

WATERS, WETLANDS, COASTAL REGULATIONS AND COMPLIANCE

June 16, 2022

for the

“WETLAND REGULATIONS AND COMPLIANCE WORKSHOP”

Presented to

MOBILE AREA ASSOCIATION OF REALTORS

Sponsored By

- ALABAMA COASTAL FOUNDATION
- ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, MOBILE BRANCH – COASTAL SECTION
- BALDWIN COUNTY ASSOCIATION OF REALTORS
- HAND ARENDALL HARRISON SALE LLC
- MOBILE AREA ASSOCIATION OF REALTORS
- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
- WEEKS BAY NATIONAL ESTUARINE RESEARCH RESERVE
- ALABAMA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES-STATE LANDS DIVISION

Materials

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**MATERIALS PREPARED AND PRESENTED BY:
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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 COMMENTS.

1. **Duties; Responsibilities; Expectations.** As a real estate lawyer, real estate broker, agent, owner, developer, contractor, consultant, or surveyor, 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 trust the personal, political and subjective feelings of the “government.” This includes all the internal memos (regulatory guidance), directives, and evolving interpretations and “wish lists” made along the way.

You are expected to provide competent, knowledgeable, legal and up-to-date advice to your client, customer or to the 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. The “New” Rule has not yet been finalized, but was drafted to again 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 address environmental and climate (i.e., real estate) issues, 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 certain 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).

2. Property . . . Aquatic Features and Baseline Conditions (Prior and Existing) . . . and . . . WHAT Now?! We have provided several additional attachments to emphasize the importance and complexity of the dynamic issues involving real property and “Water.”

- (a) **Article by Neil 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 2]**

3. Real Estate Contracts / Disclosures / Due Diligence / Prior and Existing Site Conditions.

- (a) **Should the Seller Make Specific Disclosures of Certain Features Such As**
 - (i) Wetlands [See “Addendum W-Wetlands” to the Offer to Purchase/Lease Form (2008) by the Wisconsin Realtors Association] **[Tab 5-A]**;
 - (ii) Lead, Radon, Asbestos;
 - (iii) Easements, Covenants, Declarations;
 - (iv) Climate Change – Sea Level Rise, and Higher “High Tides;”
 - (v) Flooding, Nuisance Flooding, Storm Surge;
 - (vi) Permits and Violations.
- (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.] **[Tab 5-B]**
- (c) **Disclosure of Conditions of Groundwater.** [See ASTM International E1527-21.] **[Tab 4]**

4. What About Title Insurance and Schedule B II Exceptions to Title Insurance Coverage? Water, wetlands, riparian rights, tidal lands, submerged lands, and lands that have experienced accretion, reliction, or avulsive events are favorite exceptions to title insurance coverage by title companies. However, rarely will you see only one exception listed.

- (a) **Wetlands and Title to Real Property.** The existence of wetlands or other aquatic resources on real property, or a “conditions or features of the real property” do 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” attempting to describe and address wetlands, tidally influenced properties and riparian rights.

In many reports, commitments and policies, it is common to see several exceptions to title insurance coverage with language similar to the following:

[NOTE: The following seven Exceptions actually appeared in one title commitment until lengthy objections were submitted to the title insurance underwriter.]

- “(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.”

As another example, the following four exceptions appeared in another title commitment:

“ . . . 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.

Question: 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 Wetlands “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 and Underwriter’s Response.**

- (i) **Objections.** Attached as **Tab 3-A** are certain objections to these types of exceptions I have made and submitted many times to attorneys representing the “other” party, and attorneys for title companies, in response to title commitments and title insurance policies issued. 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) above.
- (ii) **Underwriter’s Response.** However, I did receive some supporting comments from a title underwriter’s legal department that are described on the attached **Tab 3-B**.

5. **What Are Jurisdictional Wetlands? . . . Anybody?**

B. **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's records, 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.USFS.gov; www.FEMA.gov; www.NOAA.gov
 - (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 online procedures and using the online request forms on the particular agency website if the records are not readily accessible or publicly 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.”] **[Tab 4]**
- (c) **Investigate** (i) whether any activity on the property was required to have one or more permits, licenses or approvals, and determine the type; (ii) determine if any violations exist (and have been resolved); (iii) the compliance history; and (iv) review the permit, determine the present status of compliance, review the records, and review the notice (and **transfer**) requirements.
- (d) **Transfer the Permit.** If the property has or had one or more permits, licenses or approvals, (i) obtain a copy; (ii) determine the status (what was permitted; (iii) what was the permitted activity, (iv) was the activity accomplished and completed (and was the activity and permit matters you wish to have?); and (v) require and have the permits, licenses and approvals transferred and assigned as part of the transaction if such are transferable.

- (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 resolved and cured. Who has the duty (if any exists) to disclose the violation or give notice to “the agency?”
- (f) **Determine** if the laws, regulations and permit (and conditions) have changed since the permit was originally 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 conducted without a permit, can an “**after-the-fact**” permit be obtained? (For CWA § 404 permits – **See ATF Permit Procedures: 33 CFR § 326.3(a);** <https://www.mvn.usace.army.mil/Portals/56/docs/regulatory/EnforcementOverview.pdf>.)
- (h) **Mitigation**. If wetlands, streams or other mitigation is required, determine the extent of the mitigation required, the cost of onsite mitigation or off-site purchase of mitigation bank 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 are required or have been purchased,

- (i) obtain all records and evidence from the property owner;
- (ii) transfer the permit properly and the mitigation approval and certificate of purchased bank credits;
- (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. Developer’s engineer, using local stormwater requirements, designs a detention pond and capacity that realistically could not handle the amount and force of stormwater from the design watershed AND from other adjacent areas. The detention pond was breached almost after each rain event, causing substantial runoff and erosion to occur on the downhill neighbor’s property, and resulting in substantial sedimentation in the stream and hardwood bottoms on the neighbors’ properties..
- (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) Wetlands and Streams Mitigation Banks in your watershed runs out of wetlands or streams mitigation credits totally or the type credits required.
 - (v) Consultant or Corps conducts the Wetlands Rapid Assessment Procedure (“WRAP”) to determine the functional value of the wetlands, streams or both to be filled, and (possibly subjectively) determines very high values and functions, requiring many more mitigation credits.
 - (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 obtain permits, and comply with permit conditions? Yes.**

3. 2021 Nationwide Permits (“NWP”) Issued March 15, 2021, and February 22, 2022, Effective Until March 14, 2026.

(a) Reissued NWPs.

- (i) Sixteen of the 2021 Final NWPs were described and published in 86 FR 2744 (January 13, 2021), effective March 15, 2021; and 40 NWPs were reissued and one NEW NWP issued by Final Rule dated December 27, 2021, as described and published in 86 FR 73522 with an effective date of February 22, 2022. There are General Conditions

for each NWP as well as state water quality and coastal consistency conditions.

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

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. [See

<https://www.sam.usace.army.mil/missions/regulatory/nwp.aspx>]

- (ii) **General and Regional NWP Conditions.** The 2021 NWPs also have General Permit Conditions, as well as ADEM CWA § 401 Water Quality Conditions and ADEM Coastal Consistency Conditions.

4. Regional General Permits for Minor Structures and Activities in Alabama (Issued/Effective October 1, 2021, Until October 1, 2026). [Tab 9]

- (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). [See https://www.sam.usace.army.mil/Portals/46/docs/regulatory/public_notices/Special%20Public%20Notice%20-%20Alabama%20General%20Permit%20Reissuance%202021.pdf]
- (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 6-A**]
 - **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-B**]
 - **Section 12.6** Coastal Areas [**See Excerpts Tab 6-C**]
- (ii) **ADEM MOA with Baldwin County Commission Delegating Management and Permitting Authority Regarding “Activities on Beaches and Dunes” [Tab 7] and the Resulting Baldwin County Coastal Area Program Ordinance – Resolution # 2015-011 [Tab 7-A]**
- “Establishing Beach and Dune Protection and Management Regulations for Baldwin County, Alabama”
- (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 Excerpt Tab 8**]

Tab 1



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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.



Tab 2

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.)***
Carolyn 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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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.]**

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

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

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 East²² 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

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/awawgw/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 estate²⁶ 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 Program³³ 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

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 1973³⁴ 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 regulations³⁷ 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

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 appealed⁴¹ 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

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

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-flooding-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 Supplement⁵⁷ 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

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

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 § 401⁶³ water quality consistency certification from the state environmental agency.⁶⁴ If the project is in the coastal zone, a coastal zone management program consistency certification⁶⁵ 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)

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

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.

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?!)]

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.”

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.

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 3-A

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:

I. 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:jhm

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

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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.

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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.

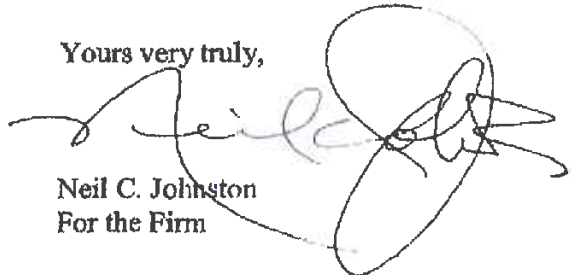
B. Tract

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,

A handwritten signature in dark ink, appearing to read "Neil C. Johnston", with a large, loopy flourish extending from the end of the signature.

Neil C. Johnston
For the Firm

Tab 3-B

Subject: RF: 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 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 4

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Last Updated: Dec 21, 2021

ASTM E1527-21

Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process


1. Scope

1.1 Purpose—The purpose of this practice is to define good commercial and customary practice in the United States of America for conducting an *environmental site assessment*² of a parcel of *commercial real estate* with respect to the range of contaminants within the scope of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601) and *petroleum products*. As such, this practice is intended to permit a *user* to satisfy one of the requirements to qualify for the *Innocent landowner, contiguous property owner, or bona fide prospective purchaser* limitations on CERCLA liability (hereinafter, the "*landowner liability protections*," or "*LLPs*"); that is, the practice that constitutes *all appropriate inquiries* into the previous ownership and uses of the *property* consistent with good commercial and customary standards and practices as defined at 42 U.S.C. § 9601(35)(B). (See Appendix X1 for an outline of CERCLA's liability and defense provisions.) Controlled substances are not included within the scope of this practice. Persons conducting an *environmental site assessment* as part of an EPA Brownfields Assessment and Characterization Grant awarded under CERCLA 42 U.S.C. § 9604(k)(2)(B) must include controlled substances as defined in the Controlled Substances Act (21 U.S.C. § 802) within the scope of the assessment investigations to the extent directed in the terms and conditions of the specific grant or cooperative agreement. Additionally, an evaluation of *business environmental risk (BER)* associated with a parcel of *commercial real estate* may necessitate investigation beyond that identified in this practice (see 1.4 and Section 13).

1.1.1 Recognized Environmental Conditions—The goal of the processes established by this practice is to identify *recognized environmental conditions*. The term *recognized environmental condition* means (1) the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* to the *environment*; (2) the likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* or likely *release* to the *environment*; or (3) the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* under conditions that pose a *material threat* of a future *release* to the *environment*. A *de minimis condition* is not a *recognized environmental condition*.

1.1.2 Petroleum Products—*Petroleum products* are included within the scope of this practice because they are of concern with respect to *commercial real estate* and current custom and usage is to include an inquiry into the presence of *petroleum products* when doing an *environmental site assessment* of *commercial real estate*. Inclusion of *petroleum products* within the scope of this practice is not based upon the applicability, if any, of CERCLA to *petroleum products*.

Version

E1527-21 

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petroleum products.

1.1.3 CERCLA Requirements Other Than Appropriate Inquiries—This practice does not address whether requirements in addition to *all appropriate inquiries* have been met in order to qualify for the *LLPs* (for example, the duties specified in 42 U.S.C. §§ 9607(b)(3)(s) and (b) and cited in

Appendix X1, including the continuing obligation not to impede the integrity and effectiveness of *activity and use limitations [AULs]*, or the duty to take reasonable steps to prevent *releases*, or the duty to comply with legally required *release* reporting obligations).

1.1.4 Other Federal, State, and Local Environmental Laws—This practice does not address requirements of any state or local laws or of any federal laws other than the *all appropriate inquiries* provisions of the *LLPs*. *Users* are cautioned that federal, state, and local laws may impose environmental assessment obligations that are beyond the scope of this practice. *Users* should also be aware that there are likely to be other legal obligations with regard to *hazardous substances* or *petroleum products* discovered in, on, or at the *subject property* that are not addressed in this practice and that may pose risks of civil and/or criminal sanctions for noncompliance.³

1.1.5 Documentation—The scope of this practice includes research and reporting requirements that support the *user's* ability to qualify for the *LLPs*. As such, sufficient documentation of all sources, records, and resources utilized in conducting the inquiry required by this practice must be provided in the written *report* (refer to 8.1.9 and 12.2).

1.2 Objectives—Objectives guiding the development of this practice are (1) to synthesize and put in writing good commercial and customary practice for *environmental site assessments* for *commercial real estate*; (2) to facilitate high quality, standardized *environmental site assessments*; (3) to provide a practical and reasonable *standard practice* for conducting *all appropriate inquiries*; and (4) to clarify an industry standard for *all appropriate inquiries* in an effort to guide legal interpretation of the *LLPs*.

1.3 Units—The values stated in inch-pound units are to be regarded as the standard. The values given in parentheses are mathematical conversions to SI units that are provided for information only and are not considered standard.

1.4 Considerations beyond Scope—The use of this practice is strictly limited to the scope set forth in this section. Section 13 of this practice identifies, for informational purposes, certain environmental conditions (not an all-inclusive list) that may exist at a *subject property* that are beyond the scope of this practice, but may warrant consideration by parties to a *commercial real estate transaction*. The need to include an investigation of any such conditions in the *environmental professional's* scope of services should be evaluated based upon, among other factors, the nature of the *subject property* and the reasons for performing the assessment (for example, a more comprehensive evaluation of *business environmental risk*) and should be agreed upon between the *user* and *environmental professional* as additional services beyond the scope of this practice before initiation of the *environmental site assessment* process.

1.5 *This practice offers a set of instructions for performing one or more specific operations. This document cannot replace education or experience and should be used in conjunction with professional judgment. Not all aspects of this practice may be applicable in all circumstances. This ASTM standard is not intended to represent or replace the standard of care by which the adequacy of a given professional service must be judged, nor should this document be applied without consideration of a project's many unique aspects. The word "Standard" in the title means only that the document has been approved through the ASTM consensus process.*

1.6 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety, health, and environmental practices and determine the applicability of regulatory limitations prior to use.*

1.7 *This international standard was developed in accordance with internationally recognized*

**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**

INTRODUCTION

On November 1, 2005, EPA issued a Final Rule establishing standards and practices for conducting all appropriate inquiries (AAI) as required under sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended. Section 312.11 of the Final Rule stated that ASTM Standard E1527-05, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" may be used to comply with the AAI requirements. In December 2013, EPA amended the AAI regulation to add a reference in Section 312.11 to the updated ASTM E1527-13 standard. The 2013 amendment established that EPA found the ASTM E1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" to be compliant with the AAI regulation.

ASTM International recently revised the ASTM E1527-13 standard. ASTM E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" was published in November 2021 and provides new instructions and clarifications concerning key terms and the site research and reconnaissance required, as well as addresses emerging contaminants of potential future concern.

This document presents a comparison of the AAI regulatory requirements, the requirements of the new ASTM E1527-21 standard, and the prior ASTM E1527-13 standard.

Exhibit 1 presents a summary of the regulatory sections in the AAI regulation and the relevant or corresponding sections of both the ASTM E1527-21 standard and the ASTM E1527-13 standard. The first column in Exhibit 1 provides a list of the major activities required by the AAI final rule. The second column provides citations to the applicable sections of the regulation where the requirements are discussed. The third column in Exhibit 1 presents the corresponding sections of the ASTM E1527-21 standard. The fourth column presents the corresponding sections of the ASTM E1527-13 standard. The fifth column provides a brief narrative of notable differences between the AAI regulation and the ASTM E1527-21 standard. As shown throughout the exhibit, the differences between the AAI regulatory requirements and the newly revised ASTM E1527-21 standard are minor in nature. ASTM generally provides clarifications, more instructions, and additional appendices in the newly revised E1527-21 standard.

SUMMARY OF DIFFERENCES BETWEEN ASTM E1527-13 AND ASTM E1527-21

ASTM E1527-21 differs from ASTM E1527-13 in a few key areas, while staying consistent with the AAI regulation.

There are several changes in the wording of the language, mostly related to the definitions and discussion of three key terms: Recognized Environmental Conditions, Historical Recognized Environmental Condition, and Controlled Recognized Environmental Condition. While the definitions of all three terms have been revised, the concepts and ramifications of the definitions have not.

ASTM E1527-21 also incorporates some new definitions and additional instructions and clarifications regarding other key terms or concepts, including “review of land title records,” “property use limitations,” “likely,” “significant data gaps,” “presumed viability,” and the “level of inquiry” depending on the future intended uses of the subject property.

ASTM E1527-21 Section 8.3, *Historical Research*, was significantly revised in the E1527-21 standard, which requires compiling and analyzing historical property information. In addition to revising the section layout, ASTM E1527-21 now clarifies:

- Properties may be different in use, size, configuration, or address than in the past and the environmental professional should consider these factors when conducting their research;
- The eight standard historical resources, which now includes interviews, as well as other sources;
- If the general type of use is retail, industrial, or manufacturing, then standard historical resources shall be reviewed if they are likely to identify a more specific use and are reasonable ascertainable;
- Aerial photographs, fire insurance maps, local street directories, and historical topographic maps must be reviewed if they are reasonably ascertainable, likely to be useful, and applicable to the subject property; and
- If these four historical sources were researched for the subject property, provide coverage of one or more adjoining properties, and are likely to be useful in satisfying the historical research section object, then these sources should also be reviewed for the adjoining properties.

ASTM E1527-21 generally revised Section 9, *Site Reconnaissance*, and clarified that the Phase I report should describe which of the specific features, activities, uses, and conditions both were and were not present at the subject property.

ASTM E1527-21 also added a few notable additions to the Phase I report:

- A site plan and photographs, as defined in Section 12.3, *Contents of the Report*;
- The identification of significant data gaps in the Findings of the report per Section 12.5.1, *Significant Data Gaps*; and

- All recognized environmental conditions, controlled recognized environmental conditions, and significant data gaps listed in the Conclusions of the report per Section 12.7, *Conclusions*.

ASTM Section 12.8, *Additional Investigation*, and Note 6 of the E1527-21 standard clarifies that an opinion should be provided in the report that additional investigations may be appropriate. This requirement is different than a recommendation that provides a specific course of action, which is not required and falls outside the scope of the Phase I Environmental Site Assessment standard.

Another significant difference of this new updated standard is the discussion around emerging contaminants. ASTM E1527-21 notes in Sections 13.1.5.15 and X6.10 that substances not defined as hazardous substance under CERCLA, including some substances generally referred to as emerging contaminants because human understanding is evolving (e.g., per- and polyfluoroalkyl substances, or PFAS), are not included in the scope of a Phase I report. However, emerging contaminants may want to be assessed in connection with commercial real estate, because once these contaminants are defined as a hazardous substance under CERCLA, then these substances must be evaluated within the scope of E1527-21.

Lastly, ASTM E1527-21 significantly revised the Appendices, including providing an updated legal background on CERCLA and the application of AAI (X1), an additional examination of the recognized environmental condition definition and logic (X4), expanded suggestions for the Phase I Environmental Site Assessment report format (X5), and discussions of emerging contaminant and petroleum product non-scope issues (X6).

CONCLUSION

Based on the analysis provided above and Exhibit 1 below, ASTM E1527-21, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" is compliant with the AAI regulation. It is EPA's determination that parties who want to claim protection from liability under CERCLA may follow the regulatory requirements of the All Appropriate Inquiries Rule at 40 CFR 312 or use the ASTM E1527-21 "Standard Practice for Phase I Environmental Site Assessments" to comply with the all appropriate inquiries provision of CERCLA.

EXHIBIT 1

Definitions and Requirements	Final AAI Regulation	ASTM E1527-21	ASTM E1527-13	Description of Notable Differences
Section 312.1 Purpose, applicability, scope, and disclosure obligations				
Purpose	312.1(a)	1.1, 7.1	1.1, 7.1	<p>The AAI regulation provides a standard specifically related to the requirements of CERCLA §§ 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).</p> <p>ASTM E1527-21 provides a standard for conducting a <i>Phase I Environmental Site Assessment</i> intended to reflect good commercial and customary standards and practices.</p>
Applicability	312.1(b)	1.1, 4.1, 4.2, 4.5.3	1.1, 4.1, 4.2, 4.5.3	<p>The AAI regulation applies if the future owner wants to qualify for CERCLA liability protections or to those conducting site characterization and assessments with the use of a grant awarded under CERCLA § 104(k)(2)(B), without limit to a particular land use.</p> <p>ASTM E1527-21 states that the practice has utility for a wide range of uses outside of potential CERCLA liability.</p>
Scope	312.1(c)	1, 4.1, 4.2.1, 4.2.2	1, 4.1, 4.2.1, 4.2.2	<p>In addition to CERCLA-defined hazardous substances, AAI includes petroleum products and controlled substances within its scope for persons conducting AAI with grants awarded under the authorities of CERCLA § 104(k)(2)(B).</p> <p>ASTM E1527-21 includes petroleum products in its scope because they may be of concern in, on, or at the subject property, not because of any potential CERCLA applicability to petroleum. Controlled substances are specifically defined as "not within the scope of" ASTM E1527-21, but E1527-21 notes that controlled substances must be included if the assessment is conducted under an EPA Brownfields Assessment and Characterization Grant to the extent directed by the terms and conditions of the grant.</p>
Disclosure Obligations	312.1(d)	Appendix X6.9.1	Appendix X5.9.1	<p>ASTM E1527-21 does not specifically address disclosure obligations for either the user or environmental professional. This lack of disclosure obligations is not significant, because the AAI regulation does not include any disclosure requirements, but the standard merely notes that it does not limit or expand any disclosure requirements otherwise required under CERCLA.</p> <p>Appendix X6 in ASTM E1527-21 (Summary of Common Non-Scope Issues) briefly discusses the potential for OSHA and real estate transaction disclosure requirements relating to mold hazards.</p>
Section 312.10 Definitions				

Definition of Abandoned Property	312.10(b)	3.2.1	3.2.1	ASTM E1527-21 clarifies the term as a noun (denoted by an "n").
Definition of Adjoining Properties	312.10(b)	3.2.4	3.2.4	ASTM E1527-21 clarifies that "adjoining" is relative to the "subject property" and clarifies the term as a noun (denoted by an "n").
Definition of Data Gap	312.10(b)	3.2.19 12.5.1	3.2.21	<p>The AAI regulation indicates that the data gap applies to efforts by the environmental professional and to the efforts of any person listed in § 312.1(b) to gather the specific information required by §§ 312.20(e)(1) and (e)(2).</p> <p>ASTM E1527-21 indicates that a data gap may result from incompleteness in any activities required under the practice, including site reconnaissance and interviews.</p> <p>ASTM E1527-21 also newly defines "significant data gap" as a "data gap that affects the ability of the environmental professional to identify a recognized environmental condition," and "raises reasonable concerns involving the effects of the data gap on the ability of the environmental professional to render an opinion" (see Sections 3.2.78 and 12.5.1).</p>
Definition of Date of Acquisition or Purchase Date	312.10(b)	4.6.1, Footnote 9	4.6, Footnote 5	None
Definition of Environmental Professional	312.10(b)	3.2.30, Appendix X2.1	3.2.32, Appendix X2.1	ASTM E1527-21 specifically refers to the definition provided in the AAI regulation and adds that the person may be an independent contractor or an employee of the user.
Definition of Relevant Experience	312.10(b)	Appendix X2.2	Appendix X2.2	None
Definition of Good Faith	312.10(b)	3.2.35	3.2.38	ASTM E1527-21 clarifies the term as a noun (denoted by an "n").
Definition of Institutional Controls	312.10(b)	3.2.42	3.2.45	ASTM E1527-21 clarifies the term as a noun (denoted by an "n").
Section 312.11 References				
References	312.11	2	2	<p>The AAI and ASTM reference sections serve different purposes. The AAI reference section lists the ASTM E1527 standard as alternative means of complying with the AAI rule.</p> <p>The E1527-21 standard lists other ASTM standards (E2091, E2247, E2600, E2790), Federal Statutes, OSHA Standard, and EPA Documents that may be of use or of interest to persons using the E1527-21 standard.</p>

Section 312.20 All appropriate inquiries				
List of Components in All Appropriate Inquiries	312.20(a)	4.6, 6, 7, 10	4.6, 6, 7, 10	None
Shelf Life of the Written Report	312.20(b)	4.6.1, 4.6.2	4.6	None
Use of Previous Reports Prepared by Others	312.20 (c)-(d)	4.7	4.7	<p>The AAI regulation and the ASTM E1527-21 standard both recognize that environmental site assessments include information that is relevant to subsequent users and should be considered to avoid duplicating efforts in the future. ASTM E1527-21 clarifies that this practice does not convey a right to use or rely upon prior information and addresses the contractual and legal obligations to subsequent users of the site assessments only in stating that they are beyond the scope of the practice.</p> <p>The AAI regulation states that AAI may include the results and information contained in a previous inquiry so long as the prior AAI were done in compliance with the requirements of CERCLA §§ 101(35)(B), 101(40)(B) and 107(q)(A)(viii); the information was collected or updated within one year prior to the date of acquisition of the subject property (except certain items below); previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge; and the following were conducted within 180 days prior to that acquisition:</p> <ul style="list-style-type: none"> (i) Interviews with past and present owners, operators, and occupants (ii) Searches for recorded environmental cleanup liens (iii) Reviews of federal, tribal, state, and local government records (iv) Visual inspections of the facility and of adjoining properties (v) The declaration by the environmental professional. <p>ASTM E1527-21 states that prior environmental site assessments may be used so long as the information was generated as a result of procedures that meet or exceed the requirements of ASTM E1527-21 and there is a current investigation of conditions likely to affect recognized environmental conditions in connection with the subject property. This standard also states generally that additional tasks may be necessary to document conditions that may have changed materially since the prior assessment was done. In addition, this standard applies the same 1 year / 180-day limits as the AAI regulation.</p>

Objectives	312.20(e)	1.2, 7.1	1.2, 7.1	<p>The objectives of the AAI regulation are to set forth the standards and practices that are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property in order to satisfy CERCLA liability protection or Brownfield Assessment grant requirements.</p> <p>The objectives of ASTM E1527-21 are to set a practical and reasonable standard practice for environmental site assessments for commercial real estate and to identify recognized environmental conditions for the subject property.</p>
Contaminants of Concern	312.20(e)(2) 312.1(c)	1.1	1.1	<p>The AAI regulation applies to hazardous substances (and if conducted under § 312.1(b)(2) adds pollutants, contaminants, petroleum and petroleum products, and controlled substances). ASTM E1527-21 applies to the broad range of contaminants within the scope of CERCLA and petroleum products. As noted above, the scope for ASTM E1527-21 generally does not include controlled substances but recognizes their applicability under EPA Brownfields Assessment and Characterization Grants.</p>
Performance Factors	312.20(f)	8.1.3, 8.1.4, 8.1.5	8.1.3, 8.1.4, 8.1.5	None
Data Gaps	312.20(g)	12.5.1, 12.6.2	12.7	<p>None. The ASTM E1527-21 standard states that a data gap by itself is not inherently significant. It is only significant if other information and/or professional experience raises reasonable concerns involving the effects of the data gap on the ability of the environmental professional to render an opinion regarding whether conditions exist that are indicative of recognized environmental conditions or controlled recognized environmental conditions. This same concept with regard to data gaps is addressed in the AAI rule.</p> <p>If a significant data gap is identified, ASTM E1527-21 requires the environmental professional to comment in the Opinion section of the report how the missing information that caused the significant data gap affects the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases in, on, or at the subject property. ASTM E1527-21 also requires that the report Conclusions section include all recognized environmental conditions, controlled recognized environmental conditions, and significant data gaps.</p>
Releases and threatened releases	312.20 (h) 312.1(c)	3.2.75, Appendix X1.1.1	3.2.82, Appendix X1.1.1	<p>The AAI regulation states that releases and threatened releases should be noted in the report of inquiries, unless quantities and amounts do not pose a threat to human health or the environment. ASTM E1527-21 clarifies there are statutory exclusions from the definition of "release" that may impact the environmental professional's conclusion and that AAI does not specifically discuss if CERCLA excluded releases have to be identified to comply with the AAI rule.</p>

Section 312.21 Results of inquiry by an environmental professional

Requirements for Inquiries of the Environmental Professional	312.21(b)	7.2, 6	7.2, 6	<p>The ASTM A1527-21 standard fully addresses the provisions required in the AAI regulation. Both the AAI rule and the ASTM E1527-21 standard require that the investigation include a review of records, interviews, and a site visit.</p> <p>The AAI regulation requires that prospective property owners and the environmental professional conduct interviews with past and present owners. The regulation also requires visual inspections; a review of government records, a review of historical sources, the consideration of commonly known or reasonably ascertainable information, and an assessment of the degree of obviousness of the presence and the ability to detect contamination.</p> <p>The ASTM E1527-21 standard requires the environmental site assessment include: records review (physical setting resources, government records, historical records); site reconnaissance; interviews with owners, operators, and occupants of the property and local government officials; and an evaluation and report. In addition, the user must review land title records and judicial records for environmental liens and activity and use limitations; and report specialized or actual knowledge or experience of the user, purchase price, any commonly known or reasonably ascertainable information, and maps of the property.</p> <p>Both the AAI regulation and the ASTM E1527-21 standard require that the final report include an opinion regarding additional appropriate investigation, if the environmental professional holds such an opinion.</p>
Report Requirements	312.21(c)	12, Appendix X5	12, Appendix X4	<p>Both the AAI rule and the ASTM E1527-21 standard require the report to contain opinions as to whether there are conditions indicative of release and as to identification of data gaps. Both also require that the final report include a statement that the person signing the report meets the definition of an environmental professional provided in § 312.10 of the AAI regulation.</p> <p>The ASTM E1527-21 standard goes further to require the report to include a site plan showing the approximate location of features, activities, uses, and conditions of the subject property, and photographs of features, activities, uses, and conditions indicative of recognized environmental conditions and de minimis conditions, as well as other relevant and representative photographs deemed at the discretion of the environmental professional. Significant data gaps are required to be identified in the Findings section of the report. ASTM E1527-21 requires that the report include a Conclusions section that lists all recognized environmental conditions (including controlled recognized environmental conditions) and significant data gaps connected with the subject property. The report should also include an opinion by the environmental professional regarding additional appropriate investigation, if any, to detect the presence of hazardous substances or petroleum products.</p>

Signed Declarations to Be Included in the Written Report	312.21(d)	12.7, 12.13, 12.14	12.8, 12.12, 12.13	<p>ASTM E1527-21 requires a more specific declaration of Conclusions about the presence of recognized environmental conditions, controlled recognized environmental conditions, and/or significant data gaps than the AAI regulation. Both require a declaration that the environmental professional meets the definition defined in §312.10 and that the AAI investigation was performed in conformance with 40 CFR Part 312.</p> <p>ASTM E1527-21 requires an additional statement that the Phase I Environmental Site Assessment was performed in conformance with ASTM E1527-21.</p>
Section 312.22 Additional inquiries				
Additional Inquiries	312.22(a)	6.2, 6.3, 6.4, 6.5, 6.6	6.2, 6.3, 6.4, 6.5, 6.6	<p>The AAI regulation assigns the task of developing information on environmental cleanup liens, specialized knowledge, relationship of purchase price to fair market value, and commonly known information to the person seeking liability protection or conducting assessments with Brownfields grants. The AAI regulation states that this data may be provided to the environmental professional by the user.</p> <p>The ASTM E1527-21 standard goes further and states that it is the user's responsibility to collect the information and the user should report the information to the environmental professional. If the user does not communicate the information to the environmental professional, the environmental professional should consider the significance of the absence of such information.</p>
Section 312.23 Interviews with past and present owners, operators, and occupants				
Interviews with the Subject Property Past and Present Owners, Operators, and Occupants	312.23(b), 312.23(c)	10	10	<p>The AAI regulation requires that reasonable efforts be made to interview the current owner or occupants. Additionally, at least one of the following groups must be interviewed, to the extent necessary to achieve the objectives and performance factors: current or past facility managers; past owners, occupants, or operators; or employees of current or past occupants.</p> <p>ASTM E1527-21 states that the key site manager or someone with knowledge of the subject property should be interviewed. Additionally, a reasonable attempt to interview current occupants must be made. ASTM E1527-21 also states that interviews with past owners, operators, and occupants of the subject property shall be conducted to the extent that they have been identified and that the information likely to be obtained is not duplicative of information already obtained from other sources or resources.</p>
Interviews Conducted at Abandoned Properties	312.23(d)	10.5.5	10.5.5	None.

Section 312.24 <i>Reviews of historical sources of information</i>				
Review of Historical Sources: Suggested Sources	312.24(a)	8.3.4, 8.3.8, 8.3.9	8.3.4	<p>The AAI regulation lists the review of historical documents and records to include, but not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.</p> <p>The ASTM E1527-21 standard provides a more detailed list of eight standard historical resources (see Sections 8.3.4.1 through 8.3.4.8) to be used in the historical review, as well as several other historical resources (Section 8.2.4.9) that can be used, but are not required. ASTM E1527-21 (Section 8.3.8) clarifies which resource must be reviewed if the environmental professional deems them reasonably ascertainable, likely to be useful, and applicable to the subject property, though some recourse exists if such resources are not reviewed. ASTM E1527-21 (Section 8.3.9) also lists the four resources that must be reviewed if they were researched for the subject property, provide coverage of one or more adjoining properties, and are likely to be useful in satisfying the historical research section objective.</p>
Review of Historical Sources: Period to Be Covered	312.24(b)	8.3.8	8.3.2	<p>The AAI regulation requires that the historical record review must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.</p> <p>ASTM E1527-21 indicates that all obvious uses of the subject property shall be identified from the present, back to the subject property's first developed use, or back to 1940, whichever is earlier. "Developed use" specifically includes agricultural uses and placement of fill dirt, and other uses that may not involve structures. The ASTM E1527-21 standard is more stringent than the AAI final regulation.</p>
Section 312.25 <i>Searches for recorded environmental cleanup liens</i>				
Searches for Recorded Environmental Cleanup Liens	312.25	5.4, 6.2, 6.4, 10.8.1.12, X1.7	6.2, 6.4, 10.8.1.10	Both the AAI regulation and the ASTM E1527-21 standard require a search for liens; however, AAI allows the user to retain the information or share it with the environmental professional, whereas ASTM E1527-21 states that the information should be provided to the environmental professional. ASTM E1527-21 also provides additional clarification and information on reviewing land title records and judicial records for environmental liens (see Section 6.2 and Appendix X1.7).
Section 312.26 <i>Reviews of Federal, State, Tribal, and local government records</i>				
Government Records Review: List of Records	312.26(a), 312.26(b)	8.2.1, 8.2.2, 8.2.3, 8.2.4	8.2.1, 8.2.2, 8.2.3, 8.2.4	The ASTM E1527-21 standard provides more expansive lists of physical setting resources, as well as standard and additional federal, state, tribal, and local environmental record sources than the AAI regulation.

Government Records Review: Search Distance	312.26(c), 312.26(d)	8.1.2, 8.2.2	8.1.2, 8.2.1	The AAI rule includes a 0.5-mile distance for the search of publicly available lists of engineering controls, but allows for the distance to be adjusted, based upon professional judgement. The ASTM E1527-21 standard sets the institutional and engineering control search distance as "property only." Consistent with AAI, the ASTM E1527-21 standard allows for the adjustment of the minimum search distances based on the discretion of the environmental professional.
Section 312.27 Visual inspections of the facility and of adjoining properties				
Site Visit: Requirements	312.27(a), 312.27(b)	9	9	<p>The AAI regulation and ASTM E1527-21 standard both require that a visual on-site inspection of the subject property and facilities be conducted, and a visual inspection of adjoining properties be conducted from the subject property line, public rights-of-way, or other vantage point.</p> <p>The ASTM E1527-21 standard states that a prior environmental site assessment may be used for the purposes of guidance but shall not be relied upon as representative of current features, activities, uses, or conditions.</p> <p>Section 9.4 of ASTM E1527-21 requires that current and past features, activities, uses, and conditions (specified in Sections 9.4.1 through 9.4.28) be noted when observed or when such information is ascertained during interviews. The environmental professional is required to document what features, activities, uses, and conditions were and were not present in, on, or at the subject property in the report.</p>
Site Visit: Limitations	312.27(c)	9.2.6	9.2.4	None
Section 312.28 Specialized knowledge or experience on the part of the defendant				
Specialized Knowledge or Experience	312.28	6.3	6.3	<p>The AAI regulation requires the user to take into account any specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry.</p> <p>ASTM E1527-21 requires the user to take into account their specialized knowledge about conditions indicative of releases or threatened releases. The ASTM E1527-21 standard states that the goal is to use specialized knowledge that is material to recognized environmental conditions in connection with the subject property. If there is relevant specialized knowledge, the user should communicate such information to the environmental professional prior to the site reconnaissance.</p>
Section 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated				
The Relationship of the Purchase Price to the Value of the Property	312.29	6.5	6.5	Similar requirements. However, ASTM E1527-21 goes further than the AAI regulation by suggesting the user inform the environmental professional if the purchase price of the subject property is lower than the fair market value due to contamination. However, the user is not required to disclose the purchase price to the environmental professional.

Section 312.30 Commonly known or reasonably ascertainable information about the property				
Commonly Known or Reasonably Ascertainable Information about the Property	312.30	6.6	6.6	Similar requirements. The AAI rule requires that commonly known or reasonably ascertainable information about the subject property be included in the investigation and provides a list of typical sources of such information. The ASTM E1527-21 standard adds that the user should notify the environmental professional of this knowledge prior to site reconnaissance.
Section 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation				
The Degree of Obviousness of the Presence or Likely Presence of Contamination	312.31	6.7, 12.6, 12.7, Appendix X3	6.7, 12.6, 12.8, Appendix X3	Similar requirements, but the ASTM E1527-21 standard is more specific with the items to be addressed, such as cases of controlled recognized environmental conditions and any significant data gaps identified. ASTM E1527-21 requires the opinions section of the report to include the environmental professional's rationale for concluding that a finding is or is not a recognized, controlled, or historical environmental condition or a de minimis condition.

Tab 5

Tab 5-A

ADDENDUM W - WETLANDS

1 USE FOR SALE OR LEASE OF PROPERTY THAT CONTAINS OR MAY CONTAIN WETLANDS.

2 This Addendum is attached to and made part of the Offer to Purchase/Lease dated _____
3 made by the Buyer, _____ with respect to the property at
4 _____, Wisconsin (Property).

5 ■ **WETLANDS NOTICE:** It is in the Buyer's best interest to determine if the Property contains wetlands **prior** to the
6 purchase or lease of the Property because:

7 • **Wetlands are not suitable for development.**

8 Building in wetlands is not recommended because it increases the likelihood of flooding and structural failures.

9 • **State and federal laws require permits before wetlands can be built upon or impacted.**

10 State wetland permit information from the Wisconsin Department of Natural Resources can be found at
11 <http://dnr.wi.gov/wetlands/programs.html>. Federal wetland permit information from the U.S. Army Corps of
12 Engineers can be found at <http://www.mvp.usace.army.mil/regulatory/>. Also, check for local permits. Note, not all
13 projects will be eligible for permits. Construction in wetlands without permits will result in enforcement action -
14 requiring removal of structures, wetland restoration, and potential fines.

15 **To determine if a property contains wetlands.** Wetlands are identified based on the presence of three
16 characteristics: hydric soils (soils indicative of wet conditions), wetland plants, and seasonal water; however, many
17 wetlands do not have standing water for much of the year. Buyer can review maps and other resources for *Locating*
18 *Wetlands* at <http://dnr.wi.gov/wetlands/locating.html>. Professional assistance is often needed to verify the presence or
19 absence of wetlands (see <http://dnr.wi.gov/wetlands/delineation.html> for information).

20 **Wisconsin Wetlands.** Wetlands may be perceived as an amenity or a liability depending upon the desired use of the
21 property, however all wetlands provide important ecological functions. Wisconsin has 12 types of wetlands including:
22 marshes, meadows, wooded swamps, bogs, fens and others. Descriptions and photographs can be found at
23 <http://www.wisconsinwetlands.org/wetofwisc.htm>.

24 ■ **SELLER INFORMATION**

25 Buyer has inquired of Seller who has indicated that Seller (check one):

26 1. ☐ Does ☐ Does not have notice or knowledge that the Property contains wetlands.

27 2. ☐ Does ☐ Does not have notice or knowledge that the Property contains lakes, ponds, streams, or drainage
28 ditches.

29 3. ☐ Does ☐ Does not have notice or knowledge that the Property contains standing water or areas where water
30 collects at or near the soil surface between March-November in most years.

31 **Note:** Seller's lack of knowledge does not confirm the absence of wetlands.

32 **THE WETLAND EVALUATION CONTINGENCY IS PART OF THIS ADDENDUM IF THE BOX PRECEDING THE**
33 **CONTINGENCY IS MARKED, SUCH AS WITH AN "X". IT IS NOT PART OF THIS ADDENDUM IF THE BOX IS**
34 **MARKED N/A OR LEFT BLANK.**

35 ☐ **WETLAND EVALUATION CONTINGENCY:** This Offer is contingent upon Buyer obtaining a written report which
36 determines if there are wetlands at the Property within _____ days of acceptance of this Offer. Buyer shall arrange
37 for a wetland delineation professional to conduct an on-site evaluation of the Property and prepare a written report, at
38 buyer's cost, unless otherwise agreed in writing. This contingency shall be deemed satisfied unless Buyer delivers a
39 copy of a wetland delineation report to Seller, and the listing broker if Property is listed, which shows the presence of
40 wetlands on the property; within five days of the earlier of: 1) Buyer's receipt of the report or 2) the deadline for Buyer
41 obtaining said report. If the report shows wetlands on the Property (Seller shall provide Buyer with a credit of
42 \$ _____ /wetland acre at closing) (Buyer may rescind this Offer) (_____
43 _____
44 _____)

(STRIKE AND COMPLETE AS APPLICABLE.)

45 By initialing and dating below, the Parties acknowledge that they have received and read a copy of this Addendum.

46 _____
47 Buyer(s) Initials Date Seller(s) Initials Date

REAL ESTATE CONDITION REPORT

THIS **CONDITION REPORT** CONCERNS THE REAL PROPERTY LOCATED AT _____
 _____ IN THE _____ OF _____, COUNTY

 OF _____, STATE OF WISCONSIN. THIS REPORT IS A DISCLOSURE OF THE CONDITION OF THAT
 PROPERTY AS OF _____, _____, IN COMPLIANCE WITH SECTION 709.02 OF THE WISCONSIN
 (MONTH) (DAY)

STATUTES. IT IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR ANY AGENTS REPRESENTING ANY PRINCIPAL IN THIS TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PRINCIPALS MAY WISH TO OBTAIN.

OWNER'S INFORMATION

B. 1. In this form, "am aware" means to have notice or knowledge. In this form, "defect" means a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises.

B. 2. The owner discloses the following information with the knowledge that even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the property. The owner hereby authorizes any agent representing any principal in this transaction to provide a copy of this statement, and to disclose any information in the statement, to any person in connection with any actual or anticipated sale of the property.

B. 3. The owner represents that to the best of his or her knowledge the responses to the following statements have been accurately noted as "yes", "no" or "not applicable" to the property being sold. If the owner responds to any statement with "Yes", the owner shall provide, in the additional information area of this form, an explanation- of the reason why the response to the statement is "yes".

B. 4. If the transfer is of a condominium unit, the property to which this form applies is the condominium unit, the common elements of the condominium and any limited common elements that may be used only by the owner of the condominium unit being transferred.

See
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Report*

STATEMENTS

Yes No N/A

- | | | | | |
|--|-------|-------|-------|-------|
| C.1. I am aware of defects in the roof. | _____ | _____ | _____ | _____ |
| C.2. I am aware of defects in the electrical system. | _____ | _____ | _____ | _____ |
| C.3. I am aware of defects in part of the plumbing system (including the water heater, water softener and swimming pool) that is included in the sale. | _____ | _____ | _____ | _____ |
| C.4. I am aware of defects in the heating and air conditioning system (including the air filters and humidifiers). | _____ | _____ | _____ | _____ |
| C.5. I am aware of defects in the well, including unsafe well water. | _____ | _____ | _____ | _____ |
| C.6. I am aware that this property is served by a joint well. | _____ | _____ | _____ | _____ |
| C.7. I am aware of defects in the septic system or other sanitary disposal system. | _____ | _____ | _____ | _____ |
| C.8. I am aware of underground or aboveground fuel storage tanks on or previously located on the property. (If "yes", the owner, by law, may have to register the tanks with the Department of Commerce at P.O. Box 7970, Madison, Wisconsin 53707, whether the tanks are in use or not Regulations of the Department of Commerce may require the closure or removal of unused tanks.) | _____ | _____ | _____ | _____ |
| C.9. I am aware of an "LIP" tank on the property. (If "yes", state whether or not the owner of the property either owns or leases the tank). | _____ | _____ | _____ | _____ |
| C.10. I am aware of defects in the basement or foundation (including cracks, seepage and bulges). | _____ | _____ | _____ | _____ |
| C.11. I am aware that the property is located in a floodplain, wetland or shoreland zoning area. | _____ | _____ | _____ | _____ |
| C.12. I am aware of defects in the structure of the property. | _____ | _____ | _____ | _____ |

**See
Experts
Report***

- C.13. I am aware of defects in mechanical equipment included in the sale either as fixtures or personal property.
- C.14. I am aware of boundary or lot line disputes, encroachments or encumbrances (including a joint driveway).
- C.15. I am aware of a defect caused by unsafe concentrations of, or unsafe conditions relating to, radon, radium in water supplies, lead in paint, lead in soil, lead in water supplies or plumbing system, or other potentially hazardous or toxic substances on the premises.
- C.16. I am aware of the presence of asbestos or asbestos-containing materials on the premises.
- C.17. I am aware of a defect caused by unsafe concentrations of, unsafe conditions relating to, or the storage of, hazardous or toxic substances on neighboring properties.
- C.18. I am aware of current or previous termite, powder-post beetle or carpenter ant infestations.
- C.19. I am aware of defects in a wood burning stove or fireplace or of defects caused by a fire in a stove or fireplace or elsewhere on the property.
- C.20. I am aware either that remodeling affecting the property's structure or mechanical systems was done or that additions to this property were made during my period of ownership without the required permits.
- C.21. I am aware of federal, state, or local regulations requiring repairs, alterations or corrections of an existing condition.
- C.22. I have received notice of property tax increases, other than normal annual increases, or am aware of a pending property reassessment.
- C.23. I am aware that remodeling that may increase the property's assessed value was done.
- C.24. I am aware of proposed or pending special assessments.
- C.25. I am aware of the proposed construction of a public project that may affect the use of the property.
- C.26. I am aware of subdivision homeowners' associations, common areas co-owned with others, zoning violations or nonconforming uses, rights-of-way, easements, or another use of a part of the property by nonowners, other than recorded utility easements.
- C.27. I am aware of other defects affecting the property.

ADDITIONAL INFORMATION

- D.1. I am aware that a structure on the property is designated as a historic building or that part of the property is in a historic district.
- D.2. The owner has lived on the property for _____ years.
- D.3. Explanation of "yes" responses. (See B.3.) _____

Tab 5-B

[View the 2021 Hawaii Revised Statutes](#) | [View Previous Versions of the Hawaii Revised Statutes](#)

2015 Hawaii Revised Statutes

TITLE 28. PROPERTY

508D. Mandatory Seller Disclosures in Real Estate Transactions

508D-15 Notification required; ambiguity.

Universal Citation: HI Rev Stat § 508D-15 (2015)

§508D-15 Notification required; ambiguity. (a) When residential real property lies:

(1) Within the boundaries of a special flood hazard area as officially designated on Flood Insurance Administration maps promulgated by the United States Department of Housing and Urban Development for the purposes of determining eligibility for emergency flood insurance programs;

(2) Within the boundaries of the noise exposure area shown on maps prepared by the department of transportation in accordance with Federal Aviation Regulation Part 150-Airport Noise Compatibility Planning (14 Code of Federal Regulations Part 150) for any public airport;

(3) Within the boundaries of the Air Installation Compatibility Use Zone of any Air Force, Army, Navy, or Marine Corps airport as officially designated by military authorities; or

(4) Within the anticipated inundation areas designated on the department of defense's emergency management tsunami inundation maps;

subject to the availability of maps that designate the four areas by tax map key (zone, section, parcel), the seller shall include such material fact information in the disclosure statement provided to the buyer subject to this chapter. Each county shall provide, where available, maps of its jurisdiction detailing the four designated areas specified in this subsection. The maps shall identify the properties situated within the four designated areas by tax map key number (zone, section, parcel) and shall be of a size sufficient to provide information necessary to serve the purposes of this section. Each county shall provide legible copies of the maps and may charge a reasonable copying fee.

(b) When it is questionable whether residential real property lies within any of the designated areas referred to in subsection (a) due to the inherent ambiguity of boundary lines drawn on maps of large scale, the ambiguity shall be construed in favor of the seller; provided that a good faith effort has been made to determine the applicability of subsection (a) to the subject real property.

(c) Except as required under subsections (a) and (b), and as required under section 508D-3.5, the seller shall have no duty to examine any public record when preparing a disclosure statement. [L 1994, c 214, pt of §2; am L 1996, c 161, §15; am L 2001, c 224, pt of §7; am L 2008, c 191, §3; am L 2013, c 186, §5; am L 2014, c 111, §28]

Disclaimer: These codes may not be the most recent version. Hawaii may have more current or accurate information. We make no warranties or guarantees about the accuracy, completeness, or adequacy of the information contained on this site or the information linked to on the state site. Please check official sources.

COVID-19: Coronavirus Coverage Resources

BEST OF HAWAII: Best of Hawaii

https://www.kitv.com/news/local/starting-may-1-sea-level-rise-risks-must-be-disclosed-in-all-real-estate-transactions/article_7b9a19ee-c821-11ec-ab85-4bbdfa30077a.html

Starting May 1, sea level rise risks must be disclosed in all real estate transactions

By Kathryn Doorey
Apr 29, 2022



Photo courtesy of Hawaii Dept of Land and Natural Resources

Beginning Sunday May 1, all real estate transactions in Hawaii will be required to disclose sea level rise (SLR) risks to properties.

The **SLR mandate** was enacted in 2021 by the State of Hawaii. Supplemental materials, including the **Hawaii Sea Level Rise Vulnerability Report**, and the **Hawaii Sea Level Rise Viewer**, have been used to assist state and county planners, natural resource and infrastructure managers, and others in planning and permitting decisions, but the mandate was in direct response to documented sea level rise by scientific and governmental studies conducted around Hawaii.

Similar to existing flood zone disclosure requirements established by the National Flood Insurance Program, the SLR disclosure will help homeowners and home buyers better understand how SLR could impact their properties.

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DISCLOSURE REQUIREMENT

For Residential Real Estate in the Sea Level Rise Exposure Area

The State of Hawai'i recently enacted a new update to the Mandatory Seller Disclosures in Real Estate Transactions Law in 2021, codified within Hawai'i Revised Statutes §508D-15, requiring that real estate transactions within the State of Hawai'i must disclose any risk of sea level rise to the property.

Risks to oceanfront properties from shoreline erosion and coastal flooding are increasing with sea level rise as documented in scientific and government studies around Hawai'i.



Photo: Sea level rise putting homes at risk.

The Hawai'i Climate Change Mitigation & Adaption Commission, in collaboration with the University of Hawai'i (UH) Sea Grant Program, and the DLNR Office of Conservation and Coastal Lands (OCCL) outlined the requirements in a flyer which provides background information on the new requirement, including guidance to the Hawaii Sea Level Rise Viewer. The application, developed by the Pacific Islands Ocean Observing System at UH, allows users to assess specific properties for sea level rise risk.

The disclosure requirement applies to oceanfront and near-oceanfront properties as well as to properties close to streams or areas likely to flood in heavy rainfall events.



A bluffside collapse on Oahu's North Shore reveals troubling trends for Hawaii
By Erin Coogan

“Recent news of the North Shore home collapse highlights the real risks to oceanfront properties due to climate change,” Suzanne Case, Co-Chair of the Hawaii Climate Change Commission, noted. “Unfortunately, this may happen again, it’s a dangerous situation – and demonstrates the necessity for disclosing this kind of information.”

Do you have a story idea? Email news tips to news@kitv.com

MORE INFORMATION



It's 'inescapable': Pacific Islanders have tried to flee the climate crisis, only to face new threats

Hawaii pledges to strengthen oversight over beach erosion

Tags

Sea Level Rise

Hawaii

Economics

Building Industry

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Disclosure

Requirement

Properties

Real Estate

Risk

Kathryn Doorey

Digital Content Producer

Tab 6-A

- (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 of 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 oversight 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-Zones¹ and Coastal Barrier Resources System² (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-B

- 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 oversight 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-Zones¹ and Coastal Barrier Resources System² (CBRS) areas as indicated on the FEMA Flood Maps.

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

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

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<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-C

(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

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 through 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 its 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.

Memorandum for Agreement
Baldwin County Coastal Program Delegation
Page 3 of 3

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

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

By: _____
Charles F. Gruber
Chairman
Baldwin County Commission

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

Date: _____

Date: _____

ATTEST:

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

Tab 7-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 Ordinance.

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 = 466,036.578 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 pauciflorescens (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
CHARLES F. GRUBER
Chairman

10-7-14
DATE

ATTEST:

[Signature]
County Administrator



DAVID A. Z. BREWER
County Administrator

10-7-2014

DATE

Tab 8

**SECTION F.
ZONES)**

COASTAL HIGH HAZARD AREAS (V-ZONES & COASTAL AE

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 9



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
P.O. BOX 2288
MOBILE, ALABAMA 36628-0001

REGIONAL GENERAL PERMITS FOR MINOR STRUCTURES AND ACTIVITIES
WITHIN THE STATE OF ALABAMA
U.S. ARMY CORPS OF ENGINEERS

Effective Date: October 1, 2021
Expiration Date: September 30, 2026

AUTHORITY:

Pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344), the Mobile District, U.S. Army Corps of Engineers (Mobile District) hereby revises and issues the following Alabama General Permits (ALGP) for a period of five (5) years. In an effort to eliminate unnecessary duplication of efforts among agencies and to streamline the permitting process for routine projects with only minimal impact, the Mobile District will regulate minor structures and activities in waters of the United States, in the State of Alabama, within the regulatory boundaries of the Mobile District under the Regional General Permits identified herein. These permits supersede the previous Alabama General Permits which expire on October 1, 2021.

ALABAMA GENERAL PERMITS SUMMARY	
Permit	Activity
ALGP-01	Excavated Boat Slips
<i>ALGP-02</i>	<i>RESERVED (Previously: Maintenance Dredging) *See Note 1</i>
ALGP-03	Dredging
ALGP-04	Debris Removal
ALGP-05	Piers and Pile-Supported Structures
ALGP-07	Boat Ramps and Marine Ways
<i>ALGP-10</i>	<i>RESERVED (Previously: Living Shorelines) *See Note 2</i>
ALGP-11	Shoreline and Bank Stabilization and Protection
ALGP-13	Filling of Previously Dredged Areas
<i>ALGP-24</i>	<i>RESERVED (Previously: Piers and Pile-Supported Structures Located in Weeks Bay) *See Note 3</i>

* Note 1: Activities previously covered under permit ALGP-02 are now covered under ALGP-03.

* Note 2: Activities previously covered under permit ALGP-10 are now covered under ALGP-11 and Nationwide Permit 54.

* Note 3: Activities previously covered under permit ALGP-24 are now covered under ALGP-05.

GEOGRAPHIC APPLICABILITY:

These regional general permits are applicable in waters of the United States within the regulatory boundaries of the Mobile District which are shown in the shaded area on the map below. The Mobile District regulatory boundaries encompass all the State of Alabama that is south of the Tennessee River Valley. For a site-specific determination of applicability, please contact the Mobile District Regulatory Division office at (251) 690-2658, or go to the website:

<http://www.sam.usace.army.mil/Missions/Regulatory/MobileRegulatoryOffices.aspx>



ADMINISTRATION:

Unless specifically stated in the special conditions of the permit, a project-specific verification must be obtained for all activities covered under the Alabama General Permits **prior** to the start of regulated activities in waters of the United States. A pre-construction notification (PCN) for verification of permit coverage under the Alabama General Permits may be submitted to and verification letters issued by the following:

For projects in South Alabama Branch Counties:
U.S. Army Corps of Engineers, Mobile District
Regulatory Division, South AL Branch (RD-A)

Post Office Box 2288
Mobile, Alabama 36628-0001
Telephone (251) 690-2658
Email PCN submittals to: [CESAM-
RD@sam.usace.army.mil](mailto:CESAM-RD@sam.usace.army.mil)

For projects located in North Branch Counties:
U.S. Army Corps of Engineers, Mobile District
Regulatory Division, North Branch (RD-N)

600 Vestavia Parkway, Suite 203, Shelby Building
Vestavia Hills, Alabama 35216
Telephone (251) 690-2658
Email PCN submittals to: [CESAM-
RD@sam.usace.army.mil](mailto:CESAM-RD@sam.usace.army.mil)

If a proposed activity is located on one of the following U.S. Army Corps of Engineers' lakes in the State of Alabama, the plans **must** be reviewed and approved by the local Resource Manager. Additionally, the Resource Manager in some cases may issue a verification of authorization in lieu of the Regulatory Division. Each project management office will submit quarterly reports to the Mobile District, Regulatory Division listing all activities verified under these Regional General Permits.

Black Warrior – Tombigbee River Lakes
(Coffeetown, Demopolis, Warrior Lakes):

U.S. Army Corps of Engineers
Demopolis Site Office
384 Resource Management Drive
Demopolis, AL 36732-1546
(334) 289-3540

Alabama River Lakes
(Woodruff Lake):

U.S. Army Corps of Engineers
Alabama River Lakes Site Office
8493 U.S. Highway 80 West
Hayneville, AL 36040-2934
(334) 872-9554

Tennessee – Tombigbee Waterway
(Gainesville & portions of Aliceville Lake):

U.S. Army Corps of Engineers
Tenn – Tom Project Management Office
3606 West Plymouth Road
Columbus, MS 39701-9504
(662) 327-2142

Black Warrior – Tombigbee River Lakes (Oliver,
Holt, Bankhead Lakes):

U.S. Army Corps of Engineers
Holt Resource Office
11911 Holt Lock & Dam Road
Cottondale, AL 35453
(205) 553-9373

Alabama River Lakes
(Dannelly, Claiborne Lakes):

U.S. Army Corps of Engineers
Millers Ferry Resource Office
1226 Powerhouse Road
Camden, AL 36726-9109
(334) 682-4244

Walter F. George Lake:
U.S. Army Corps of Engineers
Natural Resource Management Office
427 Eufala Road
Fort Gaines, GA 39851
(229) 768-2516

West Point Lake:
U.S. Army Corps of Engineers
West Point Project Management Office
500 Resource Management Drive
West Point, GA 31833
(706) 645-2937

If the proposed activity is located on a lake managed by a power company, or similar entity with a shoreline management plan, permit requests may be directed through them. NOTE: Check with the Resource Manager to see if the specific lake qualifies for this alternative review procedure.

PRE-CONSTRUCTION NOTIFICATION (PCN):

The prospective permittee is required to submit a PCN for their project, unless otherwise noted in the conditions of the applicable permit. It is recommended to submit the PCN as early as possible, at least 60 days prior to the planned start of their proposed project. Please note that reviews of projects that have potential to affect cultural resources or threatened and endangered species may take longer than 60 days to complete. The PCN must include a completed Alabama Joint Application Form, which can be accessed at USACE, Mobile District, Regulatory Division's website at:

www.sam.usace.army.mil/Missions/Regulatory.aspx

or

www.adem.alabama.gov/DeptForms/Form166.pdf

The following information is required for a complete PCN and verification of coverage under the Alabama General Permits (unless noted as optional):

- ☐ A. An Alabama Joint Application form with all applicable portions completed, and signed by the applicant (may be an original or digital signature)
- ☐ B. Applicant name, address, telephone number, and email address (if available)
- ☐ C. If an agent is used, all agent contact information and applicant's signature authorizing the agent
- ☐ D. Exact location information for proposed project, including street address, latitude and longitude (in "Decimal Degree" format), and parcel number of property
- ☐ E. Full project description, including all proposed dimensions of structures and/or activity
- ☐ F. (Optional) Photographs (or description of existing conditions) of project area
- ☐ G. Statement of purpose and need for project
- ☐ H. Vicinity map on full 8.5"x 11" sheet (NOTE: The map must be legible and reproducible)
- ☐ I. Overall plan view drawing of entire property and proposed project on 8.5"x 11" sheet (NOTE: All drawings must be legible and reproducible)
- ☐ J. Cross-section or profile view drawing of proposed structure, or areas of dredge/fill, on 8.5"x 11" sheet (NOTE: All drawings must be legible and reproducible)
- ☐ K. Names and addresses of adjoining property owners
- ☐ L. If Applicable: A delineation of any wetlands (including any emergent marsh and fringe wetlands), submerged aquatic vegetation (SAV), and/or submersed grassbeds that are present on the project parcel and/or adjacent riparian area

Note: ADEM requires a copy of the PCN. Applications for projects located in Baldwin, Mobile, and Washington Counties should be emailed to: coastal@adem.alabama.gov, or mailed to: Coastal Section-Mobile Branch, Field Operations Division, ADEM, 3664 Dauphin Street, Suite B, Mobile, AL 36608; Applications for projects in all other counties should be emailed to: fieldmail@adem.alabama.gov, or mailed to: Field Operations Division, ADEM, P.O. Box 301463, Montgomery, AL 36110

Note: ADCNR requires a copy of the PCN, along with a completed ADCNR-SLD Notice of Intent to Impact State Owned Submerged Lands form. Applications should be emailed to: dcnr.coastal@dcnr.alabama.gov, or mailed to: ADCNR, State Lands Division, Coastal Section, 31115 Five Rivers Boulevard, Spanish Fort, Alabama 36527.

For additional information or assistance with the PCN, applicants may contact personnel with the U.S. Army Corps of Engineers, Mobile District, Regulatory Division at (251) 690-2658.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT: The Alabama Department of Environmental Management (ADEM) has reviewed these regional general permits and issued a conditional water quality certification (WQC) letter pursuant to Section 401(a)(1) of the Clean Water Act. The WQC letter included nineteen (19) conditions which the ADEM requested to be incorporated into each permit. The ADEM's certification of these regional general permits will expire on September 30, 2026.

Pursuant to the Coastal Zone Management Act, the ADEM has also issued a conditional letter of concurrence certifying that activities authorized by these regional general permits and located within Alabama's Coastal Zone Management Area are consistent with the Alabama Coastal Area Management Program (ACAMP). The ADEM's consistency determination included a request for specific conditions to be incorporated within each permit that apply to authorized activities located in the Alabama Coastal Zone Management area. The ADEM's consistency determination for these regional general permits will expire on September 30, 2026.

CULTURAL RESOURCES: The Mobile District will review each PCN and make a determination of the potential effects of the proposed project on any type of cultural resources listed, or potentially eligible for listing, in the NRHP. If the Mobile District determines that the project will have any potential to cause effects to a cultural resource (i.e. determinations of "no effect," "no adverse effect," or "adverse effect"), the determination will be coordinated with the SHPO pursuant to requirements under Section 106 of the National Historic Preservation Act (NHPA) and 33 CFR part 325, Appendix C. Reference General Conditions GC-7 and GC-8 pertaining to cultural and tribal resource issues.

If the Mobile District determines that the project may affect cultural resources to which any federally recognized Indian Tribe attaches religious and cultural significance, then (in addition to the SHPO) the Mobile District will also contact the appropriate Indian Tribe(s) in a manner suitable to initiate staff-level coordination or government-to-government consultation, as appropriate. The Mobile District is responsible for making the effects determination for each project, and after written notification of the determination is made to the SHPO, the Mobile District will provide the SHPO thirty (30) days to respond. In the cases of projects for which the Mobile District has made a determination that a project may affect tribal cultural resources, the Mobile District will, after initiating coordination or government to government consultation, also provide the consulting Indian Tribe thirty (30) days to respond. Verifications cannot be issued until all required consultation pursuant to Section 106 of the NHPA and 33 CFR part 325, Appendix C is complete.

THREATENED AND ENDANGERED SPECIES: No activity is authorized by these regional general permits that is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. The Mobile District will review each individual PCN and make a determination of the potential effect of the proposed project on threatened or endangered species, or critical habitat. No activity which "may affect" a listed species or critical habitat is verified for coverage under these regional general permits unless consultation pursuant to Section 7 of the ESA has been completed for the project. Reference General Condition GC-6 pertaining to threatened and endangered species, and critical habitat.

ALABAMA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES – STATE LANDS DIVISION: Public Trust Land, i.e., submerged property below mean high tide and the bottoms of navigable rivers and creeks are the property of the State of Alabama and managed by the State Lands Division (SLD) of the Alabama Department of Conservation and Natural Resources (ADCNR) for the proprietary interest of the citizens of Alabama. Any activities adjacent to these properties may require a separate permit, approval, easement and/or lease from the State Lands Division. Notification to the ADCNR-SLD is made by the applicant submitting a completed ADCNR-SLD Notice of Intent to Impact State Owned Submerged Lands form, along with a completed copy of the Alabama Joint Permit Application to the ADCNR-SLD. Applications should be emailed to dcnr.coastal@dcnr.alabama.gov or mailed to: ADCNR, State Lands Division, Coastal Section, 31115

Five Rivers Boulevard, Spanish Fort, Alabama 36527. The State Lands Division will then notify the applicant if the activity requires a separate approval, dredge permit, easement and/or lease from the ADCNR, or if additional information is required by the State Lands Division to complete its review. Applicants may contact SLD by phone at (251) 621-1238 for additional guidance.

For all activities impacting State-owned submerged lands, the following information is required by the ADCNR State Lands Division:

- (1) **Application Form:** Permit applicants must submit a completed ADCNR-SLD Notice of Intent to Impact State Owned Submerged Lands form.
- (2) **Ownership:** Permit applicants must provide evidence of riparian ownership with an affirmation of accuracy as part of their application package to the ADCNR.
- (3) **Riparian Rights Area:** All structures and other activities must be within the riparian rights area of the applicant and must be designed in a manner that will not restrict or otherwise infringe upon the riparian right of adjacent upland riparian owners. Configuration, location or design of the structure may neither physically preclude nor have the effect of precluding public access to public waters adjacent to the upland. The ADCNR recommends the structure be centered on the applicant's property and will require that all activities meet certain setback requirements. The burden of locating riparian lines is the responsibility of the riparian landowner. ADCNR may require applicants to provide a riparian area survey.

Project coordination with the ADCNR State Lands Division is the permittee's responsibility. The U.S. Army Corps of Engineers, Mobile District does not enforce ADCNR-SLD requirements.

DEPARTMENT OF THE ARMY, MOBILE DISTRICT - FURTHER INFORMATION:

a. Limits of Authorization:

- (1) These permits do not obviate the need to obtain other federal, state, or local authorizations required by law.
- (2) These permits do not grant any property rights or exclusive privileges.
- (3) These permits do not authorize any injury to the property or rights of others.
- (4) These permits do not authorize interference with any existing or proposed federal project.

b. Limits of Liability: In issuing these authorizations, neither the Federal Government, the State of Alabama, nor any designated resource agency; their staff or employees, assume any liability.

c. Reliance on Applicant's Data: In part, each individual determination by the Mobile District that verification of permit authorization is not contrary to the public interest is made with reliance on the information provided by the applicant.

d. Re-evaluation of Permit Decision: The Mobile District may re-evaluate any permit verification decision at any time the circumstances warrant. Circumstances that could require a re-evaluation include, but are not limited to, the following:

- (1) Failure to comply with the terms and conditions of the verification letter or the permit.
- (2) The information provided in support of the PCN proves to have been false, incomplete, or inaccurate (See c. above.)
- (3) Significant new information surfaces which we did not consider in reaching the original public interest decision. Such a re-evaluation may result in a determination that it is appropriate to use the suspension, modification, or revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement

procedures provide for the issuance of an administrative order requiring the permittee to comply with the terms and conditions of the verification letter and permit, and for the initiation of legal action where appropriate. The applicant/permittee will be required to pay for any corrective measures ordered by this office and for failure to comply with such directives, and this office may, in certain situations (such as those specified in 33 CFR 209.170), accomplish the corrective measures by contract or otherwise and request restitution.

- e. **Expiration or Suspension of this Regional General Permit Program:** These regional general permits will be valid for a five-year period or until suspended or revoked. They may be suspended or revoked, in whole or in part, if it is determined that the cumulative effects of any activities pursuant to them adversely affect water quality, navigation, or other public interest factors. Such suspension shall be effective upon issuance of a public notice which shall indicate a date periodically to determine if continuation of these permits is in the overall public interest.

These regional general permits will be re-advertised via public notice every five (5) years as part of a public interest review. The Mobile District will periodically review each of the permits within the Alabama General Permit program and their conditions and will decide to modify, reissue, or revoke the permits. If a permit is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an authorized General Permit will remain authorized provided the activity is completed within twelve months of the date of the permit's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 325.7. Activities completed under the authorization of these permits which were in effect at the time the activities were completed continue to be authorized by these permits unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 325.7.

- f. **Time Extensions:** Authorization under these regional general permits is valid until their scheduled expiration date of September 30, 2026. However, if a permittee has commenced or is under contract to commence the permitted activity before September 30, 2026, the permittee will have twelve (12) months from that date to complete the activity under the terms and conditions of the 2021 Alabama General Permits. In the event the permittee has not commenced or completed the project by this date, a new PCN will be required.
- g. Failure to secure verification of authorization under these regional general permits as specified herein or failure to comply with conditions of any regional general permit or any verification issued for these permits may result in enforcement actions by the Mobile District, Alabama Department of Environmental Management, or the Alabama Department of Conservation and Natural Resources.

JEREMY J. CHAPMAN
Colonel, U.S. Army
District Commander

BY:


CRAIG J. LITTEKEN, PMP
Chief, Regulatory Division

Date: 2021.09.30
15:28:24 -05'00'



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT
P.O. BOX 2288
MOBILE, ALABAMA 36628-0001

DEPARTMENT OF THE ARMY PERMIT

ALGP-01 – EXCAVATED BOAT SLIPS
SAM-2021-00490-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes the excavation or dredging of material from waters of the United States for the purpose of construction or modification of boat slips and boat berths. This permit also authorizes the stabilization of shoreline areas within the excavated boat slips, using sheet pile or other approved stabilization material.

PERMIT AUTHORITY: Section 10 and Section 404

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities under this permit

SPECIAL CONDITIONS:

- SP-1 Dredge volume cannot exceed 500 cubic yards of material from below the plane of mean high water (MHW) or ordinary high water (OHW). All dredging waterward of the MHW line or the OHW mark to reach the controlling navigational depth of the receiving waters may be authorized under ALGP-03 – Dredging. If an existing slip is being modified (enlarged) the total volume dredged originally, plus that being proposed to be dredged, cannot exceed 500 cubic yards of material below MHW or OHW.
- SP-2 A limit of three (3) residential-use boat berthing areas per project site are authorized under this permit.
- SP-3 This permit does not authorize bank and/or shoreline stabilization in areas other than the interior of the boat slip.
- SP-4 For an excavated boat slip which will have no man-made shoreline protection (such as a bulkhead, riprap, etc.), a 10-foot-wide buffer shall be maintained between the proposed work and any wetlands located inland of the MHW line or OHW mark. A 3:1 (horizontal : vertical) or flatter side slope shall be maintained for any excavated slopes which feature no shoreline protection.
- SP-5 This permit does not authorize dredging, or disposal of dredged material, in submerged aquatic vegetation (SAV), submersed grassbeds, or natural shellfish beds.
- SP-6 This permit does not authorize excavation or dredging in wetlands unless the work meets the requirements of SP-10 below.
- SP-7 When SAV, submersed grassbeds, wetlands, or natural shellfish beds are present near any proposed project, those resources must be surveyed and clearly marked with small diameter PVC pipe (or other pre-approved marking techniques) by the applicant or their representative prior to permit

verification. Marked boundaries must include a 10-foot buffer, and shall remain in place until all excavation or dredging activities are completed.

- SP-8 A minimum 10-foot buffer shall be maintained between the excavated boat slip and any SAV, submersed grassbeds, natural shellfish beds, or any wetlands located waterward of the MHW line or OHW mark, unless the work meets the requirements of SP-10 below. Use of a turbidity/sediment curtain is required for any excavation or dredging activities abutting the 10-foot buffer.
- SP-9 Dredged or excavated material shall not be placed in adjacent waters or wetlands unless specifically authorized. The dredged/excavated material shall be deposited in an approved upland area and properly contained to prevent reentering the waterway or adjacent wetlands. Applications must include adequate plans for containment of dredged/excavated material.
- SP-10 Excavation or dredging in wetlands is authorized only in previously permitted, man-made canals, where the creation of an excavated boat slip is necessary to avoid causing an obstruction to navigation. Excavation or dredging in these areas is limited to a maximum 500 square feet of wetland impacts. Applicants must demonstrate avoidance and minimization of wetland impacts to the maximum extent practicable and provide a compensatory mitigation proposal in the PCN. Compensatory mitigation may not be required for excavation or dredging resulting in less than or equal to 30 square feet of wetland impacts.

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DEPARTMENT OF THE ARMY PERMIT

ALGP-03 -DREDGING
SAM-2021-00491-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes dredging of new open water channels and maintenance dredging of previously authorized and dredged areas, for the purpose of navigation. This permit also authorizes minor shallow dredging of offshore areas to supply clean sand fill material for living shoreline or shoreline protection projects.

PERMIT AUTHORITY: Section 10

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities authorized under this permit

SPECIAL CONDITIONS:

- SP-1 This permit does not authorize dredging or the placement of dredged material in wetlands, submerged aquatic vegetation (SAV), submersed grassbeds, or natural shellfish beds. This condition may be waived by the Mobile District for dredging of invasive or noxious vegetation in man-made waterbodies or if the material is utilized as fill for an authorized living shoreline or shoreline protection project.
- SP-2 When SAV, submersed grassbeds, wetlands, or natural shellfish beds are present near any proposed project, those resources must be surveyed and clearly marked with small diameter PVC pipe (or other pre-approved marking techniques) by the applicant or a representative prior to permit authorization. Marked boundaries must include a 10-foot buffer, and shall remain in place until all dredging activities are completed.
- SP-3 A minimum buffer distance of 10 feet must be maintained between the limits of dredging and any wetlands, SAV, submersed grassbeds or natural shellfish beds. Use of a turbidity/sediment curtain is required for any dredging activities abutting the 10-foot buffer. This condition may be waived by the Mobile District for projects where existing shoreline protection such as a bulkhead or riprap is located between the dredging activity and in-shore wetlands.
- SP-4 Dredged material must be placed in an approved upland area and properly contained to prevent any material re-entering the waterway or entering any other waters of the United States, including wetlands (treated return water discharging from approved upland treatment areas is authorized under *Nationwide Permit 16 - Return Water from Upland Contained Disposal Areas*). However, dredged material may be utilized as fill in waters of the United States if specifically authorized by a separate Department of the Army permit.
- SP-5 Dredged material de-watering areas must be designed such that return water discharge will not erode down-gradient soils and cause deposition of sediment into waters of the United States, including

wetlands. Applications for projects with dredged material containment areas must include design plans which adequately demonstrate return water discharge will be treated to dissipate discharge energy and protect areas receiving the discharges.

- SP-6 Pre-dredging and post-dredging hydrographic surveys and/or surveys for submerged aquatic vegetation (SAV), submersed grassbeds or natural shellfish beds may be required if deemed necessary by the Mobile District.
- SP-7 The dredged area must not interfere with the lateral movement of sediments such that shorelines located adjacent to the project are negatively impacted (i.e. sediment starved). The applicant may be required to submit a study by a qualified professional engineer which demonstrates dredged areas will not cause adjacent shorelines to erode by intercepting and/or interrupting the natural migration of sediment along the shoreline.

CONDITIONS SPECIFIC TO NEW CHANNEL DREDGING:

- SP-8 New channel dredging must be located in an existing open water area and must result in an open water navigable channel.
- SP-9 New channel dredging must be a single and complete project and is limited to the removal of no more than 1,000 cubic yards of material.
- SP-10 The depth of the new channel dredging must not exceed -6 feet mean low water (MLW) in tidal areas or ordinary high water (OHW) in non-tidal areas, or the controlling navigational depth of the adjacent waters, whichever is less.

CONDITIONS SPECIFIC TO MAINTENANCE DREDGING:

- SP-11 Maintenance dredging must be associated with navigation and must be located either within an existing boat slip and/or existing navigation channel.
- SP-12 Maintenance dredging must be a single and complete project, and shall be limited to the removal of no more than 500 cubic yards of material.
- SP-13 Maintenance dredging is limited to previously authorized dimensions and must not exceed the controlling navigational depth of the adjacent waters. The depth of any new maintenance dredging in areas not previously dredged must not exceed -6 feet MLW or OHW, or the controlling navigational depth of the adjacent waters, whichever is less.

CONDITIONS SPECIFIC TO DREDGING TO OBTAIN FILL FOR LIVING SHORELINES OR SHORELINE PROTECTION PROJECTS:

- SP-14 The dredging activity must be directly associated with a living shoreline or shoreline protection project authorized by a separate Department of the Army permit.
- SP-15 Dredging to obtain fill material for living shoreline or shoreline protection projects shall be limited to the removal of no more than 500 cubic yards of material.
- SP-16 Dredging to obtain fill material for living shoreline or shoreline protection projects must be located in water depths of at least -3 feet MLW or OHW, in an existing open water area (not within a canal

or navigational channel), and may impact no more than 0.25 acre of waterbottom.

SP-17 The depth of the dredging used to obtain fill material for living shoreline or shoreline protection projects must not exceed -3 feet below the existing waterbottom.

SP-18 The applicant must demonstrate that material to be dredged to obtain fill material for living shoreline or shoreline protection projects will be the appropriate composition needed for the proposed project.

SP-19 Dredged material obtained for living shoreline or shoreline protection projects may not be utilized for the construction, repair, replacement, or rehabilitation of bulkheads or seawalls.

CONDITIONS SPECIFIC TO WEEKS BAY:

SP-20 This permit does not authorize any dredging activity, prop dredging, or any other similar bottom disturbance in waters of Weeks Bay. This condition does not apply to the minimum bottom disturbance which occurs during the installation of support or mooring pilings outside of wetland areas.

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DEPARTMENT OF THE ARMY PERMIT

ALGP-04 – DEBRIS REMOVAL
SAM-2021-00492-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes removal of debris from any waterway for the purposes of navigation or drainage. Debris includes, but is not limited to, fallen trees and limbs, appliances, lumber, and metal objects.

PERMIT AUTHORITY: Section 10 and Section 404

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities authorized under this permit

SPECIAL CONDITIONS:

- SP-1 Removal of debris must be for navigational or drainage purposes only.
- SP-2 Trees and/or woody vegetation which are rooted or embedded in waterbottoms must remain in place or be cut off above ground elevation before removal, so that the root mass or buried portion remains intact.
- SP-3 All removed debris must be placed in an upland disposal site. Non-landfill disposal or open burning of debris should be coordinated with the Alabama Department of Environmental Management (ADEM) at (334) 271-7700.
- SP-4 Removal of debris shall be accomplished by use of the shortest access distance through waters of the United States, except in cases where less environmental harm can be demonstrated, or health and safety may be compromised.
- SP-5 This permit does not authorize the dredging of gravel, sand, soil, silt, wetlands, natural shellfish beds, submerged aquatic vegetation (SAV), or submersed grassbeds.
- SP-6 This permit does not authorize the removal of hazardous materials or hazardous waste.
- SP-7 This permit does not authorize the dredging of new navigation channels for facilitation of debris removal.

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DEPARTMENT OF THE ARMY PERMIT

ALGP-05 – PIERS AND PILE-SUPPORTED STRUCTURES
SAM-2021-00493-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes the construction or modification of the following structures: piers; wharves; open decks; mooring pilings; dolphins; single-pile structures; floating structures; and covered, open-sided structures such as boat shelters, gazebos, and covered decks. This permit also authorizes any normal appurtenances associated with the above structures, such as boat hoists, stairways, and walkways.

PERMIT AUTHORITY: Section 10

PRE-CONSTRUCTION NOTIFICATION: PCN required, with exceptions (see SP-10 and SP-11 below)

SPECIAL CONDITIONS:

- SP-1 This permit authorizes structures that are of sufficient length to reach navigational depths adequate for the proposed use, to the extent that a hazard to navigation will not be created, as determined by the controlling authority. The length of the structure(s) should be generally consistent with other neighboring structures in the waterway. In no case shall the length of the structure(s) extend greater than 25 percent of the overall width of the waterway, as measured from the mean high water (MHW) line or ordinary high water (OHW) mark (see SP-12 for additional length restrictions for structures located in Weeks Bay).
- SP-2 A limit of three (3) boat berthing areas per project site are authorized under this permit, with the exception of structures located in Weeks Bay (see SP-13 below).
- SP-3 Structures constructed over emergent wetlands, or constructed over areas with submerged aquatic vegetation (SAV) or submersed grassbeds, must be uncovered, constructed no more than five (5) feet wide, and constructed at a height at least equal to the width of the structure. Height will be measured from the ground surface or mud line when over emergent wetlands, and from the plane of MHW or OHW (when waterward of the MHW line or OHW mark), up to the bottom of the decking. This condition may be waived on a case-by-case basis if the applicant can demonstrate construction methods and/or materials that allow for equivalent light penetration to affected wetlands.
- SP-4 The decking of structures constructed over emergent wetlands or submersed grassbeds must feature spaces of at least 0.75-inch width between decking boards. This condition may be waived on a case-by-case basis if the applicant can demonstrate construction methods and/or materials that allow for equivalent light penetration to waters located below the structure.
- SP-5 Boat shelters or any other type of roofed structures shall not be constructed within 10 feet of emergent wetlands, areas with SAV, or submersed grassbeds.

- SP-6 Structures that are designed to moor vessels shall not be constructed in a way where the moored vessel will shade or otherwise cause adverse impacts (such as prop wash, etc.) to emergent wetlands, areas with SAV, or submersed grassbeds.
- SP-7 When installing authorized pilings, emergent wetlands, SAV, and submersed grassbeds shall be avoided where practicable. If these areas cannot be avoided, then pilings must be installed in a manner (e.g. mechanical driving) that will not result in the formation of sedimentary deposits (i.e. "donuts" or "halos") around the installed pilings.
- SP-8 This permit does not authorize the operation of heavy equipment (i.e. wheeled or tracked vehicles) in wetlands or other waters of the United States unless detailed plans are submitted that: 1) Provide for the use of temporary mats or equivalent protective measures sufficient to prevent rutting and compaction of wetland soils or waterbottoms; 2) Provide for the return of all affected areas to pre-construction elevations, and the full restoration of any wetland or emergent vegetation impacted by the activity; and 3) Demonstrate avoidance of all SAVs and submersed grassbeds.
- SP-9 Structures shall not be constructed within 100 feet of a federally maintained navigation channel. This condition may be waived by the Mobile District where circumstances warrant.
- SP-10 Activities limited to the addition or replacement of a boat hoist on an existing boat shelter or boat slip, and that do not require the installation of pilings or increase the number of boat slips, are authorized by this permit and do not require a pre-construction notification (PCN) prior to commencing the activity. This condition does not apply to work on structures greater than 50 years of age. All other conditions contained in this permit apply to the activity.
- SP-11 Activities limited to the addition of a single-story roof or covering structure on an existing open-deck pier that do not require the installation of pilings are authorized by this permit and do not require a PCN prior to commencing the activity. This condition does not apply to existing decks that are located over, or within 10 feet of, emergent wetlands, SAVs, or submersed grassbeds. This condition does not apply to work on structures greater than 50 years of age. Addition of a roof or covering on an existing structure in Weeks Bay must comply with SP-14 below. All other conditions contained in this permit apply to the activity.

CONDITIONS SPECIFIC TO PIERS AND PILE-SUPPORTED STRUCTURES IN WEEKS BAY:

- SP-12 Structure(s) in Weeks Bay may not exceed 300 feet in length, as measured from the MHW or OHW shoreline.
- SP-13 A limit of two (2) boat berthing areas per project site are authorized under this permit in Weeks Bay.
- SP-14 In Weeks Bay, terminal structures such as decks and boat berthing areas, and any associated roofs or coverings, must not exceed a combined total footprint of 620 square feet and may be covered and feature screened enclosures, but not solid walls.

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DEPARTMENT OF THE ARMY PERMIT

ALGP-07 – BOAT RAMPS AND MARINE WAYS
SAM-2021-00494-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes the construction or modification of boat ramps and marine ways.

PERMIT AUTHORITY: Section 10 and Section 404

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities authorized under this permit

SPECIAL CONDITIONS:

- SP-1 This permit authorizes the dredging or filling of up to 250 cubic yards of material below the plane of mean high water (MHW) or ordinary high water (OHW).
- SP-2 This permit does not authorize any type of jetty or groin structure, or any structure that causes the accretion or erosion of adjacent or nearby shorelines.
- SP-3 For boat ramps designed for public access, the applicant must demonstrate that there is adequate upland parking to support the anticipated use.
- SP-4 Dredged material shall be placed in an approved upland area and properly contained to prevent reentering the waterway or adjacent wetlands. Dredged materials shall not be placed in adjacent waters or wetlands unless the activity is specifically authorized by a separate Department of the Army permit.
- SP-5 This permit does not authorize dredging or filling in wetlands, areas with submerged aquatic vegetation (SAV), submersed grassbeds, or natural shellfish beds.
- SP-6 This permit does not authorize construction of boat ramps and/or marine ways directly adjacent to SAV, submersed grassbeds, or natural shellfish beds, where the construction or normal use of the ramp would cause adverse impacts to these resources.

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DEPARTMENT OF THE ARMY PERMIT

ALGP-11 – SHORELINE AND BANK STABILIZATION AND PROTECTION
SAM-2021-00495-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes the installation of shoreline/bank protection and stabilization structures along existing shorelines or banks. Authorized structures include, but are not limited to filter mats, root wad revetments, crib walls, river training structures, armoring systems (such as riprap, gabions, interlocking brick/concrete systems, etc.), headland and offshore breakwaters, low-profile sills, bulkheads, and seawalls.

To the maximum extent possible, shoreline stabilization and protection should be accomplished by the establishment of appropriate native vegetation. Bulkhead or seawall structures should only be considered for those areas when there are no feasible alternatives available. These alternatives include, but are not limited to, shoreline restoration/re-vegetation, preservation and restoration of wetlands, riprap armoring, or restoration of submerged aquatic vegetation (SAV) and submersed grassbeds.

Activities authorized by this permit should take into consideration the dynamic and variable characteristics of different shorelines (i.e. slope, fetch, rate of erosion, predominant wind/wave patterns, offshore water depth and bottom character, and natural vegetative coverage). Structures should be appropriately sized, and provide adequate protection needed for the energy level of the particular environment without causing adverse impacts to surrounding properties or resources.

PERMIT AUTHORITY: Section 10 and Section 404

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities authorized under this permit

SPECIAL CONDITIONS:

- SP-1 Stabilization and protection structures may be installed adjacent to wetland areas as long as the wetlands are not adversely impacted. If any portion of the protected area is a wetland, then: 1) No fill will be placed in wetland areas (unless allowable as a de minimis impact, per SP-6); and 2) The shoreline/bank protection must be designed to allow the normal hydrologic regime to be maintained in the wetland areas. This permit does not authorize dredging or the placement of fill within areas with SAV, submersed grassbeds, or natural shellfish beds.
- SP-2 All structural materials utilized must be adequately anchored, of sufficient weight, and/or installed in a manner that prevents settlement, relocation, and loss of sediment or fill material under expected environmental conditions. Effective use of geotextile or filter fabric material is required for all new bank/shoreline stabilization and protection projects.
- SP-3 To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each project authorized under this permit. This permit does not authorize stream channelization activity.

CONDITIONS SPECIFIC TO RIPRAP AND OTHER ARMORING SYSTEMS USED FOR STABILIZATION/PROTECTION:

- SP-4** The placement of new riprap or other armoring systems (such as gabions, interlocking brick/concrete systems, etc.) is limited to no more than 500 linear feet of shoreline or bank, except for projects where armoring systems are utilized to augment existing bulkheads or seawalls. For augmentation of existing bulkheads or seawalls, placement of riprap or other armoring systems is limited to a total length of 1,000 linear feet.
- SP-5** Placement of riprap, bank dressing, or other armoring type fill below the plane of mean high water (MHW) or ordinary high water (OHW) is limited to one (1) cubic yard per linear foot of treated shoreline or bank.

CONDITIONS SPECIFIC TO BULKHEAD AND SEAWALL INSTALLATION:

- SP-6** Bulkhead or seawall structures installed to replace existing, previously permitted bulkheads or seawalls are limited to a total length of 1,000 linear feet, and the waterward edge of the new structure shall not extend more than 24 inches waterward from the base of the existing bulkhead or seawall. De minimis wetland fill not exceeding 30 square feet per single and complete project is authorized in cases where minor areas of wetland vegetation have developed as a result of bulkhead deterioration.
- SP-7** New bulkhead or seawall structures are limited to a total length of 500 linear feet and must be installed along the existing shoreline or bank at or above the MHW line or OHW mark. If adjacent wetlands are present, new bulkhead or seawall structures must be installed landward of all jurisdictional wetlands and must not separate the wetlands from contact with open waters.
- SP-8** Any wetlands located adjacent to and waterward of a new bulkhead or seawall must be protected by implementation of effective additional structural measures designed to prevent gradual scour and erosion by expected wave conditions at the site. The measures can include, but are not limited to, the installation of edging, sill structures, or breakwaters.

CONDITIONS SPECIFIC TO BREAKWATER INSTALLATION:

- SP-9** Breakwater structures and any associated fill shall not extend more than thirty (30) feet waterward from the pre-existing shoreline (as defined by the MHW line or OHW mark) and are limited to a total shore-parallel length of 500 linear feet, including spacing between structures. The crest height of headland and offshore breakwater structures is limited to no higher than +1.0 feet above the plane of MHW or OHW. The crest height of low-profile sills is limited to no higher than -0.5 feet below the plane of MHW or OHW.
- SP-10** Breakwater and sill structures shall be designed to ensure adequate circulation/tidal flushing and shoreline habitat access for aquatic and terrestrial organisms.
- SP-11** Interior angles of headland breakwaters should be 45 degrees or less relative to the prevailing shoreline (as determined by examining the orientation of adjacent shorelines a minimum of 100 feet on either side of the project).
- SP-12** At project sites where scarping of the shoreline has occurred due to scour or scalloping, fill discharges shall be limited to the minimum volume necessary to achieve equivalent elevation to adjacent undisturbed land and provide for adequate stable shoreline slope.



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DEPARTMENT OF THE ARMY PERMIT

ALGP-13 – FILLING OF PREVIOUSLY DREDGED AREAS
SAM-2021-00496-DCH

REGIONAL GENERAL PERMIT FOR WORK WITHIN THE STATE OF ALABAMA

PERMIT DESCRIPTION:

This permit authorizes the filling of previously dredged areas such as boat slips and man-made ditches.

PERMIT AUTHORITY: Section 10 and Section 404

PRE-CONSTRUCTION NOTIFICATION: PCN is required for all activities authorized under this permit

SPECIAL CONDITIONS:

- SP-1 In areas invaded by noxious or invasive aquatic vegetation, authorization to fill will be determined on a case-by-case basis.
- SP-2 If the area to be filled was originally a wetland or natural channel, the fill may not exceed the elevations and dimensions of the area as it was prior to the original excavation or dredging.
- SP-3 This permit does not authorize the filling of wetlands, areas with submerged aquatic vegetation (SAV), submersed grassbeds, natural streams, or natural channels.
- SP-4 This permit does not authorize the filling of areas providing mitigation, enhancement, or flushing of an aquatic system.

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GENERAL CONDITIONS:

NOTE: The term "you" and its derivatives, means the permittee or any future transferee. The above-described structures and activities may be authorized under these General Permits subject to the following conditions:

- GC-1** Verification of coverage under the Alabama General Permit program may not be issued for your project if you have been found by this office to be in noncompliance with any prior U.S. Army Corps of Engineers permit, or have been cited for unauthorized work, until the non-compliance or violation has been resolved.
- GC-2** This permit does not authorize structures and activities that are found to be hazardous to navigation, and does not authorize the interference with any existing or proposed federal project. If future operations by the United States require the removal, relocation, or other alteration of the structure or work authorized by this permit, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the U.S. Army Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.
- GC-3** The prospective permittee must submit a complete written pre-construction notification (PCN) with all required information, and must receive subsequent verification of permit authorization in writing from the Mobile District prior to proceeding with the activity authorized by this permit, unless otherwise excluded by the permit Special Conditions.
- GC-4** Authorization under this permit does not obviate any obligation or responsibility for compliance with FEMA-approved state or local floodplain ordinances or floodplain management requirements. The permittee should contact the officials responsible for the local community's FEMA-approved floodplain requirements if the project verified for authorization under this permit includes the placement of fill or structures within any portion of the 100-Year Floodplain.
- GC-5** For projects located in areas which may support submerged aquatic vegetation (SAV) or submersed grassbeds, an SAV survey may be required (recommended survey dates from June 1 through September 30).
- GC-6** No activity is authorized under this permit which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under this permit which "may affect" a listed species or critical habitat, unless consultation pursuant to Section 7 of the ESA addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the permitted activity. Indirect effects are those effects on listed species and critical habitat that are caused by the permitted activity and are later in time, but still are reasonably certain to occur.
- GC-7** No activity is authorized under this permit which has the potential to cause effects to any cultural resources or historic properties determined to be listed, or potentially eligible for listing, in the National Register of Historic Places (NRHP) until the requirements of Section 106 of the National Historic Preservation Act (NHPA) and 33 CFR part 325, Appendix C have been satisfied. In cases where the Mobile District has determined a proposed activity may adversely affect cultural resources

listed in or deemed eligible for listing in the NRHP, or considered significant to a federally-recognized American Indian Tribe, the activity must avoid or minimize impacts to such resources to the maximum extent practicable.

- GC-8 If any previously unknown historic, archeological, or human remains are discovered while accomplishing an activity authorized by this permit, all work in the area of discovery must cease, and the Mobile District must be immediately notified of what has been found. The Mobile District will initiate the federal, state, and tribal coordination required to determine if the site warrants recovery efforts or if it is potentially eligible for listing in the NRHP.
- GC-9 The permittee shall comply with all terms and conditions of the Alabama Department of Environmental Management 401 Water Quality Certification, dated August 4, 2021.
- GC-10 The permittee shall comply with all terms and conditions of the Alabama Department of Environmental Management Coastal Zone Consistency determination, dated August 3, 2021.
- GC-11 Verification of permit authorization will not be issued for activities located within state or National Wild and Scenic streams, rivers, or components thereof, or other areas provided special protection unless the administering agency concurs.
- GC-12 The Mobile District must be notified of the commencement and completion of the authorized work.
- GC-13 If an activity is verified for permit authorization, a "Notice of Authorization" card will be provided to the permittee along with a verification of permit authorization letter. The card must be posted at the site during construction of the permitted activity.
- GC-14 It is the permittee's responsibility to ensure that all contractors working on the permitted project are aware of all general and special conditions of the permit and the verification letter.
- GC-15 Activities authorized under this permit must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows.
- GC-16 The authorized activity must be maintained in good condition and in conformance with the terms and conditions of the permit and verification letter. You are not relieved of this requirement if you abandon the authorized activity.
- GC-17 You must allow federal and state resource agency representatives to inspect the verified activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of the authorization.
- GC-18 Pursuant to 33 U.S.C. 408, any activity that requires permission from the USACE that will alter or temporarily or permanently occupy or use a USACE federally authorized Civil Works project is not authorized by this permit unless the Mobile District first issues Section 408 permission to alter, occupy, or use the USACE project. The applicant may be required to submit additional information in order to complete the Section 408 review process. Section 408 permission must be issued for the activity prior to verification of authorization under this permit.

**MOBILE DISTRICT
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August 3, 2021

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Mobile, AL 36628-0001

AUG 09 2021

RE: U. S. Army Corps of Engineers 2021 Proposed Regional General Permits for Minor Structures and Activities within the State of Alabama (ALGP) Program
SPECIAL PUBLIC NOTICE NUMBERS:
SAM-2021-00490-DCH; ALGP-01 – Excavated Boat Slips
SAM-2021-00491-DCH; ALGP-03 – Dredging
SAM-2021-00492-DCH; ALGP-04 – Debris Removal
SAM-2021-00493-DCH; ALGP-05 – Piers and Pile-Supported Structures
SAM-2021-00494-DCH; ALGP-07 – Boat Ramps and Marine Ways
SAM-2021-00495-DCH; ALGP-11 – Shoreline and Bank Stabilization and Protection
SAM-2021-00496-DCH; ALGP-13 – Filling of Previously Dredged Areas
ADEM Tracking Code: ACAMP-2021-350-FC-FAA-COE

Dear Chief Litteken:

The listed ALGPs have been determined by the ADEM, based on their scope or nature, not to have a significant impact on coastal resources when implemented in accordance with the specific conditions prescribed herein. Therefore, and pursuant to ADEM Administrative Code 335-8-1-.03(4), these ALGPs are categorically certified to be consistent with the ACAMP.

SAM-2021-00490-DCH: ALGP-01 - Excavated Boat Slips

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT - COASTAL ZONE
MANAGEMENT CERTIFICATION CONDITIONS:**

CZM-1 ALGP-01 must not authorize any activities or structures on property or parcels fronting the Gulf of Mexico, Pelican Bay, or Weeks Bay.

CZM-2 ALGP-01 must not authorize new excavated boat slips unless it has been demonstrated that construction of piers, docks, and/or boat shelters, reaching navigational depth adequate for the proposed use, would create a navigation hazard for mariners.

CZM-3 The depth of any new boat slip is to be no greater than the controlling navigational depth of the receiving waters. The maximum length of excavation, measured from the shoreline to the interior extent, must not exceed 50 linear feet. The length of excavation, measured from the shoreline to the interior extent, must be no greater than twice the length of shoreline excavated.

CZM-4 ALGP-01 must not authorize ancillary structures which would have the effect of interfering with natural sediment transport along the shoreline or bank (i.e. wingwalls, groins, jetties, or other solid structures roughly perpendicular to the shore or bank).



CZM-5 ALGP-01 must not authorize construction of new canals or expansions of existing canals for the purpose or effect of creating new waterfront property.

SAM-2021-00491-DCH: ALGP-03 - Dredging

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT - COASTAL ZONE
MANAGEMENT CERTIFICATION CONDITIONS:**

CZM-1 ALGP-03 must not authorize any dredging within areas fronting the Gulf of Mexico, Pelican Bay, or Weeks Bay.

CZM-2 ALGP-03 must not authorize new work channel dredging associated with the use and/or construction of new piers, docks, and/or boat shelters unless it has been demonstrated that construction of piers, docks, and/or boat shelters, reaching navigational depth adequate for the proposed use, would create a navigation hazard for mariners.

SAM-2021-00492-DCH; ALGP-04 – Debris Removal

No additional conditions.

SAM-2021-00493-DCH; ALGP-05 – Piers and Pile-Supported Structures

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT - COASTAL ZONE
MANAGEMENT CERTIFICATION CONDITIONS:**

CZM-1 ALGP-05 must not authorize any structures on property or parcels fronting the Gulf of Mexico or Pelican Bay.

CZM-2 ALGP-05 must not authorize any structures in areas colonized with natural shellfish beds without prior authorization from the Alabama Department of Conservation and Natural Resources – Marine Resources Division (ADCNR-MRD).

CZM-3 ALGP-05 must not authorize the following activities: (a) structures for the permanent mooring of houseboats, (b) fueling facilities, (c) toilets or activities that produce “gray water,” (d) habitable structures (defined by the ADEM as “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”), (e) new marinas, or (f) the expansion of an existing marina beyond the existing authorized footprint.

CZM-4 ALGP-05 must not authorize platforms, decks, “T”s, “L”s, boat berthing areas, gazebos, or other similar structures to be located anywhere except at the waterward end of the access pier; and must not authorize platforms, decks, “T”s, “L”s, boat berthing areas, gazebos, or other similar structures to be located over wetlands, submersed vegetation, or submersed grassbeds.

SAM-2021-00494-DCH; ALGP-07 – Boat Ramps and Marine Ways

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT - COASTAL ZONE
MANAGEMENT CERTIFICATION CONDITIONS:**

CZM-1 ALGP-07 must not authorize any activities or structures on property or parcels fronting the waters of the Gulf of Mexico, Pelican Bay, or Weeks Bay.

CZM-2 All stormwater runoff from boat ramp approaches and parking areas must be directed away from the boat ramp. Site plans for proposed boat ramps must feature design elements which will accomplish this diversion.

SAM-2021-00495-DCH; ALGP-11 – Shoreline and Bank Stabilization and Protection

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT - COASTAL ZONE

MANAGEMENT CERTIFICATION CONDITIONS:

CZM-1 ALGP-11 must not authorize any activities or structures on property or parcels fronting the waters of the Gulf of Mexico, Pelican Bay, Weeks Bay, or the man-made canals on Ono Island.

CZM-2 ALGP-11 must only authorize structures, materials, or bank dressings when it has been determined by the Army Corps of Engineers that no feasible non-structural alternatives are available including, but not limited to, preservation & restoration of dunes, beaches, wetlands, submersed grassbeds, shoreline restoration & nourishment, retreat, or abandonment. Applicant preference and/or aesthetics must not be construed as a valid justification for not implementing non-structural alternatives wherever feasible.

SAM-2021-00496-DCH; ALGP-13 – Filling of Previously Dredged Areas

No additional conditions.

Call, write, or email the Mobile-Coastal office anytime with questions. Always include the ADEM tracking code above when corresponding on this matter. The ADEM contact for this and other coastal zone management issues is J. Scott Brown. He may be reached by telephone at 251. 304.1176 or via e-mail (jsb@adem.alabama.gov).

Sincerely,



A. Scott Hughes, Chief
Field Operations Division

cc: ADCNR-SLD (DCNR.Coastal@dcnr.alabama.gov)
USACE | Mobile District, S. Brad Crosson - (steven.b.crosson@usace.army.mil)



Alabama Department of Environmental Management
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463
Montgomery, Alabama 36130-1463
(334) 271-7700 ■ FAX (334) 271-7950

August 4, 2021

Colonel Sebastien P. Joly
Commander, Mobile District
U.S. Army Corps of Engineers
P.O. Box 2288
Mobile, AL 36628-0001

RE: Clean Water Act (CWA) Section 401 Water Quality Certification (WQC), U.S. Army Corps of Engineers (COE) 2021 Proposed Issuance of Alabama General Permits (ALGPs) For Activities Within the State of Alabama

Dear Colonel Joly:

This office has completed a review of the above-referenced notice and all associated materials submitted related to the proposed ALGPs. Any comments made during the public notice period have also been forwarded to the Department for review.

ALGP-01 Excavated Boat Slips
ALGP-03 Dredging
ALGP-04 Debris Removal
ALGP-05 Piers and Pile-Supported Structures
ALGP-07 Boat Ramps and Marine Ways
ALGP-11 Shoreline and Bank Stabilization and Protection
ALGP-13 Filling of Previously Dredged Areas

Because action pertinent to WQC is required by Section 401(a)(1) of the CWA, 33 U.S.C. Section 1251, et seq., we hereby issue certification that there is reasonable assurance that the discharge resulting from the proposed activities as submitted will not violate applicable water quality standards established under Section 303 of the CWA and Title 22, Section 22-22-9(g), Code of Alabama, 1975, provided the applicant acts in accordance with the following conditions as specified. We further certify that there are no applicable effluent limitations under Sections 301 and 302 nor applicable standards under Sections 306 and 307 of the CWA in regard to the activities specified. This certification shall expire at the same time as the expiration date for the above-referenced Alabama Nationwide Permits for activities within the State of Alabama.

To minimize adverse impacts to State waters, by copy of this letter we are requesting the Mobile District Corps of Engineers to incorporate the following as special conditions as appropriate to the type, location, scope, duration, and potential impact of each activity in Alabama authorized by the COE ALGPs:

1. During project implementation, the applicant shall ensure compliance with applicable requirements of ADEM. Admin. Code Chapter 335-6-6 [National Pollutant Discharge Elimination System (NPDES)], Chapter 335-6-10 (Water Quality Criteria), and Chapter 335-6-11 (Water Use Classifications for Interstate and Intrastate Waters).
2. ADEM permit coverage may be required prior to commencing and/or continuing certain activities/operations relating to or resulting from the project. If an applicant has any questions regarding ADEM regulated activity or the need for NPDES permit coverage, the applicant can contact ADEM's Water Division at (334) 271-7823. If an applicant has any questions regarding



ADEM regulated activity or the need for air permit coverage, the applicant can contact ADEM's Air Division at (334) 271-7869. If the applicant has any questions regarding ADEM regulated activity or the need for hazardous, toxic, and/or solid waste permit coverage, the applicant can contact ADEM's Land Division at (334) 271-7730.

3. Upon the loss or failure of any treatment facility, Best Management Practice (BMP), or other control, the applicant shall, where necessary to maintain compliance with this certification, suspend, cease, reduce or otherwise control work/activity and all discharges until effective treatment is restored. It shall not be a defense for the applicant in a compliance action that it would have been necessary to halt or reduce work or other activities in order to maintain compliance with the conditions of this certification.
4. The applicant shall retain records adequate to document activities authorized by this certification for a period of at least three years after completion of work/activity authorized by the certification. Upon written request, the applicant shall provide ADEM with a copy of any record/information required to be retained by this paragraph.
5. The applicant shall conduct or have conducted, at a minimum, weekly comprehensive site inspections until completion of the proposed activity to ensure that effective BMPs are properly designed, implemented, and regularly maintained (i.e., repair, replace, add to, improve, implement more effective practice, etc.) to prevent/minimize to the maximum extent practicable discharges of pollutants in order to provide for the protection of water quality.
6. The applicant shall implement a project-specific or a detailed general BMP Plan prepared by an ADEM recognized qualified credentialed professional (QCP) applicable to and commensurate with activities of the type proposed. Effective BMPs shall be implemented and continually maintained for the prevention and control of turbidity, sediment, and other sources of pollutants, including measures to ensure permanent revegetation or cover of all disturbed areas, during and after project implementation.
7. The applicant shall implement a Spill Prevention Control and Countermeasures (SPCC) Plan for all temporary and permanent onsite fuel or chemical storage tanks or facilities consistent with the requirements of ADEM Admin. Code R. 335-6-6-.12(r), Section 311 of the Federal Water Pollution Control Act, and 40 CFR Part 112. The applicant shall maintain onsite or have readily available sufficient oil & grease absorbing material and flotation booms to contain and clean-up fuel or chemical spills and leaks. The applicant shall immediately notify ADEM after becoming aware of a significant visible oil sheen in the vicinity of the proposed activity. In the event of a spill with the potential to impact groundwater or other waters of the State, the applicant should immediately call the National Response Center at 1-800-424-8802 and the Alabama Emergency Management Agency at 1-800-843-0699. The caller should be prepared to report the name, address and telephone number of person reporting spill, the exact location of the spill, the company name and location, the material spilled, the estimated quantity, the source of spill, the cause of the spill, the nearest downstream water with the potential to receive the spill, and the actions taken for containment and cleanup.
8. Additional, effective BMPs shall be fully implemented and maintained on a daily basis as needed to prevent to the maximum extent possible potential discharges of pollutants from activities authorized by this certification, directly to or to a tributary or other stream segment, that have the potential to impact a State water currently considered impaired [waterbody is identified on the Alabama 303(d)

list, a total maximum daily load (TMDL) has been finalized for the waterbody, and/or the waterbody is otherwise considered a Tier 1 water pursuant to ADEM Admin. Code Ch. 335-6-10]. The applicant shall inspect all BMPs as often as is necessary (daily if needed) for effectiveness, need for maintenance, and the need to implement additional, effective BMPs. Additional effective BMPs shall immediately be implemented as needed to ensure full compliance with ADEM requirements and the protection of water quality in the impaired waterbody.

9. All construction and worker debris (e.g., trash, garbage, etc.) must be immediately removed and disposed in an approved manner. If acceptable offsite options are unavailable, effective onsite provisions for collection and control of onsite worker toilet wastes or gray waste waters (i.e., port-o-let, shower washdown, etc.) must be implemented and maintained. Soil contaminated by paint or chemical spills, oil spills, etc. must be immediately cleaned up or be removed and disposed in an approved manner. Also, the applicant shall manage and dispose of any trash, debris, and solid waste according to applicable state and federal requirements.
10. All materials used as fill, or materials used for construction of structures in a waterbody, must be non-toxic, non-leaching, non-acid forming, and free of solid waste or other debris. This requirement does not preclude the use of construction materials authorized by the COE that are typically utilized in marine or other aquatic applications.
11. The applicant shall implement appropriate measures to minimize the potential for a decrease of instream dissolved oxygen concentrations as a result of project implementation. In addition, the applicant shall ensure that the activities authorized by this certification do not significantly contribute to or cause a violation of applicable water quality standards for instream dissolved oxygen.
12. The applicant shall implement appropriate, effective BMPs, including installation of floating turbidity screens as necessary, to minimize downstream turbidity to the maximum extent practicable. The applicant shall visually monitor or measure background turbidity. The applicant must suspend operations should turbidity resulting from project implementation exceed background turbidity by more than 50 NTUs. Operations may resume when the turbidity decreases to within acceptable levels.
13. The applicant shall evaluate, characterize, and as necessary, conduct regular analysis of any material proposed to be dredged/removed/disturbed in order to ensure that potential pollutants are not present in concentrations that could cause or contribute to a violation of applicable water quality standards. Information regarding the evaluation, characterization, or detailed results of any analyses shall be made available to ADEM upon request.
14. If upland disposal areas are utilized, the applicant shall be responsible for the condition of the disposal area, including the structural integrity of any embankments, until the disposal area is permanently reclaimed or adequately stabilized, to ensure that sediment and/or turbidity in the return water and/or stormwater runoff will not cause substantial visible contrast with the receiving waters, or result in an increase of 50 NTUs above background turbidity levels in the receiving waters.
15. For proposed activities associated with new or updated docks, marinas, multiple boat slips, floating docks, large or multiple piers, etc. or that increase the number of berthing areas, the applicant shall ensure that these facilities are equipped with appurtenances (i.e., trash receptacles, receptacles for fish offal and carcasses, SPCC for fueling facilities, and a sewage pump out system where appropriate) as needed to protect water quality.

16. The applicant is encouraged to consider additional pollution prevention practices, low impact development (LID), and other alternatives to assist in complying with applicable regulatory requirements and possible reduction/elimination of pollutant discharges. LID is an approach to land development or re-development that works with nature to manage stormwater as close to its source as possible. LID employs principles such as preserving and recreating natural landscape features, minimizing effective imperviousness to create functional and appealing site drainage that treat stormwater as a resource rather than a waste product. There are many practices that have been used to implement these sustainable ideas such as bio-retention facilities, rain gardens, vegetated rooftops, rain barrels, and permeable pavements. By implementing LID principles and practices, water can be managed in a way that reduces the impact of built areas and promotes the natural movement of water within an ecosystem or watershed.
17. The applicant is encouraged to consider and implement a site design plan/strategy for post-construction hydrology to mimic pre-construction hydrology to the extent feasible, and for post-construction stormwater runoff peak flows and total stormwater volume to minimize potential downstream channel and stream bank erosion.
18. In recognition that projects are site specific in nature and conditions can change during project implementation, ADEM reserves the right to require the submission of additional information or require additional management measures to be implemented, as necessary on a case-by-case basis, in order to ensure the protection of water quality. Liability and responsibility for compliance with this certification are not delegable by contract or otherwise. The applicant shall ensure that any agent, contractor, subcontractor, or other person employed by, under contract, or paid a salary by the applicant complies with this certification. Any violations resulting from the actions of such person may be considered violations of this certification.
19. Issuance of a certification by ADEM neither precludes nor negates an operator/owner's responsibility or liability to apply for, obtain, or comply with other ADEM, federal, state, or local government permits, certifications, licenses, or other approvals. This certification does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, trespass, or any infringement of Federal, State, or local laws or regulations, and in no way purports to vest in the applicant title to lands now owned by the State of Alabama, nor shall it be construed as acquiescence by the State of Alabama of lands owned by the State of Alabama that may be in the applicant's possession.

Please feel free to contact me at 334-394-4304 in the event you have any questions.

Sincerely,



Anthony Scott Hughes, Chief
Field Operations Division

File: WQ401

c: Nashville District COE & EPA Region IV

Tab 10

WATERS, WETLANDS, COASTAL REGULATIONS AND COMPLIANCE

June 16, 2022

Mobile Area Association of Realtors

Sponsored By:

- **Alabama Coastal Foundation**
- **Alabama Department of
Environmental Management, Mobile
Branch – Coastal Section**
- **Baldwin County Association of Realtors**
- **Hand Arendall Harrison Sale LLC**
- **Mobile Area Association of Realtors**
- **National Oceanic and Atmospheric
Administration**
- **Weeks Bay National Estuarine
Research Reserve**
- **Alabama Department of
Conservation and Natural
Resources-State Lands Division**

Materials

Prepared and Presented by:

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Mobile, AL 36602
251-432-5511
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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 § 9-10B-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

Jurisdictional Issues

Navigable Waters

- 1899 Rivers and Harbors Act, Section 10; 33 USC § 403
- Clean Water Act § 404(a)
- 33 USC § 1344 (a) [No discharge of dredged or fill to “navigable waters” without a permit]
- 33 CFR § 329

“Waters of the United States”

- Clean Water Act § 502 (7)
- 33 USC § 1362 (7) [“navigable waters” are “The Waters of the United States, including Territorial Seas.”]
- 33 CFR § 3289



Cases

- **1870:** The Daniel Ball, 77 U.S. 557, 1870 WL 12737 (1870) – RHA case- Jurisdiction over traditional navigable waters used in interstate commerce
- **1975:** NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) – Court ordered expansion of jurisdiction to “other waters” beyond traditional “Navigable waters”
- **1984:** National Wildlife Federation v. Marsh, 14 ENVTL L. Rep. 20262 (D.D.C., Feb. 10, 1984) – Expansion to cover headwaters and areas above headwaters greater than 10 acres
- **1985:** U.S. vs. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), Expansion re: adjacent wetlands (but did not decide the issue of isolated wetlands)
- **2001:** Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engs, 531 U.S. 159 (2001) – Limitation re: interstate commerce, migratory birds, significant nexus
- **2006:** Rapanos v. U.S., 547 US 715 (2006) - Limitation regarding navigable waters, waters of the U.S. , significant nexus, ecological factors
- **2011:** Precon Development Corp. vs. U.S. Army Corps of Engineers, U.S. Court of Appeals, Fourth Circuit, Case No. 09-2239 (Jan 25 2011)
- U.S. vs. Donovan, 661 F.3d 174 (3rd Cir. 2011)
- **2012:** Sackett v. EPA, 132 S.Ct. 1367 (2012)

Guidance Documents

- 2003 Joint Memorandum regarding SWANCC, 68 Fed Reg. 1995 (2003)
(See www.epa.gov/owow/wetlands/SWANCCNav.html) How to interpret interstate commerce requirements, how to determine isolated wetlands, and
- 2008 “Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in Rapanos v. U.S. & Carabell vs. United States”
- 2011 “EPA and Army Corps of Engineers Guidance regarding Identification of Waters Protected by the Clean Water Act.” (“Proposed”)

WETLANDS AND AQUATIC RESOURCES – DUE DILIGENCE

Know the Property – Surface & Subsurface

Conduct Preliminary Investigations

Establish Baseline Conditions



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

- Wetlands / Aquatic Resources (Water)
- Environmentally Sensitive Areas (Water)



TITLE vs. USE

DUE DILIGENCE

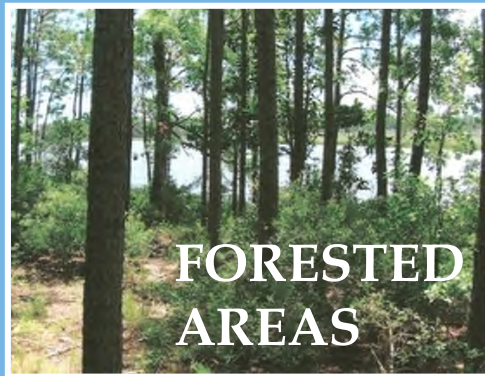
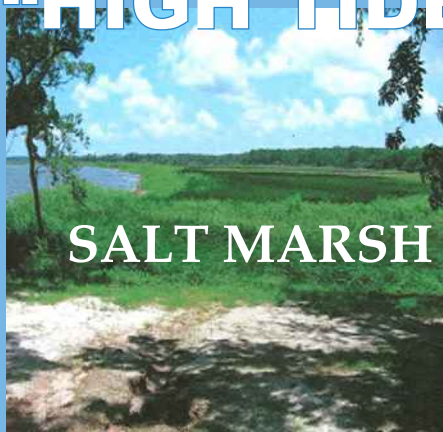
- Historical background information from Corps / other agencies (FOIA, State documents request)
- Names of predecessors / title documents, restrictions, local requirements
- Regulatory history / compliance and resolution of violations
- Reports / monitoring history
- Consultants
 - Wetland delineations
 - Corps verification /determinations
 - WRAP / history
- Aerials – successive years
- Surrounding developments

TITLE MATTERS, EXEMPTIONS AND OBJECTIONS

- 1) ACCESS to a Public Road; ACCESS to Intracoastal Waterway Navigable Waters – Determine, Confirm and “INSURE” – ALTA Endorsement)
- 2) SUBDIVISION / PROPERTY OWNERS ASSOCIATION AND COMMON AREAS “Beware of the Existing Liabilities”
 - EXAMPLE – Retention Pond
- 3) PIPELINE / POWERLINE EASEMENTS “Beware of Ancient Pipelines and Powerline Easements”
- 4) RIPARIAN / LITTORAL RIGHTS “High Tide Line” “Ordinary High Waters”
- 5) WETLANDS / AQUATIC SITES – May Affect Use Not Title or Marketable Title
- 6) CANALS / EXCAVATED UPLANDS / FLOODING OR FLOWAGE EASEMENT

EXAMPLE – RIPARIAN / LITTORAL RIGHTS “HIGH TIDE LINE” “ORDINARY HIGH WATER”

TRANSFER OF 200 ACRES OF CONTIGUOUS
PARCELS THAT CONTAINED:



- Several streams, and stream fed manmade lakes
- Mobile Bay frontage
- Frontage along Old Fowl River
- A named bayou
- Several canals excavated prior to 1968, and certain wetland areas filled prior to 1972
- Other wet and aquatic sites

TITLE MARKETABLE – Used Statutory Warranty Deed with numerous limitations of warranties of title

TITLE COMMITMENT – numerous exceptions

- Erroneous references
- Redundant / overlapping exceptions
- Wrong terminology used by title company

Although we represented the Seller – we examined the 64 exceptions and found a number of them did not affect or apply to the particular parcels to be sold and those general exceptions to riparian, water, tidal, wetland and environmental matters were redundant and objectionable.

OBJECTIONS

HAND ARENDALL
LLC LAWYERS

MEMORANDUM

TO:
FROM: Neil Johnston
DATE: June
RE: Draft Title Commitment by — File No.

Draft Title Commitment by , 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

Page 2

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 Mr. 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. I and 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:lh

October 31, 2007

, Esq.

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 _____ title insurance policy and the _____ 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

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Lawyers also admitted in Florida, Georgia, Louisiana, Mississippi, and the District of Columbia

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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.

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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 SA 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

EXCEPTIONS

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 Fowl 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 Fowl River or Mobile Bay
33. 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.
34. Rights of the United States, State of Alabama, or other parties in and to the bed, shore and waters of Mobile Bay, Fowl River, Graham 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.
35. Any portion of subject property which may be affected by accretion, reliction, erosion and avulsion.
36. 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".
37. No title is insured to any portion of land lying below the mean high water line of Fowl River or 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

RESPONSE BY UNDERWRITER FOR TITLE COMPANY

Subject: RE: interesting title review
From:
Date:
To:

here are my thoughts on the letter from Neil 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.

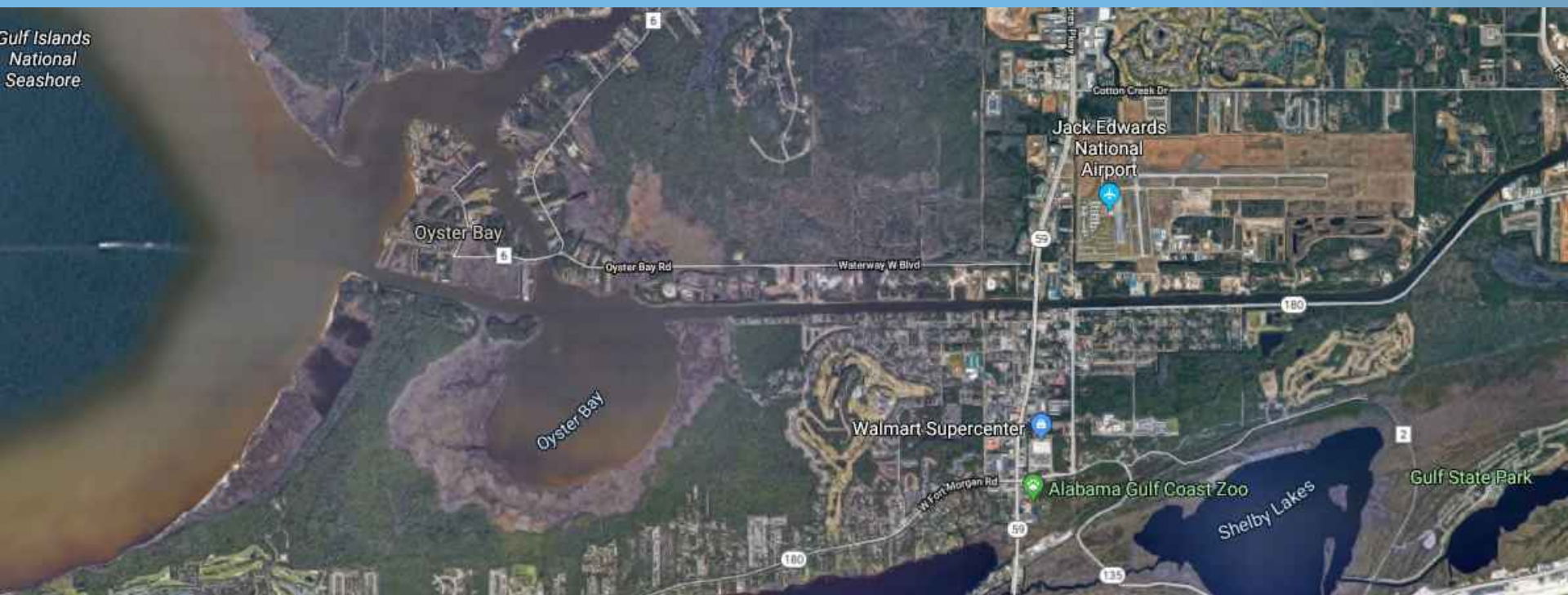
As to Item 33. I tend to agree with him. We are not insuring land lying below the "mean high water line" and the policy excludes governmental regulations. So unless Alabama Coastal Preservation statutes actually relate to the status or vesting of title a violation of them would not be covered because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

EXCAVATED UPLANDS – CANALS / FLOWAGE EASEMENTS

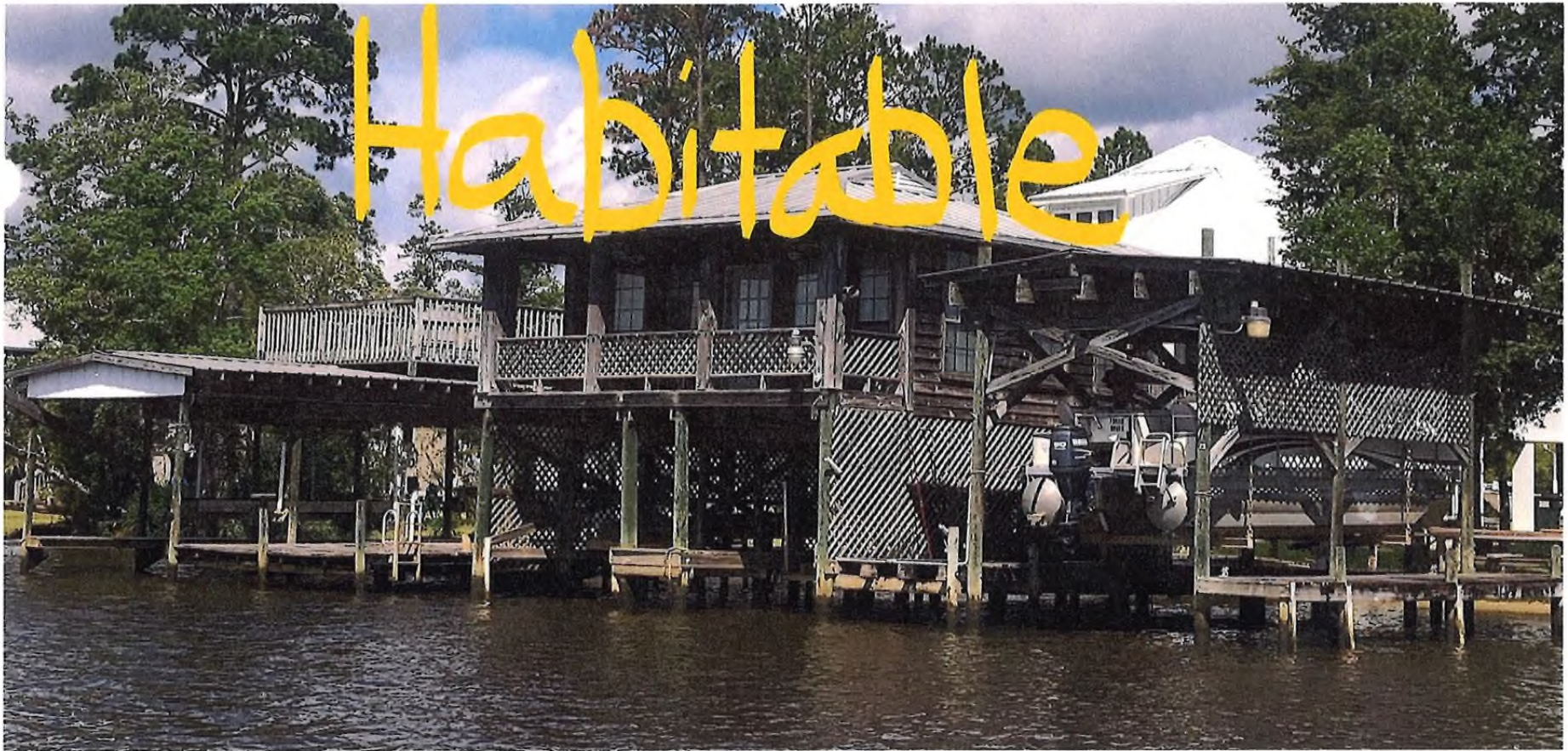
- 1932 “Foley Land Cut” – Easement granted January 9, 1932 by Easement Deed from Intracoastal Land Company, Inc. to the United States of America, recorded in Deed Book 52, Pages 327, et seq., Baldwin County Probate Court Records
- U.S. Army Corps of Engineers then excavated uplands to create a portion of the Gulf Intracoastal Waterway connecting Oyster Bay on the west to the east side of Wolf Bay



SUBSTITUTION / RELOCATION OF RESTRICTED AREA

- Tract of Land – i.e., 20 contiguous acres
- 3 acres of 1-2 acres delineated as jurisdictional wetlands
- Tract Subdivided – 5 lots of 4 acres each
- CWA § 404 Permit issued to fill 2 acres of wetlands on Lots 4 and 5 preserving wetlands on Lots 1-3 to be “Deed Restricted” –
- New owner negotiates release/relocation of restricted wetland areas

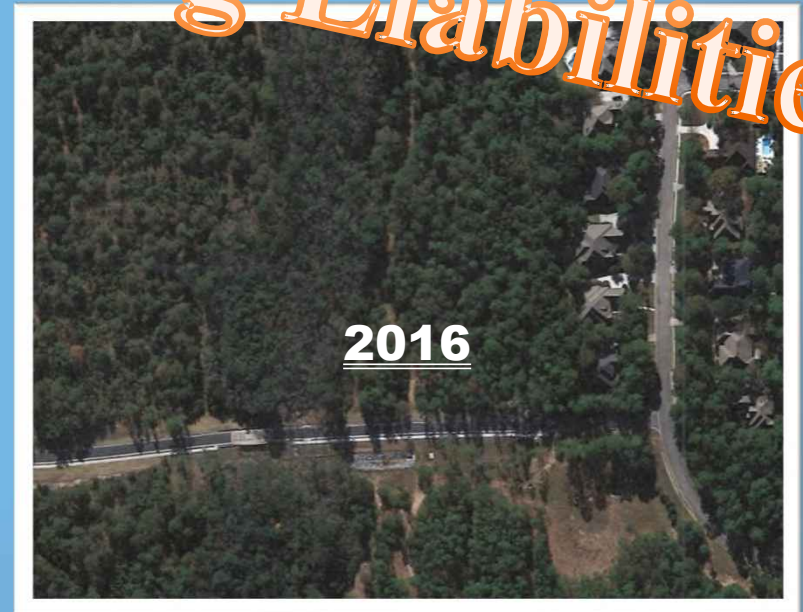
BEWARE OF AGENCY INTERPRETATION



SUBDIVISION / PROPERTY OWNERS ASSOCIATION (POA) AND COMMON AREAS



Beware of Existing Liabilities





Cattle Dipping Vats

Then and Now



BEWARE

OF

EXISTING

LEGACY

FEATURES

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.”



Firm Contact:

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