - Water rights
   - Use vs. Title

WET – DUE DILIGENCE
(KNOW THE PROPERTY – SURFACE & SUBSURFACE)
Preliminary Investigations
Baseline Conditions

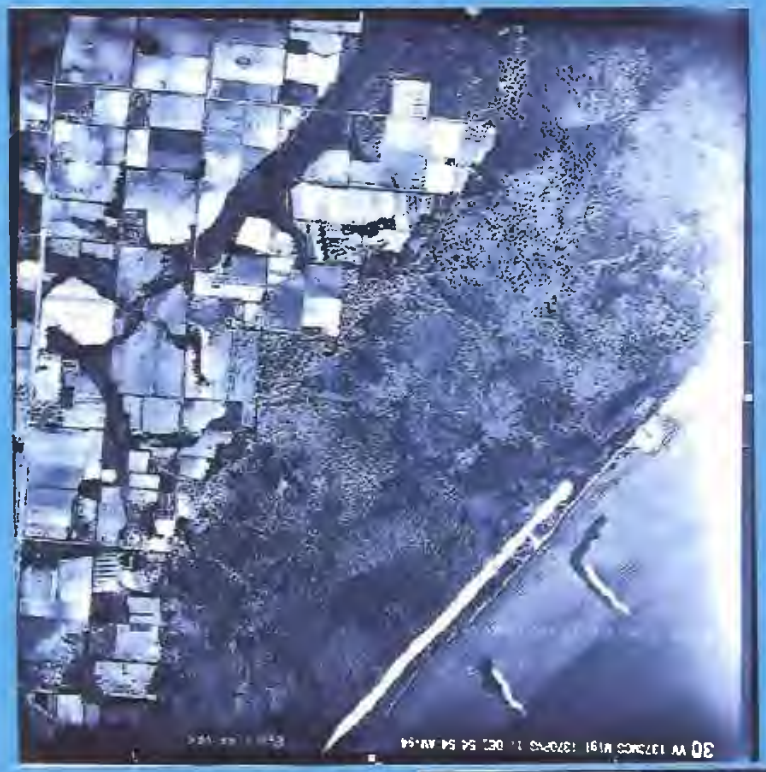
- On-site conditions (Surface/Subsurface)
- Surrounding Conditions (Water)
- Utilities and Resources (Water)

- Water / Aquatic Resources (Water)
- Environmentally Sensitive Areas (Water
- Community Relations (Water)

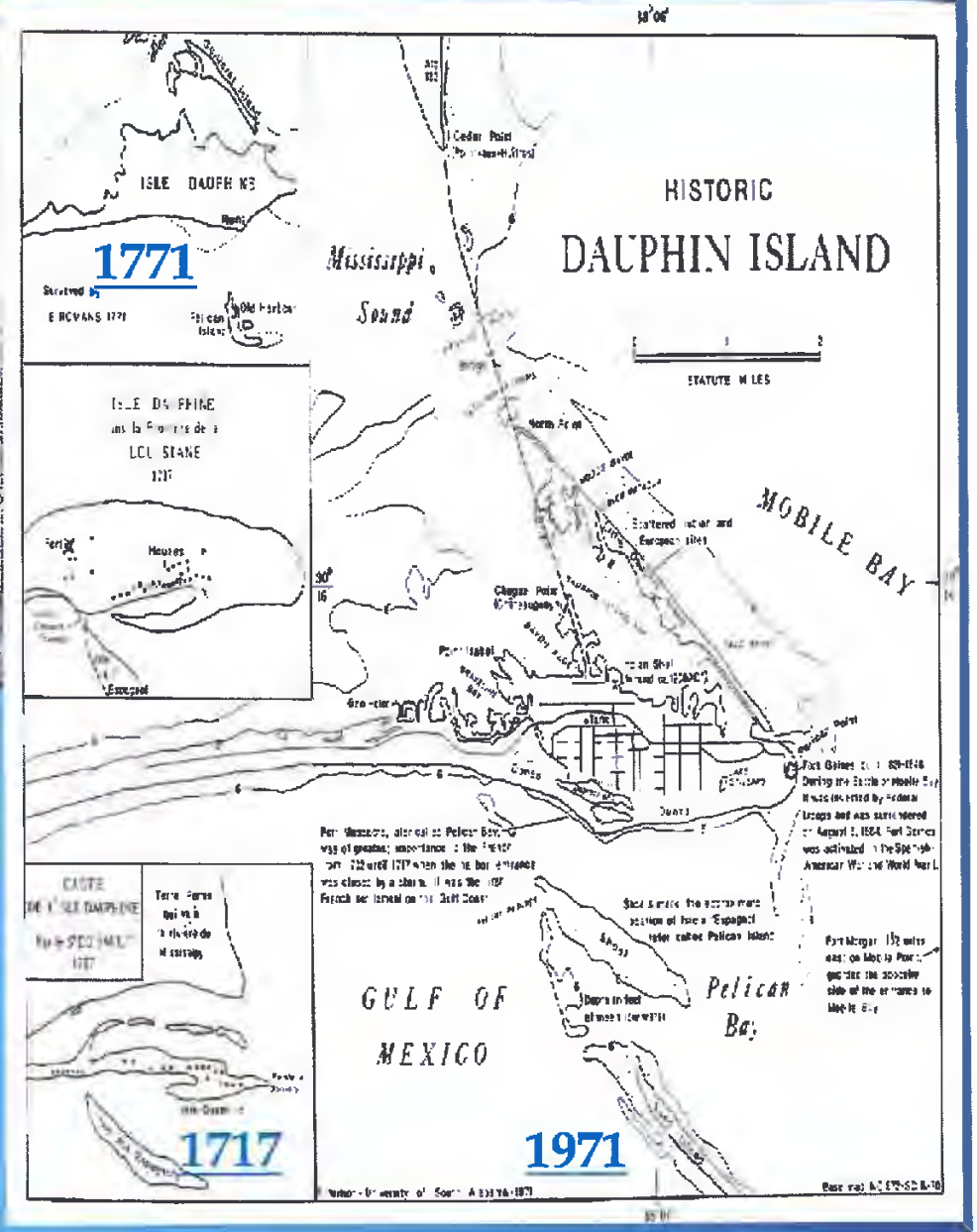
COMMUNITY RELATIONS



30 W 1373MCS M191 1370PMG 11 DEC 54 54-AM-94



PRIOR FILL
Alleged Fill Violation on Site with Historic and Prior Fill – No Violation



Prior to 1996 Piers/wharves could not be constructed in areas "Fronting on the Gulf of Mexico" but . . .

REVIEW REGULATIONS — GULF OF MEXICO OR PELICAN BAY?

South shoreline of Dauphin Island on Pelican Bay

Prior to 1996 – "No PIERS on the Gulf of Mexico."

After 1996 – "No PIERS on Gulf of Mexico, Pelican Bay, or Weeks Bay."

2015


sland
Little Dauphin Island
Dauphin Island, AL
Pelican Bay
Pelican Island
© 2015 Google
Image © 2015 TerraMetrics
Google earth
1992
Imagery Date: 1/30/2015 30°14'29.23" N 88°06'40.90" W elev -6 ft eye alt 34300 ft


2019
Little Dauphin Island
Lemoyne Dr
Dauphin Island
Bienville Blvd
Pelican Bay
Pelican Island
Legend
Dauphin House Bed & Breakfast
Dauphin Island Airport
Dauphin Island Methodist Church
Dauphin Island Police Dept
Feature 1
Feature 2
Fort Morgan
The Estuarium
Google Earth
1 mi
N

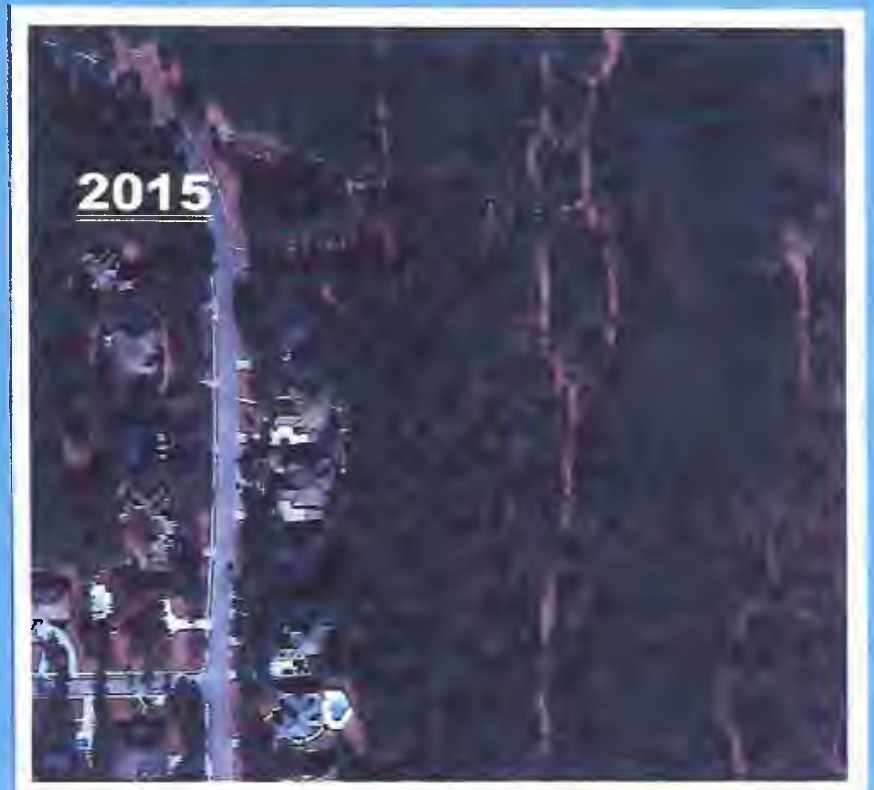
Pelican Island
September 2020

FlytheCoast.com

[photograph provided by Sam St John and Logical Computer Solutions, Inc.]

https://protect-us.mimecast.com/s/4bJJC0RAW1F17jxuw7q_a

Beware of Existing Liabilties




Habitable

As our partners have grown and diversified, we have grown and diversified. We take great pride in our services provided to our clients affecting our coastal and natural resources of the Gulf Coast, and to the consulting community and the regulatory community.

"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

HAND ARENDALL HARRISON SALE

Firm Contact:
Neil C. Johnston (Sr.) , Esq.
251-694-6247
njohnston@handfirm.com

Tab 10-A

HAND ARENDALL HARRISON SALE

Hand Arendall Harrison Sale LLC
P. O. Box 123
Mobile, Alabama 36601
Phone: 251-432-5511
Direct Phone: 251-694-6247
Direct Fax: 251-544-1618
NJohnston@HandFirm.com

Neil C. Johnston (Sr.), Esq.
www.handfirm.com

Neil C. Johnston (Sr.) is a Member in the Mobile, Alabama office of Hand Arendall Harrison Sale LLC, in the Real Estate, Land Use and Timber Practice Group (Past Group Leader). Neil is a graduate of Southwestern at Memphis (Rhodes College) (B.A. in Economics and Urban Studies) (1975), the University of Alabama School of Law (J.D. 1978 – Roll Tide!), and attended University College, Oxford, England.

Water, wetlands, stormwater, floods, endangered species, oysters, turkeys, sUAVs, cane poles and crickets are constant companions.

Neil works with clients regarding real estate titles, ownership, claims, limitations, uses, and interests in surface and subsurface real estate, various forms of transfers and transfer documents, curious questions and issues regarding title, as well as the legal and practicable solutions to issues; the recreational and commercial uses and misuses of sUAVs for real estate data collection, surveying, disaster recovery, business and insurance policies and enforcement, contracts and regulations (and the proper way to shoot a drone . . . with consequences); the acquisition, need and conservation of "Liquid Real Estate . . . No Water – No Development;" zoning, land use and environmental permitting and compliance matters; leases, easements and title; and coastal, littoral, riparian, beach and submerged land issues affecting ownership, use, development and redevelopment.

Client projects include general and complex real estate transactions, multiuse residential/commercial/conservation transactions along the Gulf Coast, Mobile Bay (and many of the other 46+ named bays in coastal Alabama) and many of the rivers, creeks, watersheds and flood plains; issues related to community associations, pipelines and other linear projects, timberland, sand, gravel and coal, water use and supply, and oil and gas developments (leasing, production and delivery, surface and subsurface uses).

Neil has been working on revisions to Alabama's Coastal Regulations and local "dune walkover" zoning and building ordinances.

Neil is a 2013 Fellow of the American College of Real Estate Lawyers (ACREL); 2014 President of the U. S. Green Building Council, Alabama Chapter; holds certificates from Wetland Resources for Wetland Delineation and Identification, and from Wetland Rapid Assessment Procedure workshops, and has held a Stormwater Qualified Credential Inspector Certificate for several years, 2007-2018, QCI # T0751.

Neil is active with the **ABA Section on Environment, Energy and Resources** (received the *Phoenix Award* in 2011) and the **Real Property, Trust and Estate Law Sections**; an active member of the Alabama State Bar Association **Environmental Law Section** (Chair 1985 and 1991), **Real Estate Law Section**, and **Oil and Gas Law Section**; listed by *Best Lawyers In America*© for Environmental Law, Real Estate Law, Litigation - Environmental, Energy Law, Natural Resources Law, Timber Law and Water Law, including being named the Mobile Environmental Lawyer of the Year for 2011, 2014, 2019 and 2021; listed "America's Most Honored Lawyers" (2020) by *The American Registry*; holds *Martindale-Hubbell* rating **AV® Preeminent™**; received the *National Wetlands Award* from the Environmental Law Institute in 2003; listed by *Chambers & Partners-USA* in the field of Environmental Law; and is a member of the Community Associations Institute – North Gulf Coast Chapter.