

ENVIRONMENTAL ISSUES AND SUBDIVISION DEVELOPMENT

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for

LORMAN EDUCATION SERVICES “SUBDIVIDING REAL PROPERTY: LEGAL, PRACTICAL AND TECHNICAL ISSUES IN ALABAMA”

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ENVIRONMENTAL ISSUES AND SUBDIVISION DEVELOPMENT

A. Due Diligence/Baseline Information Regarding Natural Resources, Issues and Regulations.

Developers, landowners, industry and governmental officials must be aware of the local, state and federal environmental issues, including the increasing demands for water and protection of natural resources that continue to evolve and directly involve the natural, practicable, economical and operational aspects of subdivision development and community. All aspects of development and the development site are now affected by some permit issue or regulation that focuses on land use, environmental, health or safety concerns. There are also cost, liability and compliance considerations associated with or which must be examined for each subdivision development.

All subdivision development and land use involve or effect environmental resources including water quantity and quality in some way, either by use, right, or impact. Historically, we have addressed the rights to land use by common law principals, by statutory restrictions and by infrastructure limitations. Permitting and transactional due diligence must include a comprehensive analysis and review of the surface and

subsurface conditions for each project. Attention must be given to identify and evaluate the complex legal and regulatory matters of land use law that will or may affect each project. As part of the development due diligence, establishment of the baseline conditions of the target property as well as the surrounding property is necessary.

You should pay attention to the physical, natural, historical and regulatory characteristics of each proposed subdivision development site, as well as surrounding sites. The conditions are determined by reviewing the site, the local and regulatory records of the site, and the records of the landowner and the community. All information gathered will help establish the existing conditions, capacities and requirements of the property. The baseline is one of the most important parts of the initial investigation for the use of the property.

Some of the matters to examine include:

1. **Topography.** The physical and natural conditions of the surface and subsurface of the site and surrounding sites should be reviewed to determine the following conditions:
 - (a) drainage;
 - (b) flood conditions/history and flood zone requirements;
 - (c) soil conditions, erosivity, slope, vegetation;
 - (d) location of water
 - (i) waterways, streams and stream types;
 - (ii) groundwater;
 - (iii) utilities;

- (iv) disposal/treatment;
- (v) flow rates;
- (e) conditions of soil and water (surface and subsurface);
- (f) existence of hazardous, toxic or regulated conditions such as waste disposal deposits, or spills, existence of USTs, existence of wetlands, endangered species, historical properties, sink holes, wells, USTs, floodplain, sewage treatment/disposal;
- (g) condition and availability of access (to the site, any water surface, any water source);
- (h) past and present condition/use of the surface and subsurface of the site and surrounding properties (existing operations, condition of buildings, location in rural areas, industrial, vacant, unimproved);
and
- (i) geology, hydrogeology, groundwater flow and recharge sources.

2. Existing Land Use and Water Regulations.

- (a) state/federal statutes/regulations;
- (b) local building codes, zoning restrictions and planning and other local ordinances;
- (c) health and safety regulations;
- (d) special or conservation districts/locations, watershed districts, historical/archeological sites; and
- (e) flood ordinances.

3. Surrounding Conditions.

- (a) past and existing land uses;
- (b) demand for and availability of water;
- (c) economic, practical and social character of neighborhood;
- (d) surface and subsurface drainage;
- (e) location of waterways, water wells, disposal activities; and
- (f) existing air and water quality.

4. Utilities and Resources.

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

5. Community Relations.

- (a) neighbors, environmental justice;
- (b) existing organizations;
- (c) regulatory agencies;
- (d) local government; and
- (e) existing businesses.

6. Environmentally Sensitive Areas.

Environmentally Sensitive Areas (ESAs) have been described to include almost any type of regulated or recognized natural resource, and is often a convenient phrase used to emphasize target areas for protection, including aquatic resources.

ESAs have been described to include:

- (a) essential habitat for threatened and endangered species;
- (b) wetlands, streams and other aquatic resources of national importance;
- (c) scientifically recognized rare ecological communities;
- (d) steep slopes;
- (e) flood prone areas;
- (f) riparian habitats and corridors;
- (g) fisheries and wildlife habitat;
- (h) hardwood bottomland habitats;
- (i) coastal areas, dunes and barrier islands; and
- (j) historic and cultural properties.

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

For example:

- (a) Linear projects or pipelines regulated by the Office of Pipeline Safety and the U.S. Department of Transportation, Research and Special Programs Administration are now required by final rule codified in 49 CFR Part 195 to consider the effects of a hazardous

liquid pipeline release on drinking water and ecological areas which the regulations refer to as “Unusually Sensitive Areas” (“USA”).

USAs include:

- (i) drinking water resources;
- (ii) sole source aquifer recharge area;
- (iii) ecological resources such as a multi-species assemblage area;
- (iv) migrating bird concentration area; and
- (v) an area containing imperiled species.

(b) Clean Water Act.

Requirements of the Clean Water Act (“CWA”) § 404 refer to “waters of the United States” (33 CFR § 328) which includes wetlands, mudflats, etc. The CWA § 404(b)(1) guidelines refer to wetlands as “Special Aquatic Sites” (40 CFR § 230.3). The U. S. Army Corps of Engineers during the CWA § 404 permit application process must consider other sensitive areas and consult with other agencies that exercise jurisdiction over sensitive areas such as endangered and threatened species and their habitat (USFWS), historic and cultural sites (SHPO), coastal resources (ADEM), and fish and wildlife species and their habitats (USFWS, NMFS, and ADCNR).

By a 1992 Memorandum of Agreement between EPA and the Corps, EPA may request elevation of permit considerations for significant impacts to “aquatic resources of national importance” or “ARNI.”

B. Permitting/Approvals.

1. General.

Though not an exhaustive list, some of the permits and approvals you may be required to obtain for any subdivision development include:

(a) Wetlands.

- (i) Clean Water Act § 404, dredge and fill permit or any one of several Nationwide or general permits.
- (ii) Clean Water Act § 401 and ADEM Admin. Regulation § 335-6-1, water quality consistency certification.
- (iii) Coastal Zone Management Act and ADEM Admin. Regulations, § 335-8-1, coastal zone regulation consistency certification
- (iv) Archaeological/historic properties study.
- (v) Wildlife/endangered and threatened species study.
- (vi) Wetland delineation, WRAP analysis, mitigation plan.
- (vii) Stream impact study, analysis and mitigation proposal.
- (viii) If road requirements, wetland approvals from planning or building departments.
- (ix) If financing, may have to address other matters.

(b) Landclearing/Construction Site.

- (i) Clean Water Act § 402 (NPDES) and § 319 – ADEM Admin. Regulation Rule § 335-6-12 “Construction Site Stormwater/Erosion Control,” NOR, CBMP plan.
 - (ii) Local landclearing approvals.
 - (iii) Compliance with flood prevention ordinances.
- (c) Archaeological/Cultural/Historic Properties.
- (i) Study – Phase I/Phase II.
 - (ii) Excavation/preservation (SHPO).
- (d) Threatened and Endangered Species.
- (i) Onsite inspection and study.
 - (ii) Endangered Species Act 16 USC 1531.
 - (1) ESA § 10 – Incidental Take permit.
 - (2) ESA § 7 – Consultation with USFWS/biological assessment (applicant) and biological opinion (USFWS).
 - (iii) ADEM Coastal Regulations species protection.
 - (iv) ADCNR – State protected species.
- (e) Flood.
- (i) Flood Insurance Rate Maps, amendments – changes.
 - (ii) Flood classifications, location of flooding, flood zones.
 - (iii) Building limitations/elevation certificate and height requirements.

- (iv) Obstructions – no rise certification.
- (v) Stormwater retention/detention requirements.
- (vi) Insurance/financing.

2. Wetland Permitting.

There are several types of CWA § 404 permits available for regulated activities. Permits include general permits, nationwide permits, individual permits, and letters of permission.

Nationwide Permits. The permits and applications most often sought for subdivision projects are nationwide permits (“NWP”) and individual permits. Both permits require CWA § 401 water quality consistency certification from ADEM and coastal management certification from ADEM if the project is in the coastal zone.

In March, 2007, the 49 NWPs available were reissued by the Corps. ADEM issued 401 certification for all 49 NWPs with additional conditions. However, ADEM issued coastal certification for only 35 NWPs and withheld certification for nine, and found five NWPs did not apply in the coastal zone.

Individual Permits. The CWA § 404 (33 USC § 1344) prohibits the discharge of dredged material and the discharge of fill material to *waters of the United States* without a permit. Prior to submitting a permit application or proceeding with activity pursuant to a general or nationwide permit, you should determine the existence and extent of wetlands by obtaining (1) a wetland delineation (preferably by a qualified consultant), (2) survey of the delineated areas, (3) submission and verification by the Corps of Engineers,

and (4) obtain a written wetland jurisdictional determination by the Corps of Engineers or a nonjurisdictional determination that no jurisdictional wetlands exist.

The project site impacts to aquatic resources must then be reviewed by the Corps and other agencies including EPA, USFWS, NOAA, ADEM, ADCNR and the Alabama State Port Authority. If “waters of the United States” (as the phrase is defined in 33 CFR 328.3) must be filled as a process of the development, (1) reasonable, practical alternatives must be examined and analyzed, (2) to the maximum extent practicable, wetlands must be avoided and impacts minimized, and (3) if any impacts or fill are still necessary, the impacted or filled areas must be mitigated. The Corps of Engineers and in some cases, the EPA, will review and investigate the proposed activity pursuant to the requirements of the National Environmental Policy Act (“NEPA”), the CWA § 404(b)(1) guidelines (33 CFR § 230), and the CEQ regulations found at 40 CFR pt. 1500, and make an environmental assessment to determine the level of impacts and make a determination and “Finding of No Significant Impacts” (“FONSI”) or require further study, an Environmental Impact Study (“EIS”).

The subdivision project will have an impact on water quality (CWA § 401), requiring ADEM’s water quality consistency certification, and if located in the coastal zone, an impact on the coastal resources requiring a review and consistency certification from ADEM.

Questions of law and fact do appear throughout the process. For instance, is the aquatic resource a “water of the United States” within the Corps/EPA jurisdiction?

By Memorandum of Agreement between the Corps and EPA, the agencies agreed and attempted to define and divide jurisdiction over discharges noting that once the application is submitted with all required information, the Corps issues a public notice that is provided to the interested public and other individuals and entities, as well as other federal and state agencies with whom consultation obligations exist by regulation such as:

U. S. Fish & Wildlife Service
State Historic Preservation Officer
Alabama Department of Conservation and Natural Resources
Alabama State Port Authority
U. S. Coast Guard
National Marine Fisheries Service
Alabama Department of Environmental Management
Environmental Protection Agency and others.

During the public notice period, normally 30 days, comments will be submitted and the District Engineer will then determine if cause exists to hold a public hearing, and an environmental assessment (“EA”) will be made to determine the environmental impacts. During the EA review, numerous criteria are considered as outlined by NEPA and the CWA § 404(b)(1) guidelines. The review period can be quite resource intensive and time consuming. An environmental impact study may be necessary, and if not, a finding of no significant impact will be made.

(a) **Jurisdictional Implications From SWANCC and Rapanos Decisions.**

(i) The Solid Waste Agency of Northern Cook County vs. U. S. Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC “), decision has caused some practitioners to argue for a very narrow interpretation of the CWA § 404 jurisdiction.

In general, prior to *SWANCC*, the evolution of the Clean Water Act jurisdiction for the last twenty years expanded to all waters of the United States (33 C.F.R. 328; 40 C.F.R. § 122), including navigable waters, tributaries, adjacent wetlands, United States v. Riverside Bayview Homes, 474 U.S. 121, 16 E.L.R. 20086 (1985), and isolated intrastate wetlands and waters. The expansion of jurisdiction over isolated wetlands and waters was justified by the Corps under the Commerce Clause of the United States Constitution (U.S. CONST. art. I cl. VIII) by the so-called “**Migratory Bird Rule.**” In other words, waters that are, should, or would be used as habitat for migratory birds which cross state lines are waters of the United States (or were pre-*SWANCC*) subject to the Clean Water Act Section 404 jurisdiction.

The Migratory Bird Rule found its way into the regulations in 1986 with the following language:

“Waters of the United States . . . also include the following waters:

- a. waters which are or would be used as habitat for birds protected by Migratory Bird Treaties; or
- b. which are or would be used as habitat by other migratory birds which cross state lines; or
- c. which or would be used as habitat for endangered species; or
- d. used to irrigate crops sold in interstate commerce.”

51 Fed. Reg. 41208, 41217 (Nov. 13, 1986).

The Rule was rejected in the Fourth Circuit in Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989), and the Seventh Circuit in Hoffman Homes, Inc. v. EPA, 975 F.2d 1554 (7th Cir. 1992), and Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993). However, the Seventh Circuit, in 1999, upheld the Rule (Solid Waste Agency of Northern Cook County v. Corps of Engineers, 191 F.3d 845 (7th Cir. 1999)), as did the Ninth Circuit in 1990 and 1995. See Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995); and Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990).

Finally, the United States Supreme Court, during the appeal from the Seventh Circuit Court opinion in Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. 159 (2001), the *SWANCC* decision, held that the Corps of Engineers overextended Section 404 jurisdiction beyond the Congressional authority. The Migratory Bird Rule was, therefore, invalidated.

A consortium of twenty-three suburban Chicago cities formed a corporation to handle their solid waste disposal. The group purchased 533 acres of an old gravel pit to develop a landfill. The pit held water seasonably and was visited from time to time by migratory birds. The site was also in close proximity to another wetland area, which was in close proximity to a navigable water. The Corps of Engineers denied, after several years, the Section 404 permit application. The cities claimed that the Clean Water Act extended only to traditional navigable waters and that the Migratory Bird Rule was not authorized under this traditional definition. In addition, the cities argued that the expanded jurisdiction exceeded Congress' broadest constitutional authority. The

Supreme Court found that the Clean Water Act grants jurisdiction only over navigable waters, in its traditional sense, waters that were or had been navigable in fact or could reasonably be navigable in fact. The Migratory Bird Rule was justified by the Corps with reference to a broad power of Congress to regulate activities substantially affecting interstate commerce rather than Congress' commerce power over navigation and thereby exceeded the scope of the Clean Water Act.

Isolated wetlands may, but do not necessarily affect interstate commerce. The Clean Water Act jurisdiction, arguably, only extends to those waters, navigable waters, that clearly have been indicated by Congress.

It now appears that each court is wrestling with its application to hydrology, whether waters are adjacent to wetlands, and whether there is a significant nexus to navigable waters. The Fourth Circuit Court of Appeals has held wetlands with hydrologic connections to non-navigable or intermittent tributaries of navigable waters to be jurisdictional. United States v. Interstate General Co., 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd*, 39 F. Appx. 870 (4th Cir. 2002); Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001). See also United States v. Eidson, 108 F. 3d 1336 (11th Cir. 1997 – pre-SWANCC). Others have interpreted SWANCC to extend the Corps' Section 404 jurisdiction only to wetlands that are “adjacent” to navigable waters. Rice v. Harken Exploration Co., 250 F.3d 246 (5th Cir. 2001); and United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002).

In Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), the Court held that the Clean Water Act jurisdiction extends only to a body of water that is actually navigable and adjacent to an open body of water.

An excellent article you should review is “Can *SWANCC* be Right For a New Look at the Legislative History of the Clean Water Act,” by Virginia S. Albrecht and Stephen M. Nickelsburg, 32 E.L.R. 11042, Sept. 2002.

Other appellate courts since *SWANCC* have ruled that *SWANCC* should be read narrowly interpreting the CWA by striking down the migratory bird rule only and not an attempt to construe navigable waters. See U. S. v. Deaton, 332 F.3d 698 (4th Cir. 2003) , although the Deaton court did state the Corps had jurisdiction to look at the whole tributary system including manmade ditches, and culverts which extend for miles before entering the Chesapeake Bay.

In Treacy v. Newdunn Associates, LLP, 344 F.2d 407 (4th Cir. 2003), the court held that Corps had jurisdiction over wetlands, that are “adjacent” to traditional navigable waters pursuant to 33 CFR § 328.3(a), and that had a surface hydrologic connection through a series of natural and manmade waterways and ditches, which even crossed under an interstate highway to traditional navigable waters 2.4 miles from the wetlands.

In U. S. v. Jones, 267 F.Supp.2d (M.D. Ga. 2003), the court found defendant liable for unpermitted discharges to navigable waters from the migration of oil spilled into a storm drain that connected to a tributary of a navigable stream. The court held defendant liable under the Clean Water Act. As support, the court cited United States v. Eidson, 108 F.3d 1336 (11th Cir. 1997) (pre-*SWANCC*), that found that a storm drainage

ditch system was a tributary because the ditch emptied into a canal and eventually into Tampa Bay, a navigable water.

(ii) Then in 2006, the Supreme Court in two consolidated cases, Carabell v. United States and Rapanos v. United States, 126 S. Ct. 2208 (2006), addressed questions about jurisdiction of the CWA §404 to wetlands that are adjacent to or have a surface hydrological connection to a traditional navigable waters. The decision overturned the Sixth Circuit Court of Appeals which ruled that wetlands connected to navigable waters only by streams and ditches that did not have a continuous flow were “adjacent to” navigable waters and therefore jurisdictional.

The Supreme Court issued a split decision with four Justices, the plurality, deciding that jurisdiction only extended to “relatively permanent, standing or flowing bodies of water” and not to intermittent or ephemeral streams, and there must be a continuous surface connection between the wetland and navigable waters. For the decision to overturn the Sixth Circuit, a fifth Justice, Justice Kennedy, voted separately with the plurality, stating that there must be a “significant nexus” between a wetland connected to a navigable water by a non-navigable waterway. For the two years after the Rapanos decision, various courts followed the plurality in some cases and Justice Kennedy’s significant nexus in others.

The Corps, meanwhile, refused to process jurisdictional requests until “guidance” was issued in June of 2007. As such, consultants made decisions regarding jurisdiction and applicants proceeded without formal Corps approval on jurisdictional determinations.

The “Memorandum Re: Clean Water Act Jurisdiction Following U. S. Supreme Court Discussion in Rapanos v. United States” issued by the Corps of Engineers on June 19, 2007, set forth certain criteria to consider and use as a guide in the field to review and make “consistent” jurisdictional determinations and administer enforcement actions. The guidance provides a jurisdictional checklist of hydrological factors and ecological features and other items to evaluate the site for significant nexus, and a list of geographical features which do not meet jurisdictional criteria.

Another extensive guidance document, Jurisdictional Determination Form Instruction Guidebook, can be found at http://www.USACE.Army.mil/cw/cecwo/Reg/cwa_guide/cwa_guide.htm. Comments on this guidance are still being reviewed and final guidance has not yet been issued. A new Regulation Guidance Letter No. 08-02 dated June 26, 2008, explains the differences between “approved jurisdictional determinations” and “preliminary jurisdictional determinations.”

(b) CWA § 404(f) Exemptions.

The Clean Water Act, 33 U.S.C. § 1334(f), exempts certain activities from the permitting process. These include ongoing and normal farming, ranching and silvicultural operations.

For purposes of developing a subdivision, normally a site must be cleared, graded, and have a good road system.

If the property is forested and has had a history of forestry improvements, ditching, forest roads, stream crossings, periodic ongoing timber harvests and site

preparation activity, the continuation of such forestry or silvicultural activities should qualify as exempt activities. However, if the activities are associated with land clearing, timbering and road work in preparation for the subdivision, the timber and road work in wetland areas may not qualify for the exemption, may be considered new activity which would then be recaptured by the statute and require a permit prior to conducting the operations.

Developers are advised to request a determination of exempt status prior to proceeding under the assumption and claim of the silvicultural exemption.

If the exemption does apply, the developer must follow federal and state requirements for forestry best management practices.

If located within a municipality, city ordinances relating to trees and buffers should be consulted.

(c) **Water Quality Consistency.**

The CWA § 401 and Corps regulations 33 CFR § 320.4(d) require state agencies (ADEM) to review federal permit applications and determine if the discharges to state waters will comply with state water quality standards established under CWA § 303 and certify consistency with those standards. The CWA § 404 permit application used in the Mobile District Corps of Engineers is a joint Corps/ADEM application but the water quality certification process usually does not begin until all aspects and information are submitted to the Corps and the Corps then formally requests the certification.

The ADEM water quality regulations are found at ADEM Admin. Regulations § 335-6-6. The requirements for obtaining the certification are found at 33 CFR § 320.4(d).

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(d) **Coastal Zone Management Program Consistency Certification.**

In the event that the subdivision or any part thereof is located in the coastal zone or area defined by ADEM in ADEM Admin. Regulations § 335-8-1, the Corps must notify ADEM and obtain a certification from the applicant that the proposed activities comply with ADEM's coastal zone management program (called the Alabama Coastal Area Management Plan or ACAMP) (1999) and ADEM concurs with the certification. Normally, the water quality certification and coastal concurrence occur at the same time in the same response letter from ADEM.

In addition, ADEM will submit conditions to be included as part of the § 404 permit if and when issued by the Corps.

The requirements for the Corps' consideration of coastal impacts is found at 33 CFR § 320.4(h).

(h) *Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal application if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

(e) **Mitigation of Wetland and Stream Impacts.**

(i) Wetlands – As part of the CWA § 404 permit application process, the applicant must implement the sequencing order of reducing impacts to wetlands and other aquatic sites to the greatest extent practicable, first by avoiding wetland impacts, second by minimizing the remaining impacts and third by mitigating for any remaining impacts that cannot be avoided or minimized.

The permit will not be finally processed until an acceptable mitigation plan has been submitted. Mitigation may be accomplished by (1) restoration of existing wetlands on or off the project site, (2) enhancement of wetlands on or off the

project site, (3) creation of wetlands, (4) preservation, or (5) a combination of these. Applicants may also propose the use of mitigation banks and in-lieu-fee projects. There have been several interagency memoranda and guidance addressing mitigation. The most recent regulations have been issued by the Corp and EPA in early 2008 that consolidates and restates the preferred options available with the intent to promote greater consistency, predictability and ecological success of mitigation projects. See [Compensatory Mitigation for Losses to Aquatic Resources](#), 73 Fed. Reg. 19, 594 (April 10, 2008) which will be codified at 33 CFR § 325 and 40 CFR § 230.

The regulations now put more focus on the use of mitigation banks and in lieu fee programs over permittee responsible plans. The permittee should now look at (1) mitigation banks, (2) in lieu fee programs, (3) permittee responsible mitigation using a watershed approach onsite and in kind, or (4) offsite and out-of-kind mitigation.

For the subdivision developer, having the right people including wetland consultants, legal advisors and engineers will insure a timely and successful project. Mitigation for impacts to wetlands also must include qualification and quantification of functional values. The Mobile District Corps of Engineers has adopted an objective functional process developed by the South Florida Water Management District, the “Wetland Rapid Assessment Procedure” or “WRAP” for evaluating and scoring the functional quality values of wetlands as low, medium or high for mitigation purposes.

(ii) Stream Impacts – CWA § 404 jurisdiction also extends to certain streams. There are several categories of streams distinguished by the prevalence and duration of water.

Perennial – streams that flow water most of the time in most years

Intermittent – streams that flow water part of the time in most years and have a defined stream channel

Ephemeral – streams that flow water in response to heavy rainfalls

Corps jurisdiction and resulting requirements for mitigation have changed by the Supreme Court ruling in Rapanos v. United States, 126 S. Ct. 2208 (2006).

The Mobile District Corps of Engineers requires streams and development impacts to streams to be evaluated and mitigated using the Standard Operating Procedures for Compensatory Stream Mitigation Guidelines September, 2008.

Mitigation for impacts to streams depends on the type of stream and upstream and downstream impacts. Proposed litigation for stream impacts must address the type, condition, function and area of the aquatic system, as well as meeting the requisite criteria for enhancement, restoration, preservation and control of the mitigation area.

3. **ADEM Construction Site Stormwater Regulations.**

The new regulations, ADEM Admin. Code Reg. 335-6-12 (“ADEM Rule”), became effective January 23, 2003, and all qualifying construction sites are now subject to the ADEM Rule.

(a) **NPDES Permits.**

(1) **Generally.** In the event a development, project or construction site will produce or discharge pollutants directly to navigable waters, including wetlands, from a pipe or another point source, an owner, operator, developer, or contractor must first obtain a general or individual National Pollutant Discharge Elimination System (“NPDES”) permit as required by the Clean Water Act § 402 (33 U.S.C. § 1342). The discharges may be from commercial or industrial operations directly to surface waters, or from sewage and waste from municipal wastewater treatment facilities, or from stormwater runoff. ADEM administers the NPDES program in Alabama, subject to EPA rules (40 C.F.R. 122), and regulations found in ADEM Admin. Code Reg. 335-6-6 and the new ADEM Admin. Code Reg. 335-6-12 (“ADEM Rule”).

NPDES permits may be individual or general. Individual permits focus on the particular operation, facility and discharges. Developers should know and anticipate the particular purpose and use of the property and explore the permit requirements for such. If water is a necessary component of the development, the water source must exist nearby or be readily available as well as have the ability to discharge the used water, waste water and stormwater. If the used water and stormwater contain regulated pollutants or the temperature of the discharged water has been changed, an individual NPDES permit may be necessary. The required information, application or registration must then be filed and

a public hearing held prior to issuance. If the operation is exposed to rainwater and has surface areas that contribute to runoff, or as discussed below, is a construction site where landclearing and grading are necessary, an individual, or in most cases, general stormwater NPDES permit coverage will be required.

(2) **ADEM Rule (Phase II) and Phase I General NPDES Permit for Construction, Land-clearing and Excavation Activities.**

Alabama's General Permit for construction activities was ALG610000 (effective until December 31, 2002, extended by administrative order until February 28, 2003) and is no longer in effect. This permit was first issued by ADEM in 1992 and generally followed EPA's Phase I permit format and was required for sites with five (5) acres or more of cleared area. The General Permit was issued for a five-year period which automatically expired in 1997 when it was reissued by ADEM for an additional five (5) years. That General Permit was extended to allow ADEM time to propose, adopt and effect new rules to address Phase I and Phase II construction sites of a lower threshold of one (1) acre sites, but expired in 2003. Any party authorized to operate prior to July, 2002, should have received notice of expiration requiring resubmission of an intent to extend coverage under the reissued permit or now, notice of registration (NOR) under the ADEM Rule. Failure to do so (and there were some sites that continued to operate under expired permits and without registration) is a violation which may result in substantial penalties.

No one can exercise authority under the ADEM Rule without fully complying with its terms, including: (a) first filing a notice of registration ("NOR") to use and be covered by the ADEM Rule, and (b) filing all required information including a

comprehensive Construction Best Management Practices (“CBMP”) plan addressing erosion and sediment control measures for stormwater discharges.

The ADEM Rule (just like the old General Permit) applies to discharges from all construction sites (Phase I and Phase II), regardless of the size of the project. ADEM Rule 335-6-12-.02(m). The federal regulations and the ADEM Rule in certain instances, however, refer to landclearing on sites one (1) acre or larger, unless a smaller site is part of a larger common development where greater than one acre of the surface is disturbed. Even though ADEM’s Rule recites its application to all sites, in practice, ADEM requires registration of sites only for those discharges of stormwater from construction sites that meet the one-acre threshold, unless the discharges from smaller sites adversely affect water quality of state waters and require an individual permit.

The ADEM Rule is a legal document based on federal and state laws and regulations which impose numerous legal duties on a defined class of persons and activities. For a clear understanding of the requirements, duties and liabilities, the ADEM Rule should be thoroughly reviewed in its entirety several times. Some of the highlights and details are described below. The ADEM Rule is comprehensive, complex, and full of confusing requirements in need of explanation, interpretation and application.

(i) **Notice of Registration (“NOR”)**. Unlike the federal permit, 40 C.F.R. § 122, and procedures in some states such as New York, discharges from a construction project in Alabama will not be permitted by the ADEM Rule until the operator (registrant) or discharger has properly completed a NOR, the complete NOR has been submitted to ADEM, ADEM has reviewed and approved the

NOR, and the operator (registrant) has received the actual receipt of an acknowledgment from ADEM (40 C.F.R. 122.28(b)(2)(iv), ADEM ADMIN Code Reg. 335-6-12-.11). However, in practice, ADEM has allowed registrants to begin work upon filing the NOR (at the registrant's risk). The ADEM-approved NOR form must be completed by or on behalf of the person seeking coverage under the ADEM Rule. The NOR must specify the construction activity, the location of the site, describe and include a CBMP plan prepared and certified by a qualified credentialed professional ("QCP"), identify past violations, describe the schedule of activity, describe and locate receiving waters, and include a certificate by the responsible person or official seeking coverage.

(ii) **The Stormwater Pollution Prevention**

Plan and CBMPs. According to the EPA, the best way to manage stormwater pollution is by use of a stormwater pollution prevention plan ("SPPP") based on the use of CBMPs. 55 Fed. Reg. 47990, 48034 (Nov. 16, 1990); Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1393 (D. Haw. 1995). The SPPP is required as a part of the EPA general permit applicable in states without approved NPDES programs. In Alabama, the SPPP counterpart is now called the "CBMP plan" which also focuses primarily on planning and management of stormwater onsite by using erosion and sediment control procedures.

Although the ADEM Rule contains other requirements which must be met, CBMPs are the most critical and the most visible elements necessary for protecting adjacent waters from stormwater discharge, and preventing violations of the permit conditions. CBMPs do not have to be the "best" in each instance, but they are required to

be appropriate for the specific site and based on good and sound engineering practices. The ADEM Rule now provides that CBMP's must be effective "to the maximum extent practicable." [ADEM Rule 335-6-125-.02 (f)]. "Maximum Extent Practicable" is defined as:

"full implementation and regular maintenance of available industry standard technology and effective management practices, such as those contained in the Alabama Handbook, designed to prevent and/or minimize discharges of pollutants and ensure protection of groundwater and surface water quality."

ADEM Rule 335-6-12.02(j).

Although the ADEM Rule contains requirements that must be met, such as development of a comprehensive plan, implementation, maintenance, and modification of the practices where and when necessary, it is apparent that the ADEM Rule requires at least minimum standards based on subjective and standard engineering practices, professional judgment, and common sense "that is necessarily required in any complex project driven by the vagaries of weather, topography, geology, soil conditions, and the unforeseen or unforeseeable construction contingencies." City of New York v. Anglebrook, Ltd. Partnership, 891 F.Supp. 908, 924 (S.D.N.Y. 1995).

CBMPs are to be designed for dynamic practices which must be continually maintained and modified to address the progressive changes in the construction site and to respond to variable weather conditions. Storm events are unpredictable. Due to the nature of construction activities and the potential for the release of pollutants, ADEM relies heavily on permit requirements using CBMPs designed on a site-specific basis by a QCP hired by the registrant. The ADEM Rule requires an operator and registrant, at all

times, to properly operate and maintain all erosion and sediment control procedures. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate quality assurance procedures. Requirements of the ADEM Rule in every aspect specifically focus on CBMPs.

One of the most important parts of the NOR, other than the certifications made, is the CBMP plan. The CBMP plan submitted with the NOR provides the description of the conditions of the construction site and the project by identifying sources of pollution in stormwater discharges as well as the appropriate management and control procedures that will reduce or prevent pollutants in stormwater discharges (to the maximum extent possible). According to ADEM, each CBMP plan:

- (1) must be prepared by a QCP or someone under the QCP's supervision;
- (2) must be comprehensive and describe structural and non-structural practices to prevent and minimize the discharges of all types to the maximum extent practicable;
- (3) must be updated and modified as necessary to address any changes in the site or deficiencies in the plan; and
- (4) must address pre-construction activities to divert up-slope water around the site, to limit the exposure of disturbed areas to precipitation to the shortest amount of time, to minimize the amount of surface area disturbed by phasing, to correct any deficiencies in CBMP implementation and maintenance, to remove sediment, nutrients, and other pollutants from stormwater before they leave the site, and to properly and promptly remediate sediment deposited offsite.

Any revisions or additions must include updated maps, a history of the location and description of the CBMPs implemented, an analysis of deficiencies, and periodic inspection reports.

At a minimum, the CBMP plan must address implementation and maintenance of effective, applicable CBMPs utilizing good engineering practices according to standards contained in approved materials. The specific reference materials must include the Alabama Handbook for Erosion Control, Sediment Control and Stormwater Management, on Construction Sites and Urban Areas, SWCC (2002) (updated June, 2003) which is referenced as the “Alabama Handbook” in the ADEM Rule. Other appropriate CBMP manuals or documents may be submitted by the registrant (or qualified credentialed professional as part of the CBMP plan) for approval by ADEM. However, any additional material referenced in the NOR and approved by ADEM becomes part of the permit requirements and must be utilized.

(3) **Other Requirements.** The ADEM Rule and the NOR contain other important requirements and duties which must be met in order to maintain compliance, such as inspection and monitoring. The importance of CBMPs is noted in other permit requirements such as required inspections, monitoring and reports. The applicant is required to have a QCP or QCI make periodic inspections of the site and CBMPs to prove that the CBMPs are effective throughout the project, were properly designed, installed and are continually maintained and upgraded, if necessary. Maintenance may include repairing or replacing damaged structures, as well as modifying CBMPs to address project site conditions and changes in weather conditions.

Inspections must be made regularly (as often as necessary), and within 72 hours of any rain event of 3/4 inches or more in any 24-hour period. (ADEM Rule 335-6-12-.28).

There are also weekly, monthly and semi-annual requirements.

(4) **Other Duties and Responsibilities.** The ADEM Rule is riddled with affirmative duties imposed on the operator and others, which duties include the duty to comply with all requirements of the ADEM Rule, the NOR and any supporting documents. The QCP, and now the QCI, have a broad range of liability for and during the project until termination of coverage.

(5) **Violations, Defenses and Penalties.** Registrants and those who should, but do not, have permit coverage, must be concerned about possible statutory violations and claims based in the common law. Potential statutory violations include the violation of or omission to meet any legal term or condition, making prohibited discharges without a permit, and knowingly making any false statement, representation, or certification by a QCP, QCI or responsible official.

Pursuant to ADEM's regulations, an explicit duty to comply is imposed:

The permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the AWPCA and the FWPCA and is grounds for enforcement action, for permit termination, revocation and reissuance, suspension, modification; or denial of a permit renewal application.

ADEM Admin. Code Reg. 335-6-6-.12(a)(1). (*See also*, ADEM Rule 335-6-12-.06).

The regulations also provide that “[a]ny person who violates a permit condition is subject to a civil penalty as authorized by Code of Alabama (1975) § 22-22A-5(18) (1987 Cum.

Supp.), and/or a criminal penalty as authorized by the AWPCA.” ADEM Admin. Code Reg. 335-6-6-.12(a)(3).

The permittee (operator and registrant) also has a duty to mitigate permit violations or any adverse impact from violations. ADEM Admin. Code Reg. 335-6-6-.12(d) and ADEM Admin. Code Reg. 335-6-12-.35(m). Enforcement may be directed against

“[a]ny person required to have a NPDES permit pursuant to this Chapter and who discharges pollutants without said permit, who violates the conditions of said permit, who discharges pollutants in a manner not authorized by the permit, or who violates this Chapter or applicable orders of the Department or any applicable rule or standard under this Division.”

ADEM Admin. Code Reg. 335-6-6-.18(2). Enforcement action may take the form of an administrative order “requiring abatement, compliance, mitigation, cessation of discharge, clean-up, and/or penalties;” an action for damages; an action for injunctive relief; or an action for penalties. ADEM Admin. Code Reg. 335-6-6-.18(2)(a)-(d).

Both the NOR form and the ADEM Rule require the signatures of the QCP and the operator as certification “under penalty of law.” The specific penalty of law is not specified, although presumably Alabama Code § 22-22-14(b) is intended, which provides as follows:

Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed, or required to be maintained, under this chapter or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall, upon conviction, be punished by a fine of not

more than \$10,000.00 or by imprisonment for not more than six months, or by both.

Primary enforcement authority for statutory violation lies within the administrative agency charged with responsibility for administering the statute – in our state, ADEM. EPA, however, will always maintain that it has reserved its own, independent, enforcement authority. Under certain circumstances, citizens too can play an enforcement role. A citizen suit may be brought pursuant to 33 U.S.C. § 1365.

While the reported court opinions and administrative decisions concerning construction and stormwater permits are somewhat limited in scope and relatively few in number, it stands to reason that they would, for the most part, focus on manner of implementation and maintenance of CBMPs. An instructive federal case from our jurisdiction is Driscoll v. Adams, 181 F.3d 1285 (11th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000). Adams owned 76 acres of land, and the Driscolls owned approximately 5 adjacent acres. The Galbreaths owned two acres adjacent to the Driscolls. A stream flowed downhill from Adams' property through a pond on the Driscolls' property, and then through a pond on the Galbreaths' property, before the stream merged with the Notterly River, which united across the Georgia-Tennessee border with the Tennessee River.

Without seeking approval from any federal, state, or local government, Adams harvested timber, cut and graded roads, graveled the roads, built culverts and dams to channel stormwater runoff, and subdivided his property into residential lots. The development caused erosion, which Adams did little to prevent, and damaged the Driscolls' and Galbreaths' properties. Adams finally sought a state permit a year-and-a-

half after he began to develop his property, and Adams did not procure a county development permit until two months after the Driscolls and Galbreaths sued him for violations of the Clean Water Act and for nuisance, trespass, and negligence under Georgia state law. Adams *never* obtained a NPDES permit. The issues on appeal were (1) whether the Clean Water Act's zero-discharge standard under 33 U.S.C. § 1311(a) applied to a discharger who could not obtain an NPDES permit because none was available and (2) whether Adams' discharges fell within the scope of prohibited discharges under the Act.

On the first issue, the appeals court looked to the narrow exception it had previously established in Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), *cert. denied*, 519 U.S. 993 (1996), for the general rule of liability for discharges without an NPDES permit. The exception would be deemed to apply if:

- 1) compliance with the zero discharge standard was factually impossible because there would always be some stormwater runoff from an area of development;
- 2) there was no NPDES permit available to cover such discharge;
- 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and
- 4) the discharges were minimal.

Driscoll, 181 F.3d at 1288-89 (citing Hughey, 78 F.3d at 1530). In other words, Hughey created a narrow exception to the CWA's zero-discharge standard for any "minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law." Id. at 1289 (citing Hughey, 78 F.3d at 1530).

The Driscoll court distinguished the case before it from Hughey, finding that Adams did not satisfy the third and fourth elements of the exception:

Adams did little or nothing to limit erosion or stormwater discharge before beginning construction. He sought none of the required permits until after considerable damage had been done to the [plaintiffs'] properties. . . . [T]he amount of Adams' stormwater discharge and the resulting damage were substantial. . . . 64 tons of sediment were deposited into their ponds as a result of Adams' activities.

Id.

On the second issue, Adams argued that he did not discharge a pollutant from a point source into a navigable water. The appeals court summarily rejected this argument. The definition of pollutant is broad and specifically includes sand and silt such as that left in the plaintiffs' ponds. Id. at 1291 (citing 40 C.F.R. § 122.2; and Hughey, 78 F.2d at 1525, n.1). "Point source" is also broadly defined and, because Adams collected stormwater through pipes and other means prior to discharge into the stream, he was within the meaning of the CWA. Id. at 1291 (citing 40 C.F.R. § 122.2). Finally, the Eleventh Circuit previously spoke authoritatively on the term "navigable waters":

The CWA defines "navigable waters" as "waters of the United States, including the territorial areas." 33 U.S.C. § 1362(7). This broad definition "makes it clear that the term 'navigable' as used in the Act is of limited import" and that with the CWA Congress chose to regulate waters that would not be deemed navigable under the classical meaning of that term. . . . Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under § 1362(7). Likewise, there is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently.

Id. (quoting United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (holding that a man-made drainage ditch was a navigable water under the Clean Water Act) (citations omitted)). The stream into which Adams discharged was thus a "navigable

water” under the CWA. (However, this interpretation may now be challenged in light of *SWANCC*).

The federal district court cases of Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F.Supp. 1389 (D.Haw. 1995), and City of New York v. Anglebrook Ltd. Partnership, 891 F.Supp. 908 (S.D.N.Y. 1995), also offer some illustration. In Molokai, the defendants were alleged to be in violation of the CWA (and applicable state statutes) because they (1) failed “to obtain a proper and timely stormwater permit before and during construction;” (2) failed “to comply with the state’s general stormwater permit conditions;” and (3) discharged pollutants into waters of the United States without a permit. Molokai, 891 F.Supp. at 1392. Because the defendant began construction without having its CBMP plan accepted by the State and before it received a Notice of General Permit Coverage (“NGPC”), it was held to be in violation of the CWA. The fact that the defendant stopped construction as a result of receiving a Notice of Violation (“NOV”) from the state was not a defense because there was “a total absence of erosion controls, extensive runoff, heavily stained with topsoil, silt, and other debris, running from the project site into the ocean.” Id. at 1395-96.

The court observed:

“[T]he defendant’s argument loses sight of the focus of the Act: the water. It fails to account for the interplay of rainwater and the construction site, and interaction that the Act and its regulatory scheme is intended to manage. It is the discharge of water without permit coverage that violates the Act, not the construction activity itself.”

Id. at 1400. The defendant should not then have been surprised when it subsequently received notification that its NOR was incomplete. No CBMP plan had even been

submitted; there was no grading plan, no sediment and erosion control plan, no permits approving plans from the relevant county agency; and there was no detailed description of the installation and location of silt fences being used.

In Anglebrook, New York City sued the developer of a golf course, claiming that the developer's "Stormwater Pollution Prevention Plan" ("SWPPP") violated section 402(a) of the CWA. 891 F.Supp. 908. Under the State of New York's program, the General Permit required that a SWPPP "include detailed descriptions of plans for erosion and sediment controls, monitoring, and record keeping," which is a standard EPA permit condition. Id. at 914. The trial court found the critical issue of the litigation to be whether the General Permit's guidelines are "hitching posts" or "sign posts" – that is, whether they are "mandatory" or "aspirational." Id. at 915. The court appropriately looked to the language of the General Permit itself and observed:

"[T]he regulations governing the contents of an SWPPP are cast in considerably more open-textured terms than the City would concede. Part III of the General Permit states that the plans should be prepared in accordance with "good engineering practices." General Permit, Part III at 7. In its description of various sediment and erosion control and stormwater management practices, the General Permit requires that permittees prepare plans which "conform to" or are "implemented in a manner consistent with" those measures. See General Permit, Part III D.2a at 10; part III D.2c at 12. Further, the Appendices which set forth in more detail various stormwater runoff prevention approaches are self-entitled "Guidelines" – not requirements. See General Permit, Appendix D, E, and F. Moreover, each Appendix explains that its purpose is to "provide guidance" and each includes the provision that it is "not fixed and inflexible" but is to be applied in a manner which considers the "particular facts and circumstances of a particular project." See General Permit, Appendix D; Appendix E; and Appendix F."

“In review of this text and context, we find that the Guidelines are intended to be flexible rules which contemplated – and indeed require – applications to exercise good engineering practices, informed by professional judgment and common sense. This interpretation best harmonizes permit compliance with the practicalities and realities of construction and landscape architecture. The preparation of a SWPPP contemplates the interaction of many disciplines: wetland biology, biology, biochemistry, engineering, agriculture, agricultural engineering, turfgrass studies, landscape architecture, limnology, soil science, hydrology, architectural history and horticulture. The Guidelines tacitly recognize the practical difficulties of synthesizing these areas by leaving space for professional judgment.”

Id. at 915-916.

The developer’s SWPPP demonstrated various erosion and sediment control measures, including diversions, earth dikes, surface roughening and grading, interior silt fences, perimeter silt fences, sediment traps, sodding, temporary seeding, and mulching. The SWPPP also included stormwater management controls, including detention ponds, vegetated swales, vegetated buffers, filter strips, oil/water separators, and biofilters (“a ditch with foliage which intercepts overland runoff and filters it”). Id. at 921. The developer’s SWPPP also required a field inspection once a week and within twenty-four hours after every rainfall of ½ inch or more and monthly testing of on-site streams and ponds for various chemicals and pesticides. Finally, the developer hired a “qualified professional monitor” (at a cost of \$163,000) for the immediately neighboring town and posted a \$2.3 million erosion and sedimentation bond “to insure remediation of any damage.” Id. at 922. The developer was not even required by the General Permit to take those last two steps.

Based upon all of this information, the court concluded as follows:

“[T]he design requirements at issue are Guidelines. They accommodate themselves to the sound professional judgment that is necessarily required in any complex project driven by the vagaries of weather, topology, soil condition and the unforeseen or unforeseeable construction contingencies.”

“While the SWPPP in question may not be completely immune from criticism of the wisdom of certain of its design choices, considered as a whole, the SWPPP is a carefully conceived plan that falls well within the boundaries of good engineering design judgment. If it is implemented in accordance with its design, the proof at trial showed no real threat of real harm to the City’s water supply and certainly no danger of immediate irreparable harm.”

“SGA’s SWPPP contains adequate erosion and sediment controls. The Plans adequately describe the erosion and sediment controls set forth in the General Permit. Defendants have established that in each instance where greater than five acres is exposed, that area will be protected by adequate erosion and sediment controls including diversions, earth dikes, surface roughening and grading, interior silt fences, sediment traps, sodding, temporary seeding and mulching. The SWPPP also provides adequate measures for maintaining stormwater quality. As indicated above, the first flush of runoff is treated adequately through detention ponds, biofilters, vegetated filter strips, swales and vegetated buffers and its Turfgrass Management System.”

Id. at 924. Because the plaintiff city did not demonstrate that the defendants’ plan would cause the release of pollutants into the water supply, the court rendered judgment for the defendants.

There are several Alabama decisions on this issue. In ADEM v. Wright Brothers Construction Co., Inc., 604 So.2d 429 (Ala. Civ. App. 1992), defendant, the site grading

contractor for a shopping center developer, was contractually responsible for erosion and pollution control. There was some effort to mitigate erosion, but soil flowed from the construction site into two tributaries of a creek. Sampling by ADEM indicated that water from the site did not meet state water quality criteria and inspection revealed violations of departmental regulations. The grading contractor had not obtained a permit for discharge into state waters, so ADEM issued a notice of violation. The contractor was required, among other things, to do the following: develop “an engineering plan and proposed implementation schedule for the construction and installation of all necessary pollution control structures needed to prevent a discharge of waste water” and to “monitor all discharges from the construction site.” *Id.* at 430.

After a number of extensions and legal deadlines without compliance by the contractor, ADEM issued an Administrative Order assessing monetary penalties and ordering the contractor to cease all unpermitted discharges from the site. The order was appealed, was determined to be reasonable by the hearing officer, and was approved by the Environmental Management Commission. The contractor appealed various issues to the circuit court, and the circuit court entered an order that did not please the contractor or ADEM, leading to cross-appeals to the Court of Civil Appeals. What the appeals court held that is immediately pertinent to the present topic is this: “Since Wright Brothers failed to obtain a permit to discharge the sediment, pollutants, and other wastes, every time [there was a] discharge[] from the construction site resulted in new or increased pollution, Wright Brothers violated [the Alabama Water Pollution Control Act].” 604 So. 2d at 433.

In Brown v. ADEM, 1999 WL 956675 (Ala. Dept. Env. Mgmt. October 12, 1999), a very short, straightforward order was issued denying an appeal from an ADEM order assessing a penalty against the petitioner because, even a year after the initial inspection, he was not using CBMPs, and sediment from his 40-acre construction site was running into a creek. The petitioner, the hearing officer found, had “no convincing explanation. . . as to why he failed to obtain a permit or initiate proper remedial or preventive measures.” 1999 WL 956675 at *2.¹

Under EPA’s final Phase II rule, the NPDES permitting authority (in Alabama, ADEM) may provide waivers from Phase II coverage to operators of small construction in two situations. These waivers are intended only for sites which are not likely to have a negative effect on water quality. First, if an operator can determine that the low predicted rainfall potential, where the rainfall erosivity factor would be less than five during the period of construction activity then he qualifies for a waiver. EPA Compliance Guide at 5-5. This waiver is given when there is low predicted rainfall, and therefore, there is little chance of having stormwater discharge. “This waiver is time-sensitive and is dependent on when during the year a construction activity takes place, how long it lasts, and the expected rainfall and intensity during that time. It creates an incentive for construction site operators to build during the dry part of the year.” Id.

Second, if an operator can determine that stormwater controls are not warranted based on either a total maximum daily load (“TMDL”) assessment for an impaired

¹ For a further discussion, see, Neil C. Johnston and Richard E. Davis, “Permits, Best Management Practices, and Construction Sites: *Don’t Muddy the Water, or Else*,” 62 The Alabama Lawyer 330, Sept. 2000.

waterbody, or for unimpaired waterbodies, an equivalent analysis, then he or she qualifies for a waiver. Id. With respect to TMDLs, EPA has provided as follows:

“TMDL process establishes the maximum amount of pollutants a waterbody can assimilate before water quality is impaired, then requires that this maximum level not be exceeded. A TMDL assessment determines the source or sources of a pollutant for the waterbody, then allocates to each source or category of sources a set level of the pollutant that it is allowed to discharge into the waterbody.”

Id. at 5-6.

The EPA requires that for a state to meet the NPDES permitting authority requirements it must require construction site operators to (i) implement erosion and sediment control CBMPs; (ii) control waste such as discarded building materials, concrete truck washout, chemicals, litter, etc. that may have an adverse impact to water quality; (iii) submit a site plan for review that includes consideration of water quality impact; and (iv) develop and implement a SPPP similar to those required under Phase I. Id. at 5-3. Under Phase II, the EPA gave the permitting authorities the choice of whether to require a NOI under a general permit for small construction sites. However, the EPA recommended the use of NOIs “for tracking permit coverage and prioritizing inspections and enforcement.” Id. at 5-9. ADEM adopted the use of registration by submission of a Notice of Registration (NOR).

(a) **Questions.**

(1) Who Holds the Permit or Registration Under the ADEM Regulations?

The ADEM Rule requires that any person intending to operate a NPDES construction site shall register the site by filing a Notice of Registration. “Operator” is defined as:

“Operator” means any person, registrant, or other entity, that owns, operates, directs, conducts, controls, authorizes, approves, determines, or otherwise has responsibility for, or exerts financial control over the commencement, continuation, or daily operation of activity regulated by this Chapter. An operator includes any person who treats and discharges stormwater or in the absence of treatment, the person who generates and/or discharges stormwater, or pollutants. An operator includes but is not limited to, property owners, agents, general partners, LLP partners, LLC members, leaseholders, developers, builders, contractors, or other responsible or controlling entities. An operator does not include passive financial investors that do not have control over activities regulated by this Chapter.

ADEM Rule 335-6-12-.02 (e), defining NOR, requires the “operator” to file the NOR.

Other provisions of the ADEM Rule describe the “site” as the registering party.
(ADEM Rule 335-6-12-.03)

ADEM Rule 335-6-12-.05, “General Provisions” not only the “operator” but others are listed as persons who might maintain the registration:

- operator
- registrant
- developer
- onsite contractor
- home builder
- utility installers
- property owners association

The registration must be maintained “until disturbance activity is complete and all disturbed areas have been reclaimed or effective stormwater quality remediation has been achieved . . . or another operator(s) has registered.”

The NOR requires that a Responsible Official, as defined by ADEM Rule 335-6-6-.09, of the registrant must sign and certify the information submitted as such RO “of the Registrant.” The certification on the NOR may give some clue about the responsible party also. It goes on to suggest that the RO shall be a high ranking person or officer of the registrant “who is the operator, owner, sole proprietor, etc.... having overall responsibility and decision making for the site/activity.”

In ADEM Rule 335-6-12-.06, entitled “Compliance with NPDES RULES,” ADEM requires “the operator or registrant” to file certain documents – as though they are different persons. Throughout the regulations, “operator” is the focus of responsibility for control, compliance, records, changes, and other matters related to the project.

ADEM Form 4981-03.doc, which is an attachment to the NOR for further explanation, contains this language:

“Item XI – Responsible Official Signature. Please submit the completed NOR with original signatures of a responsible corporate official (RCO) according to ADEM Administrative Code Rule 335-6-6-.09.”

In ADEM Rule 335-6-12-.10 , entitled “Notice of Registration,” which sets forth the requirements for submitting the NOR, it is the operator who must submit the registration, confirm information and make required notifications.

(2) Who Has Control and Contractual Responsibility?

The term “Operator,” if accepted as the determining term, does include by definition all parties that could conceivably have some impact on a construction site, the changing conditions at the site, and the structural conditions that could directly impact water quality from that site.

The decision and identity of the registrant operator, responsible official and QCP are all critical to compliance.

The liability and responsibility under the ADEM Rule can be determined by contract among private parties, but such terms and conditions must be specific; and any delegation of liability or responsibility by contract does not shield any person who may fall within the definition of an operator from liability.

“Except as expressly provided by this Chapter, liability and responsibility for compliance with the requirements of this Chapter are not delegable by contract or otherwise. The operator shall ensure that any partner, consultant, agent, contractor, subcontractor, or other person employed by, under contract, paid a salary by, or under the direction/control of the operator complies with the requirements of this Chapter. Failure of a QCI, QCP, qualified person under the direct supervision of a QCP, or any other person under contract to perform or inform the operator shall not be considered a valid defense in any enforcement action and shall not stay any requirement of this Chapter. Violations resulting from the actions of such person shall be considered violations of this Chapter and may subject the operator to enforcement action.”

ADEM Rule 335-6-12-.35-(5)(b).

For instance, the developer of a subdivision may by contract require each contractor to obtain a separate registration for the work to be performed –

site clearing
road and drainage

utilities
landscaping
home builders.

Each contract may require full compliance with all laws and regulations as well as the ADEM Rule, and an indemnity in favor of the developer for any violation, noncompliance and enforcement action.

(b) **NOR – Certifications and Liability.**

A review of the NOR as well as inspection and termination forms under the ADEM Rule reveal a number of required and comprehensive statements, representations and certifications. Each one presents an opportunity for serious repercussions if ignored.

The NOR requires certifications by (a) the QCP and (b) the operator or responsible official of the operator.

QUALIFIED CREDENTIALLED PROFESSIONAL (QCP)
CERTIFICATION.

“I certify under penalty of law that a comprehensive Construction Best Management Practices Plan (CBMPP) for the prevention and minimization of all sources of pollution in stormwater and authorized related process wastewater has been prepared under my supervision for this site/activity, and associated regulated areas/activities, utilizing effective BMPs from the Alabama Handbook for Erosion Control, Sediment Control, And Stormwater Management On Construction Sites And Urban Areas, Alabama Soil and Water Conservation Committee, as amended (ASWCC). If the CBMPP is properly implemented and maintained by the registrant, discharges of pollutants in stormwater runoff can reasonably be executed to be effectively minimized to the maximum extent practicable according to the requirements of ADEM Administrative Code Chapter 335-6-12. The CBMPP describes the pollution abatement/prevention management and effective structural & nonstructural BMPs that must be

fully implemented and regularly maintained as needed at the registered site in accordance with sound sediment and erosion practices to ensure the protection of water quality.”

OPERATOR – RESPONSIBLE OFFICIAL SIGNATURE

“I certify under penalty of law that this form, the CBMPP, and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the qualified credentialed professional (QCP) and other person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, correct, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine or imprisonment for knowing violations. I certify that this form has not been altered, and if copied or reproduced, is consistent in format and identical in content to the ADEM approved form. I further certify that the proposed discharges described in this registration have been evaluated for the presence of any non-construction and/or coal/mineral mining stormwater, or process wastewaters have been fully identified.”

ADEM Form 4981-03.doc.

The QCP certification focuses on the CBMP plan, the preparation of the QCP, that the BMP’s proposed will be effective for the particular site, that the Alabama Handbook has been utilized, and that if properly implemented and maintained the BMP’s will be effective “to the maximum extent practicable.” The QCP certifies a working knowledge of the particular site, that the QCP (or someone under the QCP’s supervision) has designed site specific BMP’s that will be effective. The operator then has the obligation by ADEM Rule to implement, maintain and even modify the CBMP certified

by the QCP to be effective. The QCP may then have exposure to claims by the operator that the CBMP is defective, fails to address site changes, or is not site specific.

The operator must sign the NOR representing and certifying knowledge of the whole site activity as well as the qualifications of everyone under the operator, that all information on the NOR, including the CBMP, were prepared by qualified people, under the “supervision or direction” of the operator, correctly and completely. It is important to note here that “registrant” or a responsible official can be the operator or any one of the other persons within the definition of “operator”, but whoever makes the representation is subject to liability as well as the “operator.” While not much different from past requirements, more emphasis is now placed on the representations and deficient information, if applicable.

The certifications are required by 335-6-12-.10(9), which refers to 335-6-6-.09. Once made, the persons making any representation is subject to 335-6-12-.06(6):

“Any person who knowingly omits or ignores required or pertinent information, or makes any false statement, representation, or certification in any record of other document submitted or required to be maintained under this Chapter, including monitoring reports or reports of compliance or noncompliance, shall be subject to penalties as provided by the AWPCA.”

(c) **Dealing With ADEM**

- 1) Know your Agency and Field Office
- 2) Be Cordial
- 3) Get Legal Assistance
- 4) Get and Keep a QCP

- 5) Educate Employees and Controllers
- 6) Maintain good legal and consultant assistance
- 7) Ask questions and maintain communication
- 8) Provide timely responses

4. Species Protection.

Wildlife, birds, fishes, mollusks and reptiles must be considered during development and land use activities even those dependent on water or particular types of upland habitat. Federal and state statutes and regulations require consideration, consultation or mitigation of impacts to protected species and their habitat . Protected species, national wildlife refuges, and national and state parks involve the USFWS, NMFS, Corps of Engineers, ADEM and the Alabama Department of Conservation and Natural Resources (“ADCNR”). Some of the agencies and laws you may encounter and must consider are as follows:

(a) **Endangered Species Act. 16 U.S.C. § 1531, et seq.**

ESA § 7 Consultation Requirements

ESA § 9 Prohibition of Take

ESA § 10 Incidental Take Permit

50 CFR § 17.

In the event the wildlife study reveals the existence of protected species on the property, the project may proceed if no affect on the species will be incurred. If adverse impacts or the species survival will be jeopardized, the Endangered Species Act allows activities to proceed, if permitted by a § 10 Incidental Take Permit, or by § 7

federal/formal consultation with USFWS. In a § 7 consultation, the applicant must conduct a biological assessment of the species and submit a report to USFWS who then will conduct additional investigation and issue a biological opinion finding “jeopardy” or “no jeopardy.”

In the event the subdivision will impact one or more protected species, the design may require revision to avoid and reduce the impact as much as possible. Those impacts that cannot be avoided may be permitted and/or mitigated.

In some instances, species may be trapped and translocated to a preapproved conservation habitat area operated similar to a wetland mitigation bank with pre-determined spacing or credits. Procedures for establishing and management of such conservation areas as described in the USFWS “Guidance for the Establishment, Use and Operation of Conservation Banks” (2003).

(b) **CWA § 404.**

33 CFR 325.2(b)(5). A § 404 permit application shall be reviewed to determine the impacts on protected species, and formal consultation may be initiated with the USFWS and NMFS.

40 CFR 230.30. The District Engineer must, pursuant to CWA § 404(b)(1) guidelines, consider the impacts to threatened and endangered species.

(c) **Alabama Department of Conservation and Natural Resources (ADCNR).**

Marine Resources Division (Salt Water Species)

Marine Police

Wildlife & Freshwater Fisheries Division

State Lands Division

Coastal Program

Permits or approvals may be necessary for the proposed activity in state waters, affect state lands or state protected game and nongame species.

Alabama Admin. Regulation 220-2-.98 prohibits any person from taking, killing, selling, trading or possessing or attempting to do so, of any invertebrate species without a permit.

Many of these species are mussels, snails, and other aquatic species.

(d) **Coastal Regulations.**

Pursuant to ADEM Admin. Code Reg. 335-8-2-.01 (2)(b), impacts on wildlife and fishing habitat must be considered as well as critical habitat of listed endangered species for compliance with regulation.

5. **Archaeological and Cultural Sites and Resources.** The National Historic Preservation Act § 106 (16 U.S.C. § 470), requires federal agencies to consider historic and cultural properties effected by land use activities. State law also protects certain state historic properties and burial grounds. The Alabama State Historical Preservation Office (SHPO) will be required to review properties, permit applications, and development plans as part of other permitting activities to determine the existence and preservation requirements of cultural resources and historic properties of state and national significance. Regulations requiring cultural resources surveys of areas impacted by any land use project are found at 40 CFR § 1502. The Corps of Engineers, as part of

the CWA § 404(b)(1) review and § 404 permit application process (33 CFR § 320.4(3)(e)) must consider the proposed actions effect on historic, scenic, cultural and recreation values:

(e) *Historic, cultural, scenic, and recreational values.* Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rives, historic properties and national Landmarks, National Rivers, National Wilderness Aras, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

Ala. Code § 41-3-1 entitled “Aboriginal Mounds, Earthworks and Other Antiquities,” protects certain historical sites and items even if located on private property.

Ala. Code § 41-9-290 and Alabama Historical Commission rules, Chapter 460-X-12-.01, pertain to protection of Alabama underwater cultural resources.

The applicant will be required to conduct an archaeological and cultural resources survey of the proposed subdivision tract by a qualified archaeologist to be submitted for review by the SHPO. The initial survey, Phase I, will determine if artifacts are present onsite or in an area that will be disturbed by the proposed activity. The SHPO will issue

either a “no historic properties affected” finding, or a finding that historic properties are present but the activity will have no effect on them. If a finding of adverse effect is made, further study, investigation and protection pursuant to state and federal guidelines will be necessary.

6. **Flood Issues.**

(a) **National Flood Insurance Definitions.**

(1) **Base Flood.** The flood having a one percent chance of being equaled or exceeded in any given year, i.e., the 100 year flood. Some building requirements though are based only on 10, 20 or 25 year flood events.

(2) **Coastal High Hazard Area.** The area subject to high velocity areas caused by, but not limited to, hurricane wave wash and designated on the FIRM as Zone V-1 through 30; VE or V Floodplain; and any land susceptible to flooding.

(3) **Floodway.** The channel of a river or other watercourse and the adjacent land areas that must be preserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.

(4) **Flood Insurance Rate Map (FIRM).** An official map of the community issued by the Federal Insurance Administration delineating the areas of special flood hazard and/or risk premium zones applicable to the community.

(a) **Statutes and Regulations.**

- 4001
- (1) National Flood Insurance Act of 1968, 42 U.S.C. § 4001
 - (2) Flood Disaster Protection Act of 1973 (Public Law 93-234, 87 stat 975)
 - (3) Federal Flood Regulations: 40 C.F.R. part 60
 - (4) Executive Order 11988 (May 24, 2977)
 - (5) Alabama Code (“Comprehensive Land-Use Management in Flood-Prone Areas”) § 11-19-1, et seq.
 - (i) Gulf Shores Ordinance No. 643, adopted August 28, 1995
 - (ii) City of Mobile Ordinance 65-042, amended 1999, entitled “An Ordinance Establishing Control of Stormwater Drainage Facilities and Land Disturbance Activities and to Establish Land Use and Control Measures in Special Flood Hazard Areas.”

The Federal Emergency Management Agency (“FEMA”) was authorized in 1968 to make flood studies relating to encroachments and obstructions to stream channels and floodways, used when establishing and adopting regulatory floodways. In order for a community such as a state, county, town, or municipality to qualify and obtain federal flood insurance and an insurance rating, flood regulations (by ordinance or rule) must be adopted. The community must then enforce the flood ordinance including land clearing, filling, and building requirements in and that affect the floodplain and/or the floodway. The floodway must be delineated by the community, or on request of the community by

the FEMA contractors. There are several engineering calculations and formulas that can be utilized, including the HEC-2 or HEC-RAS.

Municipalities and communities should be constantly concerned about their liability and the loss of the insurance program benefits if the flood regulations are not enforced. The insurance ratings can be increased by FEMA if the community fails to enforce the program meaning that federal insurance rates will be increased or the program canceled. The community could also be exposed to negligence claims and damages.

The federal regulations and local ordinances generally prohibit encroachments in the floodway. FEMA will determine the base flood level/elevation (“BFE”) for A Zones (A 1-99 and AE) and develop a Flood Insurance Rate Map (“FIRM”) showing the elevations.

Encroachments and fill are prohibited in designated floodways unless a “No Rise Certificate” is obtained from a professional engineer showing that the encroachment will not have any effect or cause any rise in the flood levels or flood width during a base flood. Some ordinances permit fill activity on streams where no floodway determination or flood elevation has been determined so long as the fill is placed no closer than 25 feet to the floodway boundary. However, as shown on a FIRM, the floodway may be an approximation. The developer must demonstrate that cumulative effects will not increase water elevations more than one foot at any point using Standard Hydraulic Engineering Principles (HEC study) – an “N” coefficient. If the HEC studies, upon determining the floodway, show that there will be an increase or even a decrease in the flood levels or the

boundaries of the floodway depicted on the FIRM, the developer will be or may be required to request a revision of the flood maps from the community. The community will have to request the revisions from FEMA. The revisions may be by way of a Conditional Letter of Map Revision (“CLOMR”) which will allow the fill or development to proceed under the existing map, as revised by the Letter, or a more formal Letter of Map Revision (“LOMR”) at which time the particular map segment will be revised. Developments upstream and downstream will affect the floodway.

The validity of local ordinances, flood hazards, and the Flood Insurance Program, has been upheld in *Turnpike Realty Co., Inc. v. Town of Bedham*, 284 N.E.2d 8991 (1972), *cert. denied* 409 U.S. 118, 34 L.Ed.2d 689 (1973). The Massachusetts Supreme Court upheld a municipal ordinance which prohibited development in floodplains except for agriculture. The ordinance recited public health and safety reasons as the purpose and the court found that floodplain zoning and the prevention of flood hazards were a legitimate exercise of police power.

C. Statutory and Voluntary Protection of Natural Resources.

1. Statutes.

Examples of statutes that encourage protection of natural resources:

(a) Open space for natural resource protection and other benefits is encouraged by:

(1) The statutory recognition of conservation easements in Alabama:

(i) Conservation Easements, Alabama Code § 35-18-1, et seq.; and

(ii) Forever Wild Amendment, Alabama Constitution of 1901, Amendment 543.

(2) Flood Hazard Zoning Ordinances:

(i) Mobile Ordinance No. 65-082, 1993 “Ordinance Establishing Control of Stormwater Drainage Facilities and Land Disturbance Activities and to Establish Land Use and Control Measure in Special Flood Hazard Areas”; and

(ii) Flood Ordinance of the City of Fairhope, Ordinance No. 668.

(3) Restrictions on Use of Beaches and Dunes:

(i) ADEM ADMIN Code Reg. 335-8 (Coastal Regulations);

(ii) Gulf Shores Zoning Ordinance, Article I, Section 8-11, Coastal Construction Setback Line; and

(iii) Town of Dauphin Island Zoning Ordinance.

(4) River Riparian Protection:

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

(b) State laws addressing water resources, wetlands, and environmentally sensitive areas:

(1) Coastal Resources: Preservation, Development, etc. of Coastal Areas, Alabama Code § 9-7-11, et seq.; ADEM ADMIN Code Reg. 335-8-1, et seq.;

(2) Wildlife Resources: Department of Conservation and National Resources, Alabama Code § 9-2-1, et seq.; Wildlife and Fisheries, § 9-11-1; Marine Resources, § 9-12-1; Public Lands, § 9-15-1;

(3) Alabama Water Resources, Alabama Code § 9-10B-3, addressing water quantities;

(4) Water Management and Drainage, Alabama Code § 9-9-1;

(5) Soil and Water Conservation, Alabama Code § 9-8-1;

(6) Water Conservation and Irrigation, Alabama Code § 9-10-1;

(7) ADEM Water Quality Regulations:

(i) ADEM Admin. Code Reg. 335-6-10, Water Quality Criteria;

(ii) ADEM Admin. Code Reg. 335-6-11, Water Use Classification;

(iii) ADEM Admin. Code Reg. 335-6-12;

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

(iv) ADEM Admin. Code Reg. 335-6-6, NPDES

direct discharges.

(c) Some federal laws that protect natural resources and effect

land use include:

(1) National Environmental Policy Act, 42 U.S.C. §

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

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

(2) The Clean Water Act, 33 U.S.C. § 1251, et seq.

The Clean Water Act has several sections and programs that effect land use.

(i) Clean Water Act § 303(d) (33 U.S.C. §

1303(b)) provides procedure for identifying waters which remain polluted even after technological standards have been applied. Limits or waste loads must be established by

each state (or failure to do so by EPA) which meet current state and water quality standards. EPA regulations at 40 C.F.R. pt. 130 address the Total Maximum Daily Loads (TMDL) for receiving waters. A TMDL is a written quantitated plan and analysis for obtaining and maintaining water quality standards in all seasons for a specific water body. For existing industries, the establishment of TMDLs following the identification of a specific polluted water where existing water quality standards, water use classifications, and NPDES limits have not been successful means more stringent permit limits and additional cost to meet the new standards. A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits for upgrading the public drinking water system until the state complied with Section 303(d) as a water quality limited segment. *Friends of Wild Swan v. EPA*, D. Mont. CV-97-35-M-DWM, 10-13-00. As TMDLs for pollutants such as siltation and sediment are developed, activities effecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDL procedures must address all pollution, including non-point source pollution, according to the court in Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are designated, and have a costly effect on the municipal sewage treatment and stormwater drainage systems.

(ii) Clean Water Act § 319, Non-Point Source Pollution and Watershed Management. The Clean Water Act § 319 directed that states consider the effects of non-point source pollution and establish watershed management

plans. After coordination with various stakeholders, including local governments, watershed users, landowners, and citizens, a plan for each watershed should be drafted and implemented. Although education and information are big parts of the management directive, we expect that the implementation stage will also include direct land use controls.

(iii) Clean Water Act § 402:33 U.S.C. § 1342.

In the event that a development will produce or need to discharge pollutants directly to navigable waters, including wetlands, from a pipe or another point source, an owner, developer, or contractor must first obtain a general or individual National Pollutant Discharge Elimination System (NPDES) permit. These discharges may be from commercial or industrial operations directly to surface waters, or from sewage and waste from municipal water treatment facilities or from stormwater runoff. ADEM administers the NPDES program in Alabama, subject to EPA regulations (40 C.F.R. 122), rules and regulations found at ADEM Admin. Code Reg. 335-6-6, the provisions of the Alabama General Stormwater Permit for Construction Sites, and the proposed ADEM Admin. Code Reg. 335-6-12 (expected to be effective in January 23, 2003).

(iv) Clean Water Act § 404 (33 U.S.C. § 1344)

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

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

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

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

(5) Historic Properties. The National Historic Properties Act, 16 U.S.C. § 470, requires federal agencies to consider historic and cultural properties effected by land use activities. State law also protects certain state historic properties and burial grounds. The Alabama State Historical Preservation Officer (SHPO) will be required to review properties, permit applications, and development plans as part of other permitting activities to determine the existence and preservation

requirements of cultural resources and historic properties of state and national significance. Regulations requiring cultural resources surveys of areas impacted by any land use project are found at 40 C.F.R. § 1502.

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

2. Restrictive Covenants and Conservation Easements – Generally.

Conservation easements and restrictive covenants can be valuable tools in the world of water resource protection and commercial development. With the tangle of permits that must be acquired and zoning regulations that must be satisfied, conservation easements and restrictive covenants often enable a developer to receive necessary permits and complete a project involving environmentally sensitive resources and issues. They also provide charitable organizations, land trusts, water protection agencies and other similar entities, with a tool for resource protection without the expenditure of resources to purchase fee title to the protected property.

Approximately forty-six states have enacted legislation providing a statutory framework for some form of conservations easements or covenants, including Alabama. Jeffrey Tapick, Note, Threats to the Continued Existence of Conservation Easements, 27 Colum. J. Env'tl. L. 257, 272 (2002) (footnote omitted); Ala. Code § 35-18-1 et seq. (Supp. 2002). Alabama's statutory scheme uses the conservation easement, as opposed to restrictive covenants, and defines it as follows:

A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or

open-space values of real property, assuring its availability for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.

Ala. Code § 35-18-1(1) (Supp. 2002).

Generally, “a conservation easement is designed to protect and preserve land in its natural state; however, many easements are designed to achieve a more specific conservation purpose, such as the preservation of land for agricultural and recreational use.” Tapick, supra. at 259. (footnote omitted). In fact, recent studies indicate that “over 2.6 million acres of land are currently protected by conservation easements,” which is up from 290,000 acres in 1988. Id. (footnote omitted). It is also important to note that this 2.6 million acres figure includes only conservation easements held by private entities and does not include conservation easements held by governmental entities. Id. at 259, fn. 2. According to one commentator, this “proliferation of conservation easements can be attributed to the incentives and attractive characteristics that they offer to landowners and land preservationists alike.” Id. at 259.

The benefits of conservation easements/restrictive covenants can be generally thrown into five categories:

1. Continued Enjoyment by the Landowner. Landowners are allowed to retain significant property rights and to preserve certain economic uses of land burdened with a conservation easement. The only property right that a landowner surrenders when placing a conservation easement on her land is the right to develop the land in a manner that violates the terms of the easement; the land itself still belongs to the landowner.

2. Flexibility to Tailor Easements to Specific Needs of Parties. Flexibility is another important advantage of conservation easements. The terms of each conservation easement can be tailored to meet whatever restrictions the landowner and easement holder agree upon, provided that the net result is the achievement of a recognized conservation purpose. This sort of flexibility allows land preservationists to reach a mutually beneficial arrangement with willing landowners, as both parties have the freedom to negotiate terms that will maximize their benefits from the conservation easement.

3. Financial Benefits to Landowner. In order to create a conservation easement, a landowner chooses to either donate or sell the property interest represented by the easement to an eligible easement holder. If she chooses to donate the easement, the landowner can receive an income tax deduction for the appraised value of the land's development rights, but only if the easement is created in perpetuity. Also, recent revisions to the Tax Code permit the value of perpetual conservation easements to be deducted from the value of the land for estate tax purposes. These income tax and estate tax deductions create incentives for landowners to donate a conservation easement on their property. However, even if she chooses to sell a conservation easement on her property, the landowner will still benefit from a reduction in state and local property taxes. Since the conservation easement puts a restriction on the "highest and best use" of the land, the landowner will pay property taxes based on a lower assessed value of the land in states that impose an ad valorem property tax.

4. Ability to Protect Land Forever. Owing to their perpetual duration, conservation easements are unlike other land preservation measures in that they cannot be circumvented easily. Smart Growth plans can be altered or repealed; zoning regulations can be amended, or trumped by use variances; and private lands owned by conservation groups can be sold to developers at a later date. Conservation easements, however, provide a more permanent solution for preserving land by "locking up" the land's development rights in perpetuity. The perpetual duration of conservation easements is undoubtedly a primary reason that land preservationists are increasingly

turning to this legal device for achieving their goals.
[However, does perpetuity last forever?]

5. Public Benefit. While the creation of a conservation easement arises from a transaction between private parties, the easement itself creates a benefit that is inherently public in nature. The general public stands to gain from the achievement of an easement's conservation purpose, be it the preservation of open space, the protection of natural resources, or the maintenance of healthy air quality. Indeed, each of the statutorily recognized conservation purposes of an easement is considered to be a public benefit.

Id. at 260-64 (footnotes omitted).

An additional benefit of conservation easements/restrictive covenants is that they can provide a vehicle for developing property. Developments in this area of the country can, and often do, affect an endangered species. Because of this, developers often will seek an incidental take permit, which allows a landowner or developer to legally perform an activity that would otherwise be regarded as an illegal take. U.S. Fish & Wildlife Service, Habitat Conservation Planning at <http://endangered.fws.gov/HCP/index.html> (last visited December 15, 2002). The U.S. Fish & Wildlife Service requires an incidental take permit when non-Federal activities “take” threatened or endangered species. U.S. Fish & Wildlife Service, Habitat Conservation Planning and Incidental Take Permitting Process Handbook at <http://endangered.fws.gov/HCP/hcpbktoc.pdf> (last visited December 15, 2002). “Take” is defined by the Endangered Species Act as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any threatened or endangered species. 16 U.S.C. § 1532(19). Many developers fall under this definition because “harm” is considered to include “significant habitat modification or degradation

where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 CFR § 17.3

Upon application for an incidental take permit, the Fish and Wildlife Service requires that a habitat conservation plan (“HCP”) be developed. HCP requirements are defined in section 10 of the Endangered Species Act and include an assessment of impact on the protected species and procedures and practices to monitor, minimize and mitigate such impact. 16 U.S.C. § 1539(2)(A). Mitigation measures take many forms, one of which is the preservation of existing habitats via conservation easements/restrictive covenants. Thus, a landowner/developer can develop a portion of his property while granting a conservation easement or restrictive covenant over the remainder of his property, thereby obtaining the necessary take permit.

Under Alabama Code § 35-18-1, a conservation easement may only be conveyed to “a governmental body empowered to hold an interest in real property” or a charitable corporation, association, or trust, “the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property.” It should be noted that the creation of a conservation easement under Alabama law is required to include “an explicit reference” to Alabama’s law on the subject. Ala. Code § 35-18-5(a) (Supp. 2002).

Alabama treats conservation easements just like other traditional common law easements. Ala. Code § 35-18-2(a) (Supp. 2002). This is despite the fact that conservation easements generally fail to meet the requirements for traditional common law servitudes upon land. Tapick, supra. at 266. The Alabama Code is somewhat lenient

with respect to traditional principles of the law of easements. Section 35-18-4 provides that a conservation easement is valid even though any of the following apply:

- (1) It is not appurtenant to an interest in real property.
- (2) It can be or has been assigned to another holder.
- (3) It is not of a character that has been recognized traditionally at common law.
- (4) It imposes a negative burden.
- (5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder.
- (6) The benefit does not touch or concern real property.
- (7) There is no privity of estate or of contract.

Ala. Code § 35-18-4 (Supp. 2002).

The Alabama Code places no affirmative limitations on the duration of a conservation easement. See, Ala. Code § 35-18-2(c) (Supp. 2002). However, if a term is not provided in the creating instrument, the term is statutorily deemed to be “the lesser of 30 years or the life of the grantor, or upon the sale of the property by the grantor.” Id. Furthermore, the Alabama Legislature has made clear that in providing for conservation easements, it has no intention of usurping the powers of the courts “to modify or terminate a conservation easement in accordance with the principles of law and equity applicable to other easements and specifically including the doctrine of changed conditions.” Ala. Code § 35-18-3(b) (Supp. 2002).

The biggest unknowns involving conservation easements/restrictive covenants are the issues of their enforcement, interpretation and construction. Since conservation easements are relatively new in Alabama—Alabama’s statutory conservation easement

has only been around since 1997—there has yet to be any reported decisions involving the interpretation or enforcement of such an easement. Ala. Code § 35-18-1 (Supp. 2002) (effective date of Act is August 1, 1997). This lack of reported cases is not at all surprising given the notion that problems with conservation easements/restrictive covenants are not likely to arise until the next generation of landowners comes into ownership. See, Melissa K. Thompson and Jessica E. Jay, An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date, 78 Denv. U.L. Rev. 373, 374-75 (2001) (noting that of the nineteen published opinions the authors were able to locate, all but two involved “second (or later) generation landowners owning property already encumbered by some form of deed restriction or conservation easement”).

There seems to be a fair amount of litigation over who the proper parties in interest are in enforcement of conservation restrictions on the national level. Alabama law is rather clear on this issue. See, Ala. Code § 35-18-3(a) (Supp. 2002). Alabama conservation easements can be enforced by either the owner of an interest in the burdened property or the holder of the easement. Ala. Code § 35-18-3(a)(1) & (2) (Supp. 2002). However, at the time of the creation of the easement, the parties can agree to include a “third-party right of enforcement” in the governing instrument. Ala. Code § 35-18-3(a)(3) (Supp. 2002). This third party right of enforcement is limited to “a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.” Ala. Code § 35-18-1(3) (Supp. 2002).

In enforcement actions, one of the biggest problems that can occur is a debate as to an ambiguity in the creating instrument. In cases challenging the validity of a conservation easement/restrictive covenant, “courts have looked beyond the plain language in the easement or restriction at issue and, when faced with what they characterize as an ambiguity, attempted to discern the parties’ intent at the time the parties entered into the agreement.” Thompson and Jay, supra. at 381. Therefore, it is extremely important when drafting a conservation easement/restrictive covenant to consider the potential of future litigation.

To the extent possible, the instrument should be drafted with all potential legal challenges in mind, and every effort should be made to be clear and precise in the wording of the instrument. “The more thorough and consistent the document, the better the chance a court will uphold its restrictions.” Id. at 409. This is very important because “[w]here ambiguity exists in conservation documents, courts may apply common law rules that further compromise a conservation document’s purpose.” Id. (footnote omitted). This is where “a clear and consistent statement of purpose tied to the prohibition” the party holding the easement seeks to enforce can be “extremely useful.” Id. at 410.

Of course, drafters must be careful in drafting purpose statements. Many factors should be considered:

If the purpose of a conservation easement is narrow, for example to preserve a crane rookery, a particular endangered species of plant, or a wetlands area, it is important for land trusts to try to think ahead 100 years or more to a changed landscape. Will the purpose of the conservation easement still exist, or will the restrictions be

voided by elimination of the purpose of the original easement? Is the goal long term preservation of the land or just the specific ecological feature of the property? Although narrow purpose statements in conservation documents aid land trusts' stewardship efforts and assist in litigation when the particular purpose is at risk from landowner activity, a long view of the conservation effort is important and [, to the extent permitted by applicable law,] conservation easements should contain language barring extinguishment by changed conditions.

Id.

However, parties contemplating entering into conservation easements/restrictive covenants should not fear litigation. It appears that “courts generally uphold conservation documents.” Id. at 411. Furthermore, there is the chance courts will award attorney’s fees and costs to a party forced to bring an enforcement action, thereby alleviating the fear that enforcement could prove more costly than simply purchasing the property. Id.

(a) **Restrictive Covenants.** Covenants are agreements imposed on land use to act or refrain from acting in a certain manner. Covenants may be personal to a particular class or attach and run with the land. If no duration is imposed, the duration of a covenant will be for a reasonable time period. Restrictions, reservations and covenants should be carefully and specifically drafted.

Examples of restrictive covenants include subdivision restrictions and wetland mitigation requirements. The Corps of Engineers routinely requires the imposition of use restrictions and covenants on properties used for mitigating wetland impacts. Restrictive covenants are not favored in law and are strictly construed in favor of the free use of property. Hill v. Rice, 505 So.2d 382 (Ala. 1987). When language of the restriction is

found to be ambiguous, the intent of the developer is to be given weight by the court in determining the meaning of the covenant. Cooper v. Powell, 659 So.2d 93 (Ala. 1995).

Deed restrictions are clauses and provisions included in the deed for a specific purpose of limiting full use of the property interest transferred.

A deed restriction may prohibit certain land uses and activities that may destroy, damage or alter the wetland areas or the environmentally sensitive areas. Tax breaks may be available when the development potential of the property is limited.

(b) **Conservation Easements.**

(1) Legal Considerations for Conservation Easements:

(i) Legal Documents: The conservation easement or restrictive covenant is a part of a legal transaction that involves a number of procedures and professionals prior to beginning the document preparation stage. The operating documents may include baseline documentation, appraisals, professional opinions, affidavits, title reports, management plans and other commitments.

(ii) Goals and Intentions: The easement and all related documents and proposed management will depend on development and determination of the Grantor's goals and intent, the purpose (land protection, charitable donation, income and estate tax deductions, or obtaining a permit to conduct regulated activities), and the future of the property.

(iii) Grantee Organization: State statutes and federal tax law dictate that the Grantee Organization be a qualified organization pursuant to parameters set forth in those laws. Normally, the organization must be a government

entity or a charitable organization whose primary purpose (at least, a stated purpose) is to acquire property for conservation purposes or acquire an interest in such properties by conservation easements, etc. The Grantor must be satisfied that Grantee Organization's policies, management and future will be a compatible fit.

(2) Preparation of the Conservation Easement:

(i) Once other preliminary matters have been decided and accomplished, the parties may then proceed with formalizing the relationship and drafting the conservation easement agreement. State, local, and federal laws and regulations should be identified, reviewed, and consulted throughout the drafting process. The drafting should take place with independent legal representation of the Grantor and the Grantee to ensure that there are clear understandings of all of the ramifications, purposes, and agreements of the parties.

(ii) The provisions of the conservation easement agreement should be carefully drafted to reflect the full intention of the parties, the purposes of the agreement, and to fully comply with any applicable law. While many items could be considered for inclusion, basic provisions, at a minimum, should include the following:

- Recitations
- Identification of the Grantor
- Grantee Organization
- Grant and Conveyance
- Purpose and Duration

- Prohibited Uses and Activities
- Grantor's Reserved Rights
- Enforcement and Inspection
- Other Provisions

(a) Recitations: The recitations should be extensive and provide the background information and the understandings of the parties. Examples of information that should be included in a recitation includes providing a confirmation of title, explaining the desires of the Grantor and Grantee, explaining the desire to create a long-term commitment (if not perpetual), reference to state or local laws supporting the conservation purposes, a description of the structural, functional and statement of public benefit values of the property, and reference to the baseline documentation, if not included as a part or exhibit to the conservation easement.

(b) Identification of the Grantor: The owner of the property and type of ownership should be identified. In addition to recitations and the identification of the Grantor in the document, a title report or abstract that will confirm title and type of ownership of the Grantor should be obtained. A title report will also identify any claims, judgments, or lien holders who may have an interest or claim an interest in the property. Examples of such liens would include:

- Judgment of creditors
- Lawsuits pending against the owner
- Taxes
- Mortgage or pledge

- Easements/rights of way
- Prior reservations
- Recorded leases

(c) Grantee Organization: The Grantee Organization should be identified as an organization that can accept and hold the interest granted.

(i) “Holder” under most statutes is defined as:

- A governmental body empowered by the law of the state or the United States to hold an interest in real property; or
- A private, non-profit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real properties, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality, or preserving the natural, historical, architectural, archeological or cultural aspects of real property which is the recipient or Grantee of a conservation easement.

(ii) A determination of who the Grantor wants to do business with, who will hold the easement and, if necessary, who will enforce the easement are critical to the long-lasting relationship and existence of the conservation easement and purposes of the conservation easement.

(iii) In the conservation easement agreement, the Grantee should be identified as a governmental body or charitable organization with requisite purposes and powers described by the statutes.

(iv) For Internal Revenue Service purposes and for tax considerations, the Grantee Organization should be a qualified organization as defined in IRC Section 170(h)(3).

(iii) The Grant and Conveyance: The conveyance and grant of an easement must be for consideration or value to be effective. This may be by way of reciting that the consideration is the payment of money from the Grantee to the Grantor or by covenants and promises made, such as covenants of the Grantor to the Grantee, mutual covenants, or covenants of the Grantee to the Grantor. State laws should be consulted for full compliance.

The grant and conveyance (whether for money or gift) should be made voluntarily by the Grantor of the conservation easement to the Grantee. “Grant,” “Bargain” and “Sell” are statutory words of warranty in Alabama. Use of these words, though they may be limited expressly by the language of the instrument, provide that the Grantor has the right to transfer an interest in the property, transfer unencumbered title to the property, and is in peaceful possession of the property. Exceptions and limitations to these statutory warranties are expressly allowed by statute. Ala. Code. § 35-4-271.

The conveyance document should recite the statute or law applicable (most state conservation easement statutes require that the statute be specifically mentioned). The easement should be granted for one or more specific purposes set forth in the statute, or referenced and described in a separate provision of the agreement.

(iv) Purpose and Duration: The purpose of the conservation easement should be spelled out in specific terms, either in the granting

clause or in a separate purpose provision. The purpose should be explained by an affirmative description. Each state statute recites general categories of recognized conservation purposes.

IRC Section 170 (h) defines “conservation purpose” as follows:

- “(a) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (b) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (c) the preservation of open space (including farmland and forest land) where such preservation is –
 1. for the scenic enjoyment of the general public, or
 2. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (d) the preservation of an historically important land area or a certified historic structure.”

State statutes should be consulted to determine what, if any duration requirement may be necessary to qualify an easement as a conservation easement. The time period in Alabama, for example, can be the lesser of 30 years or the life of the Grantor. The duration or term can be stated from one year (or less) to “in perpetuity.” In order to qualify for federal income or estate tax deductions, the term must be perpetual. The Louisiana conservation easement statute provides that a conservation easement duration will be unlimited unless the parties agree otherwise.

(v) Prohibited Uses: This provision may be called “Prohibited Uses” or “Conservation Restrictions” as described in the Alabama Forever Wild Amendment (See Exhibit B). The provision may be general in description, however, the more specific the prohibited activity, the less interpretation or construction

necessary to enforce the easement terms. The prohibited activities should be designed to protect the conservation purposes of the easement or, as described in Louisiana, the servitude. Examples could include restrictions on subdivisions, land clearing, filling or excavation, restrictions on construction of structures and commercial use (other than compatible uses or consistent uses, such as farming, timber management, limited buildings, educational activities, and hunting or fishing).

Those rights and uses that are not prohibited may be exercised by the Grantor by implication or specific reservation. “Other rights” may be further restricted by allowing the use “so long as such use does not adversely affect or impair the conservation purposes” of the easement.

Federal law prohibits surface mining, except as regard a “qualified mineral interest.” A qualified mineral interest includes subsurface hydrocarbons and access thereto unless the ownership of minerals was severed from the surface prior to June 13, 1976, and there is a very remote likelihood of production of the minerals. IRC § 170(h)(5)(B) and § 170(h)(6).

(vi) Grantor’s Reserved Rights:

(a) Specific Matters: Like other provisions of the easement, these “reserved rights” should be specific. Grantor can and will argue that any right or use not prohibited can be exercised. Reserved rights should not be inconsistent with the conservation purposes or adversely affect the conservation purposes or functions. Examples of reserved rights will vary greatly depending on purpose, location, Grantor, and site-specific features.

Subdivisions, buildings, improvements, recreational activities (hunting, fishing, trapping, camping, boating), research, pile-supported structures, timber management, mineral extraction, occupation of the property, farming or ranching activities, or the ability to lease the property to others are some general reserved rights that come to mind.

(vii) Enforcement and Inspection: Provisions expressing the rights of the Grantee Organization and any third parties to enforce the provisions of the easement, to protect the purposes, and to periodically inspect the property are very important to the intent of the parties.

(viii) Other Provisions: Other essential provisions should address tax liability, indemnities, condemnation, assignment by the Grantee Organization, amendments to the easement, abandonment, or termination.

Each conservation easement or restrictive covenant is different and should be treated on a site-specific and Grantor-specific basis. Knowledge of the Grantor or the Grantor's family, the Grantor's intentions and goals, the land and the Grantee Organization must be obtained to successfully draft the easement agreement and address the duties of each party.

(3) "In Perpetuity": The duration or term of a conservation easement is usually discussed in state statutes such as the Alabama Conservation Easement Act (See Exhibit A). The Alabama Act supports the duration contained in the Easement Agreement or if no duration is stated, it will be "the lesser of 30 years or the life of the Grantor, or upon the sale of the property by the Grantor." In other words, the Alabama Act can be interpreted to allow a duration "in perpetuity".

“In Perpetuity”, magic words that are essential to qualify a conservation easement for the Federal tax benefits under IRC Section 170(h).

“IRC Section 170(h) provides in part as follows:

...

(2) Qualified Real Property Interest – for purposes of this subsection, the term “qualified real property interest” means any of the following interests in Real Property:

- (A) The entire interest of the donor other than a qualified mineral interest.
- (B) A remainder interest, and
- (C) A restriction (granted in perpetuity) on the use which may be made of the real property.

...

(5) Exclusively for Conservation Purposes – for purposes of this subsection –

Conservation purpose must be protected – A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity....”

“In perpetuity” is also extensively discussed in the Treasury Regulations § 1.170A-14.

“Perpetual” is defined by Black’s Law Dictionary as “continuous”, “never ceasing”, “enduring”, and by Webster’s Dictionary as “continuing forever”, and “everlasting”. Will a conveyance of a conservation easement in perpetuity then last forever?

The perpetual nature of the character, duration, existence and obligations under a conservation easement may be affected by a number of events, circumstances and provisions of the agreement such as:

- (i) amendment
- (ii) condemnation
- (iii) changed circumstances
- (iv) extraordinary events
- (v) termination
- (vi) modifications
- (vii) inheritance
- (viii) judicial interpretation.

(4) Challenges to Existing Easements: As the conservation easement movement ages, the challenges of perpetuating the original structure of the conservation easement becomes more evident. Once the conservation easement is in place and operations restricted by the terms, reality, second-guessing and to some extent, regret may enter the picture.

Land trusts and recipient organizations should be cautious to involve and educate all of the potential grantor family including the individuals, or family members, stockholders or interest holders. Involvement, understanding and consent by all will not prevent future problems, however, they will help build a long term cooperative relationship.

The motivation to challenge or remove the development restrictions of a conservation easement on property may involve the original grantor whose intentions have changed, financial conditions, next generation's opinions and desires to control the property, changes in organization structure or agenda, changes in society or cultural trends, or enforcement actions.

What we do today to protect the natural environment or pieces of it, seems a great advancement from our procedures 20 years ago. What will our actions of today look like 20 years from now?

Challenges may be filed to invalidate restrictions or to enforce restrictions contained in conservation easements.

(c) Management Agreements / Conservation Plans.

Through education and cooperation, the use of voluntary management agreements can be an effective wetland protection tool. The agreements may be initiated by an agency or organization with a landowner to conduct or change land use operations pursuant to a coordinated plan throughout a watershed, as a stream or coastal corridor, or to address a particular concern such as stormwater, erosion, animal waste, access, or restoration. Incentives may include economic benefits, cost-sharing, tax relief, and publicity.

Mitigation and Conservation Banking are alternatives for agencies or landowners who recognize the need and economics associated with mitigation under the Clean Water Act and the Endangered Species Act. Any permit applicant required to mitigate unavoidable impacts (individual, DOT, utilities, etc.) may be willing to invest in or purchase credits from a bank if no or few reasonable alternatives exist or such would be in the best interest of the community or species. The landowner has a management alternative and regulatory agencies receive mitigation and conservation activities without the cost of acquisition.

The criteria for wetland mitigation banks must meet the requirements set forth in the *1995 Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, Fed. Reg. 58605, Nov. 28, 1995. Species conservation banks must meet the requirements of *USFWS, Guidance for the Establishment, Use and Operation of Conservation Banks* (2003).

3. “Green” Improvements.

(a) Local. Open space, stormwater, watershed protection, floodplain issues and wetland protection are popular topics of green/smart growth and local land use regulations.

(1) Open Space Planning.

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

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

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

a. *Open Space, Permanent Usable, in Planned Unit Development*: (a) privately-owned

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

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

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

Examples of local land use plans include:

- Fairhope Comprehensive Land Use Plan
- Comprehensive Plan for the City of Mobile, as amended May 19, 1998.

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

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

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

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

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

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

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

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

The Town works with the residents for education, recycling and cleanup programs.

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

The Tennessee Legislature recited reasons for protecting open space:

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

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

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

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

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

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

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

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

....

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

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