

WATERS & WETLANDS COMPLIANCE

WHAT'S UP WITH THAT? SIZE AND PLACEMENT DO MATTER!

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for the

WEEKS BAY NATIONAL ESTUARINE RESEARCH RESERVE
“WETLAND REGULATIONS AND COMPLIANCE WORKSHOP”

WEEKS BAY RESERVE RESOURCE CENTER
ON WEEKS BAY

Materials

Prepared and Presented by:

Neil C. Johnston, Esq.
Christopher S. Williams, Esq.
Hand Arendall LLC
Post Office Box 123
Mobile, Alabama 36601
(251) 694-6247
njohnston@handarendall.com
cwilliams@handarendall.com

- and -

Abbey L. Thompson, 2nd yr Law Student
Cumberland School of Law
Tripp Dubose, 3rd yr Law Student
University of Alabama School of Law

HAND  ARENDALL

L.L.C. ■ LAWYERS




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New Stuff

As a consultant, you are hired to design and implement the scope of your work and provide knowledgeable, legal and up-to-date advice to your client. How you do this is critical. Knowing the rules, regulations and people is not enough. Everything you do is in constant motion and begs for innovation, creativity, initiative and flexibility.

We are unable to describe all of the changes, differences, and new stuff, but have provided some of those matters that should be of interest to illustrate the dynamics of natural resources and environmental law. “New Stuff” is the simple phrase that involves that constant change and innovation of the economy, personalities, interpretations, politics and you.

Examples of “New Stuff:”

1. **Wetlands / Jurisdiction.** When do you need a Clean Water Act § 404 (33 U.S.C. §1344) or 1899 Rivers and Harbors Act § 10 (33 USC § 403) permit, what needs to be part of the point application, and what are the costs? What are Wetlands?

(a) **Ask Congress or ask “Where has Congress been?”:**

1899 Rivers and Harbors Act § 10 (33 U.S.C. § 403)
1948 Water Pollution Control Act
1972 Amendments – Federal Water Pollution Control Act of 1972
(33 U.S.C. § 1251, et seq.)
1977 Amendments – Clean Water Act (33 U.S.C. §1344)
1981 Amendments – Municipal Waste Water Treatment
Construction Grant Amendments
1987 Amendments – Water Quality Act
1994 Amendments – Ocean Pollution Reduction Act
National Environmental Policy Act of 1969 (42 U.S.C. § 4321)
Endangered Species Act of 1973 (16 U.S.C. § 1531)
Coastal Zone Management Act of 1972 (16 U.S.C. § 1451)
Federal Water Pollution Control Act 1972
Oil Pollution Act of 1990 (33 U.S.C. § 2701)
Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1201)

[NOTE: No new legislation has passed defining the extent of federal jurisdiction over “waters of the United States” in quite some time although many proposed bills have been considered.]

(b) **Ask the U.S. Courts**

N.R.D.C. v. Callaway, 392 F.Supp. 685 (D.C. Cir. 1975) – This was the first case to expand the Federal Water Pollution Control Act jurisdiction beyond traditional navigable waters “to the maximum extent permissible.”

Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) – 5000 acres of Louisiana hardwood bottoms were to be cleared and converted to agriculture by using heavy equipment.

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) –Adjacent wetlands.

SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) – Non-navigable, isolated, intrastate waters (invalidated the migratory bird rule).

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



U.S. v. Donovan, 661 F.3d 174 (3rd Cir. 2011) – [Tab A]



Sackett v. EPA, 132 S.Ct. 1367 (2012) – The Supreme Court unanimously determined that the compliance order given by the EPA was a final agency action, and there was no adequate remedy other than APA review, so the Sacketts could bring the dispute to court to challenge the compliance order. The Court found the action final, because it had determined rights or obligations, and legal consequences would flow from the issuance of the order, including penalties and limiting the ability of the Sacketts to obtain a permit from the Army Corps of Engineers. The compliance order was also the consummation of the agency’s decision-making process, and it only indicated the possibility of an “informal discussion” which did not suffice to make an otherwise final agency action nonfinal. The Court concluded that compliance orders will remain an effective means of securing prompt voluntary compliance when there is no substantial basis to question their validity. Critics believe the decision may open the door to contest the lack of pre-enforcement review under other statutes beyond the CWA, but the scope of the new rules is undefined as of yet. [Tab B]



(Proposed) *2011 Guidance on Identifying Waters Protected by the Clean Water Act* – This 2011 Guidance is still in the consideration stage and is New. It will replace the 2003 Guidance and the 2008 Guidance if it is even approved and finalized. According to the commentary in the Guidance, this is prepared to be used by field staff of the EPA and the Corps as a guide of the “agencies’ current understandings; it is not a rule, and hence is not binding; and lacks the force of law.”



New Stuff:

There is a more complete **discussion** of the agencies’ interpretations of the *Rapanos* and *Carabell* cases in the Proposed 2011 Guidance highlighting the “significant nexus” to traditional waters test of Justice Kennedy or the plurality test (Justice Scalia) that jurisdictional waters include those with permanent standing or flowing waters and adjacent wetlands must have a continuous surface connection to traditional waters. The 2011 Guidance also contains more explanations of the legal basis for defining how and which waters are to be protected. The agencies state that the goals are to increase clarity and reduce costs and delays associated with decisions, decrease complexity, and increase consistency of determinations.



[NOTE 1: *Sackett’s* comments – Supreme Court Justice Alito, in his concurrence, criticized Congress for not explicitly defining what Congress meant by “waters of the United States” in the Federal Water Pollution Control Act of 1972, as well as failing to clarify

the meaning subsequently. Furthermore, he stated “But far from providing clarity and predictability, the agency’s [EPA’s] latest informal guidance [2011 Guidance] advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.”]



[NOTE 2: It is interesting to note that the Supreme Court in *SWANCC* and again in *Rapanos* suggested that Congress intended the Clean Water Act to be limited in application. However, rather than amending the regulations to address jurisdiction as suggested by Chief Justice Roberts in *Rapanos*, the Corps of Engineers and EPA have issued a series of nonregulatory interpretations and “guidance”:

January 15, 2003 Joint Memorandum providing clarifying guidance on *SWANCC*, 68 Fed. Reg. 1991, 1995.

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

RGL 07-01 “Practices for Documenting Jurisdiction under Section 9 & 10 of the RHA of 1899 and Section 404 of the CWA”

RGL 08-02 “Jurisdictional Determinations”

2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act

The intent and purpose of these guidelines appear to be attempts to again expand the reach of the agencies’ jurisdiction.

The 2011 Proposed Guidance issued in draft in April, 2011, when finalized will supersede the January 15, 2003 Joint Memorandum (68 Fed. Reg. 1991, 1995) which provided “clarifying guidance” on *SWANCC*, the 2007 draft Guidance on *Rapanos* and the 2008 Joint Guidance memo on *Rapanos*.

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

“This draft guidance document is intended to describe for agency field staff the agencies’ current understandings; it is not a rule, and hence it is not binding and lacks force of law.”

“The proposed [2011] Guidance is consistent with the principles established by the Supreme Court cases and is supported by the agencies scientific understanding of how waterbodies and watershed’s function.” 76 Fed. Reg. 24479 (May 2, 2011).

There are distinct differences between the 2008 Guidance and the 2011 Guidance. The 2008 Guidance focused on the criteria that would satisfy the *Rapanos* plurality and Justice Kennedy’s “significant nexus.”

The 2008 Guidance provides “A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” The Guidance also provides details as to what hydrologic and ecologic factors will be considered in the significant nexus determination. The hydrologic factors listed are: volume, duration, and frequency of flow; proximity to the traditional navigable water; size of the watershed, average annual rainfall; and average annual winter snow pack. The ecological factors listed are: potential of tributaries to carry pollutants and flood waters to traditional navigable waters, provision of aquatic habitat that supports a traditional navigable water, potential of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality in traditional navigable water. The Guidance describes certain considered geographic features which are generally not jurisdictional waters: swales or erosional features and ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The 2011 Guidance will significantly expand the jurisdiction over waters of the United States under all CWA programs that use that term including Sections 303 (TMDL) and water quality standards, Section 311 oil spill program, Section 401 state water quality certification process, Section 402 NPDES, and Section 404. The 2008 Guidance addressed Section 404 only. In addition, the 2011 Guidance now addresses the “other waters” described in EPA’s regulations 40 CFR 230.3(s)(3) and the Corps of Engineers’ regulations 33 CFR 328.3(a)(3).]

(c) **Ask the Agencies:**

(i) **Federal**

U. S. Army Corps of Engineers
U. S. Fish and Wildlife Services
U. S. Coast Guard
U. S. Environmental Protection Agency
Natural Resources Conservation Service
Office of Surface Mining
National Oceanic and Atmospheric Administration

(ii) **State**

Alabama

Alabama Department of Environmental Management (ADEM)

- Mining and Nonpoint Source Section
- Field Operations Division
- Coastal Section

Alabama State Port Authority

Alabama Department of Conservation and Natural Resources

Alabama State Historical Preservation Officer (SHPO)

Alabama State Oil and Gas Board

Alabama Surface Mining Commission

Alabama Department of Industrial Relations

Mississippi

Mississippi Department of Environmental Quality

Mississippi Department of Marine Resources

Mississippi State Oil and Gas Board

Mississippi Department of Wildlife, Fisheries, and Parks

Mississippi Department of Archives and History

Mississippi Soil and Water Conservation Commission

Louisiana

Louisiana Department of Environmental Quality
Louisiana Department of Natural Resources
Louisiana Department of Wildlife and Fisheries
Louisiana Department of Culture, Recreation, and Tourism
Louisiana State Historic Preservation Office

Florida

Florida Department of Environmental Protection
Florida Fish and Wildlife Conservation Commission
Florida Department of State- Division of Historical Resources



2. **Nationwide Permits**

- (a) 2012 **New** Nationwide Permits. The 2004 Nationwide Permits expired March 18, 2012. Most of the Nationwide Permits were reissued as published in the Federal Register on February 12, 2012 (76 FR 9174), effective March 19, 2012, for a five year period. [See **Tab C.**]

Numerous changes and limitations have been made as shown on the chart attached as **Tab C.** Examples:

- NWP 13 for Bank Stabilization prohibits “invasive plant species”;
- NWP 21 for Surface Coal Mining Activities added limits of ½ acre of nontidal wetlands and streambed fills limited to 300 linear feet and does not authorize valley fills;
- NWP 44 for Mining Activities (other than coal mining) continued the ½ acre limitation and added limits of fill to 300 linear feet of streambed;
- Did not reissue NWP 47 for Pipeline Safety Emergency Inspections; and
- Added two new NWPs 51 and 52 Renewable Energy Generation Facilities.



- (i) **General and Regional NWP Conditions** – The 2012 NWPs also have General Permit Conditions and in some instances Regional Conditions are imposed.



- (ii) **State Certifications and Conditions**

Alabama

Mississippi
Louisiana

(b) **General Permits:**

- (i) **Alabama – General Permit for Minor Structures** proposed 1/19/11, reauthorized and effective 9/30/11 (five years) ALG05-2011. [See **Tab D**]
- (ii) **(Proposed) 7/12/12 General Permits for Waters in the Riverine Extent of the Established Boundary of the Weeks Bay National Estuarine Research Reserve.** ALG27-2012 through ALG30-2012. [See News Article Regarding Weeks Bay and copy of Proposed Permit Conditions.] [Tab E]

The Weeks Bay National Estuarine Research Reserve was established by state nomination to the Federal Research Reserve Program (16 USC § 1461) and is shown on the map at **Tab E**. The Weeks Bay Reserve became the sixteenth designated National Estuarine Sanctuary in 1986 under the administration of the Alabama Department of Conservation and Natural Resources, State Lands Division, Coastal Section, which is periodically reviewed and evaluated by the Estuarine Reserves Division of the Offices of Ocean and Coastal Resource Management (15 CFR § 921.40).

- (a) Existing Weeks Bay Pier (minor structures) rules and general permit conditions ALG24-2011 through ALG26-2011. [See page 13 of 24 at **Tab D**]
 - (b) Proposed new pier rules and general permits for Weeks Bay Riverine Areas (Fish River and Magnolia River). ALG27-2012 through ALG30-2012. [See **Tab E**]
 - (c) New pier general permits Alabama Coastal Areas – See ALG01-2011 and ALG05-2011. [See **Tab D**]
- (iii) **Alabama General Permits for Living Shorelines.** ALG10-2011. [See **Tab D**]

Activities must be coordinated with the U. S. Army Corps of Engineers, Mobile District, the Alabama Department of Environmental Management (ADEM) Coastal Section and the Alabama Department of Conservation and Natural Resources (ADCNR), State Lands Division – Coastal Branch.

The proposed activities must be described on the Corps/ADEM Joint Permit Application form.

- (c) **Transfer of Permits**: It is important with any conveyance of property that has been impacted by a permit of any kind, CWA § 404, ADEM Coastal or SLD permit, that the property is in compliance with the permit conditions and that the permit be transferred and the appropriate agencies notified.

3. **Natural Resources. What Must be Permitted?**

- (a) **Oil and Gas**. New drilling and production sites (and assorted related activities such as access roads, canals, pipelines, etc.) in Alabama, Louisiana and Mississippi are being permitted in surprising and innovative ways when located in wet or aquatic environments.

- (i) In Alabama, oil and gas, including coalbed methane gas wells, are subject to the laws and regulations of the State Oil and Gas Board of Alabama. Alabama Code § 9-17-1 and OGB Administrative Rules 400-1-1.

No oil and gas well can be drilled without a permit from the OGB, and an Affidavit of Ownership or Control certifying by the operator or permit applicant that they have 100 percent of the rights to drill and produce. The regulations don't say it, but doesn't this include the responsibility to obtain all other permits such as NPDES Construction Site Stormwater permit from ADEM, a CWA § 404 permit from the Mobile District?

ADEM Admin. Rules

- ADEM Admin. Rules Administrative Code r. 335-6-6-.23 General Permits/Water Quality
- ADEM Admin. Rules Administrative Code r. 335-6-6-.03 Requirement for NPDES Permits
- ADEM Admin. Rules Administrative Code r. 335-6-12 Construction sites; and
- ADEM General NPDES Stormwater Permit (ALR-100000) effective April, 2011

OGB Admin. Rules

- OGB Administrative Code r. 400-1-2-.01 Well Permit



- OGB Administrative Code r. 400-1-4.02 Protection of Freshwater Resources
- OGB Administrative Code r. 400-1-4-.10 Pit Construction and Maintenance
- OGB Administrative Code r. 400-1-6-.10 Site Maintenance



In 2011, the Alabama State Oil and Gas Board issued approximately 245 oil/gas well permits, most onshore with an average size of the drill site and access road of four acres (some are more), that disturbed 980 acres of surface. We not aware of any activity or requirement under the Oil and Gas Board regulations requiring other permits prior to issuing the drilling permit except OGB Admin. Code r. 400-3-6-.03 relating to coalbed methane gas operations that no “produced water” from the well can be discharged “unless appropriate approved permits allowing such discharge is on file with the Board.”

Unless permitted or exempt, any activity that discharges dredged or fill material into “waters of the United States” including wetlands, is prohibited. Oil and gas operations normally include an access road to a well site of two to four acres where the drilling operations will occur and a drilling mud or fluid holding pond will be excavated or built.

In order to landclear and excavate the well site, build the access road, if all or a portion are located in a wetland, a Clean Water Act § 404 Joint Permit Application should be filed with the U. S. Army Corps of Engineers and the Alabama Department of Environmental Management. Public notice will be issued as well as notice to the surface owner, surrounding owners, and numerous agencies. In the event a permit application is not filed and no permit is obtained, any discharge of fill or dredged material into wetlands is a violation of the Clean Water Act and subject to enforcement action. It may be possible to obtain an “after the fact” permit instead of removing all fill material and restoring the site. **See Public Notice of the After the Fact Permit Application No. AM-2011-1062-SBC, MIDROC Operating Company and the ADEM letter requiring NPDES permit coverage. [Tab F]**



The regulations pertaining to 33 U.S.C. § 1344 (Clean Water Act § 404) are found at 33 C.F.R. § 320 (Corps/Engineers) and at 40 C.F.R. § 230 (EPA). The Clean Water Act § 404 permit application

also requires certifications from the Alabama Department of Environmental Management (ADEM) that the discharge and fill activity will be consistent with the water quality laws and regulations of the state.



- (ii) In Mississippi, an innovative use of NWP12 “Utility Line Activities” was made and approved by the Mobile District for an oil and gas well pad to authorize the fill of .43 acres of wetlands for the well pad in 2010. By New Public Notice dated April 25, 2012, SAM-2012-0404-SBC, an individual permit application was made for an additional permanent fill to expand the well pad of .549 acres increasing the overall site to 1.29 acres. [Tab G]

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- (iii) Several surrounding states also have issued Corps General Permits addressing oil and gas activity.
 - a) Galveston District
 - b) New Orleans District
 - c) Vicksburg District
- (iv) Construction Site Stormwater Permits. Is oil and gas construction site work exempt from EPA’s construction stormwater rules or the requirements of 33 USC § 1342 (1) (CWA § 402(1))?

CWA § 402(1); (33 U.S.C. §1342(1)):

“Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which

are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.”

This provision was added as part of the Water Quality Act of 1987 amendments to the Clean Water Act (40 CFR § 122.26(a)(2)).

The Energy Policy Act of 2005, Section 323, amended the CWA adding the following language (33 USC § 1362 (24)): “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means “all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activity.”

However, 40 CFR § 122.26(c)(1)(iii)(c) provides that stormwater discharges from oil and gas activities that are contaminated or “contributes to a violation of a water quality standard” must have a NPDES permit:

“**122.26(c)(1)(iii)** The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or


(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.”

EPA proposed and issued a final rule in 2006 to exempt oil and gas from construction site NPDES requirements for stormwater discharges of sediment. In *Natural Resources Defense Council v. United States Environmental Protection Agency*, 526 F. 3d 591 (9th Cir. 2008), the Court vacated EPA’s 2006 oil and gas construction stormwater rule and made the prior regulations recited above applicable.

Is This New Stuff?

- a) Sediment is a contaminant.
- b) A well site and access road are construction sites.
- c) States, including Alabama, Texas, California, Mississippi, Louisiana, Florida and others, enforce NPDES permit requirements for protection of water quality, and have erosion and sediment issues to address.

 4. **Other Resources.** It is interesting that other extraction activities are not exempt from permitting requirements.

- (a) **Coal.**
See 2012 NWPs NWP 21
 NWP 44
 NWP 49
 NWP 50.
See Alabama Surface Mining Commission
 (i) Ala. Code § 9-16-71;
 (ii) Admin. Rules 880-X-_____.

See ADEM Admin. Code r. 335-6-6;
Admin. Code r. 335-6-9;
CWA § 404.

- (b) **Sand and Gravel (Non-Coal).**
CWA § 404 or CWA § 402;
33 CFR § 323.4;
40 CFR § 232.3;

ADEM Admin. Code r. 335-6-6;
ADEM Admin. Code r. 335-6-9;
ADEM Admin. Code r. 335-6-12;
Alabama Department of Industrial Relations;
Alabama Code § 9-16-4.

- (c) **Timber.** Alabama Voluntary Best Management Practices – CWA §404(f) (33 U.S.C. § 1344(f)) exemption of discharges from forest roads.



But see *Natl. Envir. Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) where the court struck down the silvicultural exemption holding that forest roads were point sources. EPA recently filed a “Notice of Intent to Revise the Stormwater Regulations” to exempt runoff from logging roads.



- (d) **Dredged Material / Beneficial Use.** The U. S. Army Corps of engineers (including the various districts here) are now encouraging and developing beneficiary uses of dredged material. See May, 2012 Draft Environmental Assessment – Brookley Hole Demonstration: Beneficial Use of Dredged Material from Mobile Harbor Federal Navigation Channel – Mobile County, Alabama.

661 F.3d 174

United States Court of Appeals,
Third Circuit.

UNITED STATES of America

v.

David H. DONOVAN, Appellant.

No. 10-4295. | Argued on July 12,
2011. | Opinion Filed: Oct. 31, 2011.

Synopsis

Background: United States brought enforcement action against property owner, under Clean Water Act, seeking to compel owner to remove fill material from portion of his property. The United States District Court for the District of Delaware, Leonard P. Stark, J., 2010 WL 3614647, adopted report and recommendation of Mary Pat Thyng, United States Magistrate Judge, 2010 WL 3000058, which granted summary judgment in favor of government and imposed \$250,000 fine. Owner appealed.

[Holding:] The Court of Appeals, Rendell, Circuit Judge, held that Army Corps of Engineers had jurisdiction to enforce Act against owner's land.

Affirmed.

Attorneys and Law Firms

*175 Richard A. Barkasy, Esq., Schnader Harrison Segal & Lewis, Pittsburgh, PA, Marieke T. Beck-Coon, Esq., Stephen A. Fogdall, Esq. [argued], Schnader Harrison Segal & Lewis, Philadelphia, PA, Counsel for Appellant.

Katherine J. Barton, Esq. [argued], United States Department of Justice, Environment & Natural Resources Division, Kent E. Hanson, Esq., United States Department of Justice, Environmental Defense Section, Washington, DC, Patricia C. Hannigan, Esq., Assistant U.S. Attorney, Office of United States Attorney, Wilmington, DE, Counsel for Appellee.

Before: RENDELL, SMITH and FISHER, Circuit Judges.

Opinion

OPINION OF THE COURT

RENDELL, Circuit Judge.

David H. Donovan added fill material to a portion of his property in New Castle County, Delaware that the United States contends is “wetlands” subject to the *176 Clean Water Act (“CWA” or “Act”). The Government brought an enforcement proceeding against him under the Act to force him to remove the fill and pay a fine. Donovan argued that his property is not covered by the CWA. However, the District Court disagreed, granting summary judgment in the Government's favor and imposing a \$250,000 fine. In this appeal, we are called upon to decide what test to apply in order to determine whether land is “wetlands” subject to the CWA after the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). We join the Courts of Appeals for the First and Eighth Circuits in holding, as the District Court here did, that property is “wetlands” subject to the CWA if it meets either of the tests laid out in *Rapanos*. We hold, further, that summary judgment was properly granted and will affirm.

I. Background

A. Facts and Procedural Posture

Donovan has owned a four-acre parcel of land bordering Route 13 near Smyrna in New Castle County, Delaware since September 29, 1982. The land is situated within the watershed of the Sawmill Branch, which flows into the Smyrna River, and then into the Delaware Estuary and on to the Delaware Bay. The Sawmill Branch becomes tidal approximately 2.5 miles from Donovan's property. In August 1987, the land was inspected by the United States Army Corps of Engineers (“Corps”). Following this inspection, the Corps categorized the property as wetlands, concluded that approximately ¾ of an acre had been recently filled by Donovan, and warned Donovan that federal law required him to obtain a permit should he wish to fill more than one acre of his property.

In early 1993, the Corps again inspected Donovan's land and found that he had continued to fill his property without a permit. In July 1993, the Corps sent a cease-and-desist notice to Donovan, ordering him to remove 0.771 acres of fill material, or to submit a pre-discharge notification. Donovan rebuffed this initial notice and the similar notices that followed. Donovan's emphatic response to the notices was that the Corps had no right to regulate the use of his land.

In 1996, the United States sued Donovan, alleging that he had violated the CWA, 33 U.S.C. § 1311(a). In March 2002, the United States District Court for the District of Delaware concluded that Donovan had violated the CWA. Donovan appealed, but we dismissed the appeal for lack of jurisdiction because the District Court's order was not then final. On December 21, 2006, the District Court entered a final judgment against Donovan, imposing a \$250,000 fine and requiring him to remove 0.771 acres of fill from his land.

Donovan appealed the December 21, 2006 judgment, arguing that the CWA did not give the Corps jurisdiction over his land. On July 24, 2008, we appointed *amicus* to address whether the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006), would require remand in this case.¹ The Government then filed a motion requesting that the case be remanded to the District Court so that a record could be developed on the issue of the Corps' jurisdiction over Donovan's *177 land. We granted that motion and remanded the case to the District Court on April 13, 2009.

On remand, the District Court referred the case to a Magistrate Judge for all pretrial matters. On March 15, 2010, Donovan moved for judgment on the pleadings and the Government moved for summary judgment. The Government submitted two expert reports: one from wetland scientist Edward M. Launay ("Launay report") and the other from scientists at the Stroud Water Research Center ("Stroud report"). Both reports were based on extensive analysis and testing of Donovan's property between June 2009 and November 2009. Launay used a variety of methods to map stream channels on and around Donovan's property and to demonstrate that they were perennial. The Stroud scientists examined the physical, chemical, and biological connections between the wetlands on Donovan's property and downstream waters of the Sawmill Branch. The Stroud scientists analyzed, *inter alia*, the wetlands' hydrological connections to downstream waters, the wetlands' potential for filtering pollutants, and the wetlands' role in the aquatic ecosystem for fish and invertebrates.

Donovan did not present any expert evidence in support of his motion, relying instead on his own affidavit, in which he expressed familiarity with the pattern of water flow on his property and stated that "the amount of water flowing on my Property in a given period is completely dependent on the amount of rainfall in the area during that period" and "[t]he only source of water flow on my Property is rainwater run-

off from the adjacent highway." JA 639. His affidavit claimed that "in periods of no rain" the channels on his property are "completely dry." JA 640. Donovan also claimed that "2009 and 2010 are the rainiest and wettest years that I can recall in the nearly 50 years I have lived in the Smyrna region" and that the channels on his property were "completely dry for significant periods" in 2008, including "the summer months." *Id.* Donovan also stated that "[i]n periods of heavy rainfall, when there is water flowing on my Property, the rainwater channels are clearly defined and easy to differentiate from the neighboring land." JA 641.

The Magistrate Judge recognized that the sole issue to be decided was whether the property on which Donovan placed fill material is subject to regulation under the CWA. The Magistrate Judge issued a Report and Recommendation ("R & R") on July 23, 2010, which recommended that the District Court deny Donovan's motion and grant summary judgment in favor of the Government. In the R & R, the Magistrate Judge concluded that wetlands are covered by the CWA if they meet either of the tests articulated by the Supreme Court in *Rapanos*. The Magistrate Judge then analyzed the Government's expert reports and noted that they "offered sufficient evidence to support a finding" that the first *Rapanos* test was met, JA 17, and that they "adequately show[ed]" that the second *Rapanos* test was met, JA 22. The Magistrate Judge did not cite or credit Donovan's declaration. The Magistrate Judge also recommended that Donovan's motion for judgment on the pleadings be denied, stating that the Government had adequately pled a basis for asserting jurisdiction over Donovan's land.

Donovan objected wholesale to the R & R. On September 13, 2010, the District Court overruled Donovan's objections to the R & R, granted the Government's motion for summary judgment, and denied Donovan's motion for judgment on the pleadings. The District Court rejected Donovan's contention that the Magistrate Judge misapplied the legal standard for *178 summary judgment, saying that "there is no genuine issue of material fact as to whether the wetlands are subject to CWA jurisdiction, and ... [Donovan] failed to come forward with evidence to enable a jury to reasonably find for ... him on that issue." JA 30. The District Court agreed with the Magistrate Judge that federal authority can be asserted over wetlands that meet either *Rapanos* test. As to the first *Rapanos* test (which we will call the "continuous surface connection test" or the "plurality's test"), the District Court concluded that the Government "propounded significant evidence" that the test was met, and that Donovan's declaration failed to create a genuine issue

of material fact as to whether the test was satisfied. JA 33. The District Court was also “satisfied that the Government’s evidence ... establishes” that the second *Rapanos* test (which we will call the “significant nexus test” or “Justice Kennedy’s test”) was met and noted that Donovan had “largely relief[d] on arguments by counsel concerning alleged deficiencies with the Government’s evidence, but put[] forth no evidence of his own.” JA 35–36. The District Court concluded that Donovan failed to come forward with specific facts showing a genuine issue for trial and granted the Government’s motion for summary judgment. Finally, the District Court denied Donovan’s motion for judgment on the pleadings, holding that the Government pled enough factual matter to plausibly suggest that Donovan’s property is subject to the CWA.

On November 8, 2010, Donovan appealed, arguing that the District Court applied the wrong legal standard to determine whether the Corps had jurisdiction over Donovan’s property and misapplied the summary judgment standard.

B. Legal Background

The CWA provides that “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). According to the statutory definition, “discharge of any pollutant” includes “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).² The CWA defines “navigable waters” as the “waters of the United States.” 33 U.S.C. § 1362(7). The Corps has interpreted this to mean that its regulatory jurisdiction extends over, *inter alia*, traditional navigable waters, their tributaries, and wetlands which are adjacent to any of the above. 33 C.F.R. § 328.3(a).³

The Supreme Court first considered the CWA’s applicability to wetlands in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). In that case, the Corps sought to enjoin a landowner from filling its property because the Corps deemed the property *179 to be wetlands falling under the protection of the CWA. The Supreme Court held that the Corps’ construction of the CWA as applying to wetlands adjacent to waterways covered by the Act⁴ was reasonable and that the landowner could not fill its property without a permit from the Corps. *Id.* at 131–35, 106 S.Ct. 455.

The Supreme Court next addressed the scope of the CWA’s coverage in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (“*SWANCC*”). In *SWANCC*, the Corps asserted jurisdiction over “an abandoned sand and

gravel pit in northern Illinois” based on 51 Fed.Reg. 41217, a regulation that purported to extend the Corps’ jurisdiction to intrastate waters “which are or would be used as a habitat by” endangered species or birds that migrate across state lines. *See id.* at 162–64, 121 S.Ct. 675. The Court held that the term “navigable waters,” as defined in the CWA, could not be interpreted to include “nonnavigable, isolated, intrastate waters” not adjacent to bodies of open water, such as the pit at issue. *Id.* at 171, 121 S.Ct. 675.

The Supreme Court’s most recent exposition on the breadth of the Corps’ jurisdiction under the CWA came in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). In *Rapanos*, a consolidation of two cases, the Court considered “whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute ‘waters of the United States’ within the meaning of the Act.” *Id.* at 729, 126 S.Ct. 2208 (plurality opinion). The Court of Appeals for the Sixth Circuit had upheld the Corps’ claim of jurisdiction. The Supreme Court, in a fractured 4–1–4 decision, vacated those judgments and remanded for further proceedings to determine whether the wetlands were subject to the restrictions of the CWA.

Four dissenting Justices took an expansive view of the CWA’s reach. Justice Stevens, writing for the dissenting Justices, stated that the Court should have deferred to what he and his fellow dissenting Justices viewed as the Corps’ reasonable interpretation of its jurisdiction. *Id.* at 796, 126 S.Ct. 2208 (Stevens, J., dissenting). However, five Justices believed that the Corps’ jurisdiction is more limited, although they did not all agree on the proper test to determine the scope of that jurisdiction.

Justice Scalia, writing for a four-Justice plurality, stated that the term “waters of the United States” as used in the CWA “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams [] ... oceans, rivers, [and] lakes.’ ” *Id.* at 739, 126 S.Ct. 2208 (alterations in original) (citing Webster’s New International Dictionary 2882 (2d ed. 1954)). The plurality opinion noted that “the phrase [‘the waters of the United States’] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* As for wetlands, the Justices in the plurality concluded that they only fall within the scope of the CWA if they have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there

is no clear demarcation between 'waters' and wetlands." *Id.* at 742, 126 S.Ct. 2208.

*180 Justice Kennedy concurred. Although agreeing with the plurality's conclusion that the Corps' jurisdiction was more limited than the dissenters believed and that the case should be remanded, Justice Kennedy disagreed with the plurality's jurisdictional test. Under Justice Kennedy's approach, wetlands are subject to the strictures of the CWA if they possess a "significant nexus" with "waters of the United States," meaning that the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 779, 780, 126 S.Ct. 2208 (Kennedy, J., concurring).

At first glance, the *Rapanos* opinions seem to present an analytical problem: the three opinions articulate three different views as to how courts should determine whether wetlands are subject to the CWA, and no opinion was joined by a majority of the Justices. So which test should apply? Interestingly, after explaining why he would have affirmed the judgments below, Justice Stevens noted that, "[i]t has been [the Supreme Court's] practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate." *Id.* at 810, 126 S.Ct. 2208 (Stevens, J., dissenting). That practice, he observed "has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views." *Id.* (citations omitted). Then, Justice Stevens stated that, although the Justices voting to remand disagreed about the appropriate test to be applied, the four dissenting Justices—with their broader view of the CWA's scope—would nonetheless support a finding of jurisdiction under *either* the plurality's or Justice Kennedy's test, and that therefore the Corps' jurisdiction should be upheld in all cases in which either test is satisfied. *Id.* at 810 & n. 14, 126 S.Ct. 2208.

II. Discussion⁵

A. The Standard(s) for Establishing Federal Regulatory Jurisdiction Over Wetlands

[1] [2] Following Justice Stevens's instruction, the District Court in the instant case examined both the *Rapanos* plurality's test and Justice Kennedy's test to determine whether the Corps has jurisdiction over Donovan's land and concluded that both tests were met, resulting in a finding of

jurisdiction. Donovan argues that this was error because the opinions in *Rapanos* fail to provide any governing standard, and therefore, under this Court's opinion in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir.1994), pre-*Rapanos* case law should govern whether Donovan's land is subject to the CWA. We disagree.

While the Courts of Appeals are split on the proper interpretation of *Rapanos*, none has adopted Donovan's position. The Courts of Appeals for the Seventh and Eleventh Circuits have concluded that Justice Kennedy's test alone creates the applicable standard for CWA jurisdiction over wetlands. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir.2006); *181 *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir.2007). These courts based their conclusions on an analysis of the Supreme Court's decision in *Marks v. United States*, in which the Court directed that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citation and internal quotation marks omitted). In their view, Justice Kennedy's opinion in *Rapanos* controls because, among those Justices concurring in the judgment, Justice Kennedy's view is the least restrictive of federal jurisdiction. *Gerke*, 464 F.3d at 724–25; *Robison*, 505 F.3d at 1221–22.

The Courts of Appeals for the First and Eighth Circuits have taken a different view. These courts examined the Supreme Court's directive in *Marks*, but found that the *Rapanos* opinions did not lend themselves to a *Marks* analysis because neither the plurality opinion nor Justice Kennedy's opinion relied on "narrower" grounds than the other. *United States v. Johnson*, 467 F.3d 56, 62–64 (1st Cir.2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir.2009). Judge Lipez, writing for the majority of the panel in *Johnson*, disagreed that the "narrowest grounds" in the *Marks* sense necessarily means those grounds least restrictive of federal jurisdiction. The court in *Johnson* stated that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground *most* restrictive of government authority ... because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." 467 F.3d at 63 (emphasis added). Even if one were to conclude that the opinion resting on the narrowest grounds is the one that relies on "less sweeping reasons than the other"—meaning that it requires the same outcome (here, the presence of federal regulatory jurisdiction) in only a

subset of the cases that the other opinion would, and in no other cases—the court in *Johnson* concluded that *Marks* is unhelpful in determining which *Rapanos* test controls. *Id.* at 64. This is because Justice Kennedy's test would find federal jurisdiction in some cases that did not satisfy the plurality's test, and vice versa. *Id.* For example, if there is a small surface water connection between a wetland and a remote navigable water, the plurality would find jurisdiction, while Justice Kennedy might not. Furthermore, a wetland that lacks a surface connection with other waters, but significantly affects the chemical, physical, and biological integrity of a nearby river would meet Justice Kennedy's test but not the plurality's. *See id.* It is therefore difficult, if not impossible, to identify the “narrowest” approach.

Accordingly, the *Johnson* Court looked to Justice Stevens's approach in *Rapanos* and found it to provide “a simple and pragmatic way to assess what grounds would command a majority of the Court.” *Id.* According to the *Johnson* Court, following Justice Stevens's instructions and looking to see if either *Rapanos* test is satisfied “ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding.” *Id.*⁶ Therefore, the Courts of *182 Appeals for the First and Eighth Circuits held that federal regulatory jurisdiction can be established over wetlands that meet either the plurality's or Justice Kennedy's test from *Rapanos*. *Id.* at 66; *Bailey*, 571 F.3d at 799.⁷

We agree with the conclusion of the First Circuit Court of Appeals that neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other, and that, therefore, a strict application of *Marks* is not a workable framework for determining the governing standard established by *Rapanos*. We also agree with its conclusion that each of the plurality's test and Justice Kennedy's test should be used to determine the Corps' jurisdiction under the CWA.

As we have stated in discussing *Marks*, our goal in analyzing a fractured Supreme Court decision is to find “a single legal standard ... [that] when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree.” *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir.1991), modified on other grounds, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). To that end, we have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue. *See United States v. Richardson*, 658 F.3d 333, 340 (3d Cir.2011) (viewing

as “persuasive authority” the shared view of a four-Justice dissent and a single-Justice concurrence); *Horn v. Thoratec Corp.*, 376 F.3d 163, 176 & n. 18 (3d Cir.2004) (“Thus, on the state requirement issue, Justice Breyer joined with the four-member dissent to make a majority.”); *Student Pub. Interest Research Grp. of N.J., Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1451 (3d Cir.1988) (deriving holding from one Justice concurrence and four dissenting Justices).

The Supreme Court has also employed this mode of analysis. In *United States v. Jacobsen*, 466 U.S. 109, 111, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), the Supreme Court determined that the rule of law established by its prior decision in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), could be divined by combining the opinion of the *Walter* Court (which garnered only two votes) with the opinion of four dissenting Justices. Justice Stevens, writing for a majority of the Justices in *Jacobsen*, downplayed its reliance on the votes of the dissenting Justices in extrapolating a legal standard from *Walter*, saying that “the disagreement between the majority and the dissenters in [*Walter*] with respect to the [application of law to fact] is less significant than the agreement on the standard to be applied.” *Jacobsen*, 466 U.S. at 117 n. 12, 104 S.Ct. 1652; *see also Vasquez v. Hillery*, 474 U.S. 254, 261 n. 4, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (describing as *183 “unprecedented” the argument that “a statement of legal opinion joined by five Justices”—including some Justices in dissent—“does not carry the force of law”), *Alexander v. Choate*, 469 U.S. 287, 293 & nn. 8–9, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (deriving holdings from opinion of the Court, concurring opinions, and dissenting opinions); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 17, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (“On remand, the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test.”).

Thus, we are to examine the dissenting Justices' views to see if there is common ground. Here, there is more than just common ground. While our sister Courts of Appeals have struggled to divine the proper approach, we conclude that the struggle is greatly lessened because Justice Stevens, along with the other three Justices who joined his opinion, have actually told us what jurisdictional test is to be applied.

As we noted above, Justice Stevens specifically states:

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate

and remand. I close, however, by noting an unusual feature of the Court's judgments in these cases. It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views. In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.

Rapanos, 547 U.S. at 810, 126 S.Ct. 2208 (Stevens, J., dissenting) (footnotes omitted). And, lest there be any confusion, he adds, “in these and future cases the United States may elect to prove jurisdiction under either test.” *Id.* at 810 n. 14, 126 S.Ct. 2208. Recognizing that the plurality and Justice Kennedy had failed to give a mandate to the Court of Appeals on remand, Justice Stevens and the dissenters provided the mandate. Were we to disregard this key aspect of his opinion we would be ignoring the directive of the dissenters. They have spoken and said that, while they would have chosen a broader test, they nonetheless agree that jurisdiction exists if either the plurality's or Justice Kennedy's test is met.

Accordingly, Donovan's invocation of our decision in *Rappa* is unavailing. In *Rappa*, we confronted a Supreme Court case in which the three opinions “share[d] no common denominator” and each failed to garner a majority of the Justices' votes. *Rappa*, 18 F.3d at 1060 (analyzing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)). Faced with precedent in which there was no majority and no point of agreement whatsoever among the disparate opinions, we determined that the Supreme Court failed to establish a governing standard, and we therefore looked to prior case law to determine the relevant rule of law. *Id.* That is not the case here. Instead, in *Rapanos* there is a point of agreement and *184 no basis for disregarding the

Supreme Court's directive that two new tests should apply.⁸ Because each of the tests for Corps jurisdiction laid out in *Rapanos* received the explicit endorsement of a majority of the Justices, *Rapanos* creates a governing standard for us to apply: the CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*.

[3] [4] In any given case, this disjunctive standard will yield a result with which a majority of the *Rapanos* Justices would agree. *See Casey*, 947 F.2d at 693. If the wetlands have a continuous surface connection with “waters of the United States,” the plurality and dissenting Justices would combine to uphold the Corps' jurisdiction over the land, whether or not the wetlands have a “substantial nexus” (as Justice Kennedy defined the term) with the covered waters. If the wetlands (either alone or in combination with similarly situated lands in the region) significantly affect the chemical, physical, and biological integrity of “waters of the United States,” then Justice Kennedy would join the four dissenting Justices from *Rapanos* to conclude that the wetlands are covered by the CWA, regardless of whether the wetlands have a continuous surface connection with “waters of the United States.” Finally, if neither of the tests is met, the plurality and Justice Kennedy would form a majority saying that the wetlands are not covered by the CWA.

In sum, we find that *Rapanos* establishes two governing standards and Donovan's reliance on pre-*Rapanos* case law is misplaced. We hold that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*.

B. Application of the Rapanos tests to the Government's Motion for Summary Judgment

As we have now concluded that *either* standard in *Rapanos* can be utilized to establish the Corps' jurisdiction over wetlands, we must now determine whether the evidence before the District Court was sufficient for it to have granted summary judgment in favor of the Government under either test.

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter *185 of law.” Fed.R.Civ.P. 56(a). The initial burden is on the party seeking summary judgment to point to the evidence “which it believes demonstrate[s] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct.

2548, 91 L.Ed.2d 265 (1986). If the moving party carries this initial burden, “the nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*” and do more than “simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks omitted). A party moving for summary judgment on an issue for which it bears the ultimate burden of proof faces a more difficult road in seeking summary judgment. As we have said, “it is inappropriate to grant summary judgment in favor of a moving party who bears the burden of proof at trial unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law.” *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir.2007) (footnote omitted). In such a case, “if there is a chance that a reasonable factfinder would not accept a moving party’s necessary propositions of fact,” summary judgment is inappropriate. *Id.* All reasonable inferences should be drawn against the party moving for summary judgment. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *El*, 479 F.3d at 238.

The government met its initial burden on summary judgment of showing that Donovan’s land was subject to the Corps’ jurisdiction. The Government submitted two reports prepared by its experts, Edward Launay and scientists from the Stroud Research Center. These reports satisfy the Government’s initial burden on summary judgment for both *Rapanos* tests.

[5] First, the reports provide sufficient evidence that Donovan’s wetlands meet the plurality’s test to make out a *prima facie* case that the Government is entitled to summary judgment on the issue of the Government’s jurisdiction. *See Rapanos*, 547 U.S. at 742, 126 S.Ct. 2208. Both reports present facts showing that the channels on Donovan’s land—which continue through the Sawmill Branch and on to the Smyrna River, both navigable-in-fact waters—meet the plurality’s definition of “relatively permanent.” *See id.* at 732–33, 126 S.Ct. 2208 (plurality opinion). In concluding that the streams are perennial in nature, the Launay report cites a “degree of soil saturation and surface ponding in wetlands during the summer months, morphological conditions of the vegetation such as buttressing of tree trunks and formation of hummocks, the presence and density of plant species adapted to saturated soil conditions, and the presence of bed, bank, ordinary watermark and flowing water in the tributary channels.” JA 510. The Launay report also discusses downstream characteristics, including multiple large culverts, that reflect a perennial flow from the channels on Donovan’s

land. The Stroud report also concludes that the channels on Donovan’s land are permanent based on the existence of several organisms in the wetlands and channels, as well as the presence of certain species of fish on the property.

Both reports also establish the second requirement of the plurality’s test: that the wetlands have a “continuous surface connection” to a covered body of water. The Launay report tracks a continuous surface connection from Donovan’s wetlands to the Smyrna River and documents the findings with fifty-eight photographs carrying explanatory captions. The *186 Stroud report takes a different approach, utilizing a tracing chemical that shows a continuous surface connection. The test results show that chemical levels 2700 meters downstream were non-existent prior to the test, spiked, and dropped off precipitously thereafter, reflecting a water flow downstream from Donovan’s property. Therefore, the Launay and Stroud reports satisfy the Government’s initial burden on summary judgment with respect to the plurality’s test.

[6] As for Justice Kennedy’s test for CWA coverage, the reports also satisfy the Government’s initial Rule 56 burden of showing that there is no genuine dispute that Donovan’s wetlands, “alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780, 126 S.Ct. 2208 (Kennedy, J., concurring). The Stroud researchers added dissolved bromide and dye to the wetland complex intersecting Donovan’s property and measured levels downstream, which indicate that the Donovan wetlands contribute flow to the Sawmill Branch. The Stroud report also finds that the headwater wetlands of the Sawmill Branch, which include Donovan’s wetlands, help to remove nitrogen and protect the Delaware Estuary from excessive nutrient loading. The Stroud scientists conducted studies demonstrating that Donovan’s wetlands help sequester pollutants such as zinc and polycyclic aromatic hydrocarbons (PAHs) from downstream waters. The Government’s experts also conclude that the wetland complex that includes Donovan’s land plays an important role in the “aquatic food web,” by providing habitats and nutrients for fish species, as well as macroinvertebrates that support aquatic life in traditional navigable waters, and by supplying energy and nutrients to aquatic life in downstream navigable waters. The Launay report indicates that the gradient of the tributary stream channels on Donovan’s land is low, meaning that the wetlands retain water for relatively long periods of time and perform important functions, such as reducing sediment

loads and pollutants from storm water, as well as retaining and transforming nutrients for downstream navigable waters. Furthermore, the Launay report notes that the wetlands on and adjacent to Donovan's property discharge ground water, thereby maintaining stream flow and preserving fish and wildlife habitats.

However, our analysis does not end here. Having determined that the Government met its *initial* burden under Rule 56, we must next analyze whether Donovan came forward with specific facts showing that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586–87, 106 S.Ct. 1348 (1986).⁹

The only evidence Donovan offers in opposition to the Government's motion for summary judgment is his four-page declaration. In that declaration, Donovan states that “the amount of water flowing on my Property in a given period is completely dependent on the amount of rainfall in the area during that period” and “[t]he only source of water flow on my Property *187 is rainwater run-off from the adjacent highway.” JA 639. Furthermore, he claims that “in periods of no rain” the channels on his property are “completely dry.” JA 640. Donovan also says that “2009 and 2010 are the rainiest and wettest years that I can recall in the nearly 50 years I have lived in the Smyrna region” and that the channels on his property were “completely dry for significant periods” in 2008, including “the summer months.” *Id.* Donovan's declaration also asserts that “[i]n periods of heavy rainfall, when there is water flowing on my Property, the rainwater channels are clearly defined and easy to differentiate from the neighboring land.” JA 641. These statements all appear to be efforts to counter the Government's evidence that Donovan's wetlands fall within the *Rapanos* plurality's test. We need not, however, analyze whether Donovan has come forward with facts sufficient to raise a genuine issue about whether the *Rapanos* plurality's test is satisfied because he unquestionably has failed to raise a genuine issue about whether Justice Kennedy's test has been met.

Nothing in Donovan's affidavit speaks to the effect his wetlands have on the chemical, physical, and biological integrity of downstream waters. Donovan's only attempt to rebut the Government's showing in this regard is his argument that the Government's evidence is flawed, and that therefore a reasonable fact-finder could conclude that the Government failed to establish its regulatory jurisdiction over Donovan's land. Specifically, Donovan argues that the Government's experts exaggerate the purported effects that Donovan's wetlands have on navigable-in-fact waters by lumping Donovan's land with 761 acres of other wetlands

in the Sawmill Branch watershed. He also attacks other portions of the Government's evidence, calling it uncertain and speculative, and claiming that it could fail to convince a reasonable fact-finder that the Corps has jurisdiction over Donovan's wetlands. However, even after drawing all reasonable inferences in Donovan's favor, we find that he has not shown a genuine issue for trial.

The un rebutted evidence in the record shows that Donovan's wetlands contribute water flow to the Sawmill Branch—which becomes tidal approximately 2.5 miles from Donovan's property—and help sequester pollutants such as zinc and PAHs from downstream waters. Specifically, the record evidence indicates that the intact wetland flow path on Donovan's property removes approximately 540 grams of zinc and 12 grams of PAH compounds over its 72-meter length, while a non-wetland flow path on the south of Donovan's property removes approximately 49 grams of zinc and 0.8 grams of PAHs over its 65-meter length. Absent Donovan's wetlands, these pollutants would travel downstream, raising contaminant levels for up to 150,000,000 gallons of water past EPA drinking water guidelines for decades or centuries to come. The record also shows that the Donovan wetlands are important sources of energy and carbon for downstream habitats. In addition, the Stroud scientists found fish on Donovan's property that were also found in downstream waters of Sawmill Branch Creek. Therefore, the record evidence shows that Donovan's wetlands *alone* significantly affect the chemical, physical, and biological integrity of “waters of the United States,” without even considering the effect these wetlands have on such waters when aggregated with similarly situated lands in the region.¹⁰

*188 Donovan points us to the Supreme Court's decision in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944), and argues that summary judgment is inappropriate here because a reasonable jury would be free to disbelieve the opinions and conclusions of the Government's experts. *Sartor* is not controlling here because the *factual* evidence offered by the Government, and outlined above, is enough to meet its burden of production for a Rule 56 motion. Donovan offered no evidence to counter the Government's factual showing that Donovan's property significantly affects the chemical, physical, and biological integrity of navigable waters, nor did he raise sufficient doubt about the credibility of the Government's evidence to defeat summary judgment. See *Pelphrey v. United States*, 674 F.2d 243, 247 (4th Cir.1982) (affirming summary judgment for government and distinguishing *Sartor* as dealing with

“opinion evidence” when the moving party had submitted factual affidavits).

Faced with a motion for summary judgment citing record evidence supporting the Corps' jurisdiction, Donovan cannot rely simply on the mere possibility that a jury would find the Government's evidence insufficient. *See Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348; *cf. El*, 479 F.3d at 247 (affirming summary judgment for defendant on affirmative defense where nothing in the record rebutted defendant's expert evidence). There is no genuine issue as to the Corps' jurisdiction in this case and we will therefore affirm the District Court's order granting summary judgment to the Government.

C. Donovan's Motion for Judgment on the Pleadings

Finally, Donovan challenges the District Court's denial of his motion for judgment on the pleadings. He alleges that the sole basis for the Corps' purported regulatory jurisdiction in this case is the claim that Donovan's wetlands are adjacent to a tributary of a navigable water. This allegation is derived from 33 C.F.R. § 328.3(a)(5), which states that any “tributary” of a water covered by the CWA is itself covered by the CWA, and 33 C.F.R. § 328.3(a)(7), which states that any “wetlands adjacent to [covered] waters” are themselves covered by the CWA. According to Donovan, this was the purported basis

for the Corps' jurisdiction that the Supreme Court rejected in *Rapanos* and therefore a claim of jurisdiction invoking this standard fails on the pleadings.

The District Court correctly denied Donovan's motion. Donovan contends that the Corps has jurisdiction only over wetlands that are adjacent to navigable-in-fact waters and that the Government's pleadings fail for not alleging that Donovan's wetlands are adjacent to such waters. This argument is premised on a notion that we rejected above: that *Rapanos* fails to create a governing standard and that, therefore, pre-*Rapanos* law applies. The Government's complaint need not have pled that Donovan's wetlands are adjacent to navigable-in-fact waters and hence the District Court properly denied Donovan's motion for judgment on the pleadings.

*189 III. Conclusion

Accordingly, we will affirm the District Court's grant of summary judgment in favor of the Government and its denial of Donovan's motion for judgment on the pleadings.

Parallel Citations

73 ERC 1545

Footnotes

- 1 In *Rapanos*, the Supreme Court, in a 4–1–4 opinion that we discuss more fully below, described two new tests for determining whether property is “wetlands” covered by the CWA. The issue as to which test controls is a matter of first impression in this Court, and one we take up in depth below.
- 2 The statute defines “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). Donovan does not argue that the filler material he used on his land does not qualify as a pollutant under the CWA.
- 3 The Corps' regulations define wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” 33 C.F.R. § 328.3(b). The term “adjacent” is defined in the regulations as meaning “bordering, contiguous, or neighboring.” 33 C.F.R. § 328.3(c). According to the regulations, “adjacent wetlands” include “[w]etlands separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like.” *Id.*
- 4 The wetlands in *Riverside Bayview* were adjacent to a navigable-in-fact waterway. Such waterways are inarguably covered by the CWA. *See* 474 U.S. at 130–31, 106 S.Ct. 455.
- 5 The District Court had jurisdiction to consider this Clean Water Act enforcement case pursuant to 28 U.S.C. §§ 1331, 1345, and 1355. We have jurisdiction to review the District Court's conclusions pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court's grant of summary judgment. *Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765, 770 (3d Cir.2009). We review *de novo* a district court's denial of a motion for judgment on the pleadings. *DiCarlo v. St. Mary's Hosp.*, 530 F.3d 255, 259 (3d Cir.2008).
- 6 The *Johnson* Court also suggested that the Supreme Court has moved away from the *Marks* formulation, citing several instances in which “members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority

has embraced.” 467 F.3d at 65–66 (citing cases). Moreover, the *Johnson* Court stated that “the fact that Justice Stevens does not even refer to *Marks* indicates that he found its framework inapplicable.” *Id.* at 66.

- 7 Several Circuit Courts of Appeals have expressly reserved the issue of which *Rapanos* test, or tests, governs CWA enforcement actions. See *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir.2011) (reserving judgment on whether Corps jurisdiction can be established under either *Rapanos* test); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir.2011) (same); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir.2009) (declining to decide which *Rapanos* test or tests govern because jurisdiction was proper under both); *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir.2008) (upholding Corps jurisdiction over wetlands where evidence at trial supported jurisdiction under the reasoning of the plurality, Justice Kennedy, and Justice Stevens).
- 8 Because the four *Rapanos* dissenters explicitly endorsed both the plurality's and Justice Kennedy's jurisdictional tests, we are not faced with a concern, like in *Rappa*, that combining the votes of Justices who joined in different opinions would lead to unprincipled outcomes. *Rappa* noted that it would be possible to predict the outcome in any theoretical case involving a statute that discriminated among types of non-commercial speech and/or banned an entire means of communication. *Rappa*, 18 F.3d at 1060 n. 24. That is, knowing that four Justices in *Metromedia* thought statutes discriminating among types of non-commercial speech are unconstitutional and that two Justices believed total bans on a particular medium are unconstitutional, one could surmise that a statute attempting to do both would be found unconstitutional by a majority of the *Metromedia* Justices, but that a statute purporting to do just one would survive a challenge. Such a system, the *Rappa* court noted, would create the unprincipled outcome that “discriminat[ion] among types of non-commercial speech would be constitutional in and of itself, [but] would somehow be magically transformed into an unconstitutional statute if it also completely banned a means of communication.” *Id.* *Rapanos* creates no such dilemma. We need not “combine” the votes of Justices relying on different rationales to find that a majority of the *Rapanos* Justices would come out a particular way in a given case. Two separate rationales *each independently* enjoy the support of five or more *Rapanos* Justices, without any need to “count[] the votes” of Justices relying on different rationales. See *id.*
- 9 Donovan argues that the Magistrate Judge and the District Court misapplied the summary judgment standard by placing the burden of proof on him to show that his land is *not* subject to the CWA. While some language from the R & R and the District Court's opinion, read in isolation, might suggest such a misapplication of Rule 56, we believe that the Magistrate Judge and District Court appropriately analyzed the second step of the summary judgment burden-shifting framework in finding that Donovan had offered no evidence rebutting the Government's *prima facie* showing that it was entitled to summary judgment.
- 10 We do not purport to set out an exhaustive or exclusive list of considerations that support a finding of jurisdiction under Justice Kennedy's test. Nor do we address the question of what is meant by the words “or in combination with similarly situated lands” in Justice Kennedy's opinion. See *Rapanos*, 547 U.S. at 780, 126 S.Ct. 2208 (Kennedy, J., concurring). We simply note that, standing alone, the evidence that Donovan's wetlands significantly affect the chemical, physical, and biological integrity of other waters more readily understood as “navigable” satisfied the Government's burden on summary judgment and that Donovan has done nothing to rebut that showing so as to create a genuine issue for trial.

132 S.Ct. 1367

Supreme Court of the United States

Chantell SACKETT, et vir, Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.

No. 10–1062. | Argued Jan. 9,
2012. | Decided March 21, 2012.

Synopsis

Background: Landowners, who received compliance order from United States Environmental Protection Agency (EPA) alleging their parcel was subject to Clean Water Act (CWA) and that they violated CWA by filling about one half acre of their property with dirt and rock in preparation for building house, brought action against EPA seeking injunctive and declaratory relief. The United States District Court for the District of Idaho, Edward J. Lodge, J., 2008 WL 3286801, dismissed matter. Landowners appealed. The United States Court of Appeals for the Ninth Circuit, Gould, Circuit Judge, 622 F.3d 1139, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Scalia, held that: [1] EPA's compliance order was "final agency action" for which there was no adequate remedy other than Administrative Procedure Act (APA) review, and [2] CWA did not preclude that review.

Reversed and remanded.

Justice Ginsburg filed concurring opinion.

Justice Alito filed concurring opinion.

1368 Syllabus

The Clean Water Act prohibits "the discharge of any pollutant by any person," 33 U.S.C. § 1311, without a permit, into "navigable waters," § 1344. Upon determining that a violation has occurred, the Environmental Protection Agency (EPA) may either issue a compliance order or initiate a civil enforcement action. § 1319(a)(3). The resulting civil penalty may not "exceed [\$37,500] per day for each violation." § 1319(d). The Government contends that the amount doubles to \$75,000 when the EPA prevails against a person who has been issued a compliance order but has failed to comply.

The Sacketts, petitioners here, received a compliance order from the EPA, which stated that their residential lot contained navigable waters and that their construction project violated the Act. The Sacketts sought declarative and injunctive relief in the Federal District Court, contending that the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction. The Ninth Circuit affirmed, concluding that the Clean Water Act precluded pre-enforcement judicial review of compliance orders and that such preclusion did not violate due process.

Held: The Sacketts may bring a civil action under the APA to challenge the issuance of the EPA's order. Pp. 1371 – 1374.

(a) The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The compliance order here has all the hallmarks of APA finality. Through it, the EPA "determined" "rights or obligations," *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281, requiring the Sacketts to restore their property according to an agency-approved plan and to give the EPA access. Also, "legal consequences ... flow" from the order, *ibid.*, which, according to the Government's litigating position, exposes the Sacketts to double penalties in future enforcement proceedings. The order also severely limits their ability to obtain a permit for their fill from the Army Corps of Engineers, see *1369 33 U.S.C. § 1344; 33 CFR § 326.3(e)(1)(iv). Further, the order's issuance marks the "consummation" of the agency's decisionmaking process, *Bennett, supra*, at 178, 117 S.Ct. 1154, for the EPA's findings in the compliance order were not subject to further agency review. The Sacketts also had "no other adequate remedy in a court," 5 U.S.C. § 704. A civil action brought by the EPA under 33 U.S.C. § 1319 ordinarily provides judicial review in such cases, but the Sacketts cannot initiate that process. And each day they wait, they accrue additional potential liability. Applying to the Corps of Engineers for a permit and then filing suit under the APA if that permit is denied also does not provide an adequate remedy for the EPA's action. Pp. 1371 – 1372.

(b) The Clean Water Act is not a statute that "preclude[s] judicial review" under the APA, 5 U.S.C. § 701(a)(1). The APA creates a "presumption favoring judicial review of administrative action." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270.

While this presumption “may be overcome by inferences of intent drawn from the statutory scheme as a whole,” *ibid.*, the Government’s arguments do not support an inference that the Clean Water Act’s statutory scheme precludes APA review. Pp. 1372 – 1374.

622 F.3d 1139, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. GINSBURG, J., and ALITO, J., filed concurring opinions.

Attorneys and Law Firms

Damien M. Schiff, Sacramento, CA, for Petitioners.

Malcolm L. Stewart, Washington, DC, for Respondents.

Leslie R. Weatherhead, Witherspoon Kelley, Spokane, WA, M. Reed Hopper, Damien M. Schiff, Counsel of Record, Pacific Legal Foundation, Sacramento, CA, for Petitioners.

Scott C. Fulton, General Counsel, Carol S. Holmes, David J. Drelich, Ankur K. Tohan, Steven M. Neugeboren, Mary Ellen Levine, Richard T. Witt, Attorneys, U.S. Environmental Protection Agency, Washington, DC, Donald B. Verrilli, Jr., Solicitor General, Robert G. Dreher, Acting Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor General, Counsel of Record, Ginger D. Anders, Assistant to the Solicitor General, Lisa E. Jones, Aaron P. Avila, Jennifer Scheller Neumann, Attorneys, Department of Justice, Washington, DC, for Respondents.

Opinion

Justice SCALIA delivered the opinion of the Court.

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under § 309 of the Clean Water Act, 33 U.S.C. § 1319. The order asserts that the Sacketts’ property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

I

The Clean Water Act prohibits, among other things, “the discharge of any pollutant by any person,” § 1311, without a permit, into the “navigable waters,” § 1344—which the

Act defines as “the waters *1370 of the United States,” § 1362(7). If the EPA determines that any person is in violation of this restriction, the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action. § 1319(a)(3). When the EPA prevails in a civil action, the Act provides for “a civil penalty not to exceed [\$37,500] per day for each violation.”¹ § 1319(d). And according to the Government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to \$75,000—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.

The particulars of this case flow from a dispute about the scope of “the navigable waters” subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits. The reader will be curious, however, to know what all the fuss is about. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), we upheld a regulation that construed “the navigable waters” to include “freshwater wetlands,” *id.*, at 124, 106 S.Ct. 455, themselves not actually navigable, that were adjacent to navigable-in-fact waters. Later, in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), we held that an abandoned sand and gravel pit, which “seasonally ponded” but which was not adjacent to open water, *id.*, at 164, 121 S.Ct. 675, was not part of the navigable waters. Then most recently, in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006), we considered whether a wetland not adjacent to navigable-in-fact waters fell within the scope of the Act. Our answer was no, but no one rationale commanded a majority of the Court. In his separate opinion, THE CHIEF JUSTICE expressed the concern that interested parties would lack guidance “on precisely how to read Congress’ limits on the reach of the Clean Water Act” and would be left “to feel their way on a case-by-case basis.” *Id.*, at 758, 126 S.Ct. 2208 (concurring opinion).

The Sacketts are interested parties feeling their way. They own a #–acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order. The order contained a number of “Findings and Conclusions,” including the following:

"1.4 [The Sacketts' property] contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 'Federal Manual for Identifying and Delineating Jurisdictional Wetlands.'

"1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a 'navigable water' within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and 'waters of the United *1371 States' within the meaning of 40 C.F.R. § 232.2.

"1.6 In April and May, 2007, at times more fully known to [the Sacketts, they] and/or persons acting on their behalf discharged fill material into wetlands at the Site. [They] filled approximately one half acre.

.....

"1.9 By causing such fill material to enter waters of the United States, [the Sacketts] have engaged, and are continuing to engage, in the 'discharge of pollutants' from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

.....

"1.11 [The Sacketts'] discharge of pollutants into waters of the United States at the Site without [a] permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311." App. 19–20.

On the basis of these findings and conclusions, the order directs the Sacketts, among other things, "immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan" and to "provide and/or obtain access to the Site ... [and] access to all records and documentation related to the conditions at the Site ... to EPA employees and/or their designated representatives." *Id.*, at 21–22, ¶¶ 2.1, 2.7.

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA's issuance of the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that it deprived them of "life, liberty, or property, without due process of law," in violation of the Fifth Amendment. The District Court dismissed the

claims for want of subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed, 622 F.3d 1139 (2010). It concluded that the Act "preclude[s] pre-enforcement judicial review of compliance orders," *id.*, at 1144, and that such preclusion does not violate the Fifth Amendment's due process guarantee, *id.*, at 1147. We granted certiorari. 564 U.S. —, 131 S.Ct. 3092, 180 L.Ed.2d 911 (2011).

II

[1] The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a "failure to act." §§ 551(13), 701(b)(2). But is it *final*? It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA "determined" "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970)). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶ 2.7. Also, "legal consequences ... flow" from issuance of the order. *Bennett, supra*, at 178, 117 S.Ct. 1154 (quoting *1372 *Marine Terminal, supra*, at 71, 91 S.Ct. 203). For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.² It also severely limits the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers, see 33 U.S.C. § 1344. The Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so "is clearly appropriate." 33 CFR § 326.3(e)(1)(iv) (2011).³

The issuance of the compliance order also marks the "consummation" of the agency's decisionmaking process. *Bennett, supra*, at 178, 117 S.Ct. 1154 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The

Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to “engage in informal discussion of the terms and requirements” of the order with the EPA and to inform the agency of “any allegations [t]herein which [they] believe[d] to be inaccurate.” App. 22–23, ¶ 2.11. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of “informal discussion” and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA's judicial review provision also requires that the person seeking APA review of final agency action have “no other adequate remedy in a court,” 5 U.S.C. § 704. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional \$75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an “adequate remedy” for action already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under § 704. Instead, the Government relies on § 701(a)(1) of the APA, which excludes APA review “to the extent that [other] statutes preclude judicial review.” The Clean Water Act, it says, is such a statute.

III

[2] Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise. But in determining “[w]hether and to what extent a particular statute precludes judicial review,” we do not look “only [to] its express language.” *1373 *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The APA, we have said, creates a “presumption favoring judicial review of administrative action,” but as with most presumptions, this one “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” *Id.*, at 349, 104 S.Ct. 2450. The Government offers several reasons why the statutory scheme of the Clean Water Act precludes review.

[3] The Government first points to 33 U.S.C. § 1319(a)(3), which provides that, when the EPA “finds that any person

is in violation” of certain portions of the Act, the agency “shall issue an order requiring such person to comply with [the Act], or ... shall bring a civil action [to enforce the Act].” The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they “provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance.” Brief for Respondents 39. It is entirely consistent with this function to allow judicial review when the recipient does not choose “voluntary compliance.” The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order “as a step in the deliberative process[,] ... rather than as a coercive sanction that itself must be subject to judicial review.” *Id.*, at 38. But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just “a step in the deliberative process” when the agency rejected the Sacketts' attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA's “deliberation” over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, see § 1319(g)(8), but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.

[4] The cases on which the Government relies simply are not analogous. In *Block v. Community Nutrition Institute*, *supra*, we held that the Agricultural Marketing Agreement Act of 1937, which expressly allowed milk handlers to obtain judicial review of milk market orders, precluded review of milk market orders in *1374 suits brought by milk consumers. 467 U.S., at 345–348, 104 S.Ct. 2450. Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not subject to the administrative process, is strong. In *United States v. Erika, Inc.*, 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), we held that the Medicare statute, which expressly provided for judicial review of awards under Part A, precluded review of awards under Part B. *Id.*, at 206–208, 102 S.Ct. 1650. The strong parallel between the award provisions in Part A and Part B of the Medicare statute does not exist between the issuance of a compliance order and the assessment of administrative penalties under the Clean Water Act. And in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), we held that the Civil Service Reform Act, which expressly excluded certain “nonpreference” employees from the statute’s review scheme, precluded review at the instance of those employees in a separate Claims Court action. *Id.*, at 448–449, 108 S.Ct. 668. Here, there is no suggestion that Congress has sought to exclude compliance-order recipients from the Act’s review scheme; quite to the contrary, the Government’s case is premised on the notion that the Act’s primary review mechanisms are open to the Sacketts.

Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary

compliance in those many cases where there is no substantial basis to question their validity.

* * *

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued “to contest the jurisdictional bases for the order.” Brief for Petitioners 9. “As a logical prerequisite to the issuance of the challenged compliance order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” *Id.*, at 54–55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA’s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is *1375 a question today’s opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court’s opinion.

Justice ALITO, concurring.

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.

The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency’s mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the

property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.

The Court's decision provides a modest measure of relief. At least, property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the Administrative Procedure Act. But the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.

Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers "the waters of the United States." 33 U.S.C. § 1362(7). But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves

are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view, see *Rapanos v. United States*, 547 U.S. 715, 732–739, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167–174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff. See Brief for Competitive Enterprise Institute as *Amicus Curiae* 7–13.

Allowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.

Parallel Citations

73 ERC 2121, 182 L.Ed.2d 367, 80 BNA USLW 4240, 12 Cal. Daily Op. Serv. 3314, 2012 Daily Journal D.A.R. 3737, 23 Fla. L. Weekly Fed. S 195

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The original statute set a penalty cap of \$25,000 per violation per day. The Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, note following 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, § 3720E, 110 Stat. 1321–373, note following 28 U.S.C. § 2461, p. 1315 (Amendment), authorizes the EPA to adjust that maximum penalty for inflation. On the basis of that authority, the agency has raised the cap to \$37,500. See 74 Fed.Reg. 626, 627 (2009).
- 2 We do not decide today that the Government's position is correct, but assume the consequences of the order to be what the Government asserts.
- 3 The regulation provides this consequence for "enforcement litigation that has been initiated by other Federal ... regulatory agencies." 33 CFR § 326.3(e)(1)(iv) (2011). The Government acknowledges, however, that EPA's issuance of a compliance order is considered by the Corps to fall within the provision. Brief for Respondents 31. Here again, we take the Government at its word without affirming that it represents a proper interpretation of the regulation.

End of Document

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Summary of the 2012 Nationwide Permits

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 1 – Aids to Navigation	10	None	PCN not required	None	
NWP 2 – Structures in Artificial Canals	10	None	PCN not required	None	
NWP 3 – Maintenance	10/404				Does not authorize: maintenance dredging for the primary purpose of navigation; beach restoration; or new stream channelization or stream relocation projects.
(a) Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills		Authorizes only minor deviations for maintenance	PCN not required	Added "requirements of other regulatory agencies" to allow minor deviation changes. Limit stream channel modification to the minimum necessary for the maintenance activity.	
(b) Discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals		200 feet from structure; minimum necessary to restore capacity intake or outfall or associated canal	all activities	Removed "and within" and "immediate" from removal of accumulated sediments and debris in the vicinity of existing structures. Clarifies that the activity can include the placement of new or additional riprap in order to qualify for the NWP.	
(c) Temporary structures, fills, and work necessary to conduct maintenance activity			PCN not required	None	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations
NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	10/404	None	PCN not required	Added fish aggregating devices to list of examples of authorized structures or activities.	Does not authorize impoundments or artificial reefs. Does not authorize covered oyster trays clam racks.
NWP 5 – Scientific Measurement Devices	10/404	25 cubic yards for wells and flumes	PCN not required	Added meteorological stations, current gages, and biological observation devices to the list of examples. Added requirement that devices and any associated structures or fills be removed upon completion of the use and restored to pre-construction elevations to maximum extent practicable.	
NWP 6 – Survey Activities	10/404	1/10-acre for temporary pads	PCN not required	Added language stating the backfilling of exploratory trenches must not drain a water of the U.S. Added sample plots or transects for wetland delineations to list of examples. Replaced the 25 cubic yard limit for temporary work pads with a 1/10-acre limit.	Does not authorize fills for roads. Does not authorize permanent structures. Does not authorize fill associated with recovery of historic properties.
NWP 7 – Outfall Structures and Associated Intake Structures	10/404	None	all activities	None	Activity must comply with National Pollutant Discharge Elimination System Program.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 8 – Oil and Gas Structures on the Outer Continental Shelf	10	None	all activities	Changed Mineral Management Service to Bureau of Ocean Energy Management	Limited to facilities in areas leased by the Bureau of Ocean Energy Management of the Department of the Interior.
NWP 9 – Structures in Fleeting and Anchorage Areas	10	None	PCN not required	None	Applies to structures, buoys, and other devices placed in anchorage or fleeting areas established by the U.S. Coast Guard.
NWP 10 – Mooring Buoys	10	None	PCN not required	None	Non-commercial, single boat mooring buoys
NWP 11 – Temporary Recreational Structures	10	None	PCN not required	None	Structures must be removed within 30 days after use discontinued.
NWP 12 – Utility Line Activities	10/404	1/2 acre of waters of the U.S. for each single and complete project	PCN required if: <ul style="list-style-type: none"> A section 10 permit is required Mechanized land clearing in forested wetlands for the right-of-way Discharge results in the loss of >1/10 acre 	Clarified locations when copies of PCN would be sent by Corps to NOAA National Ocean-Service for charting (coastal United States; Great Lakes, and U.S. territories). For overhead utility lines, added requirement for DE to send PCN and verification letter to Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations.
Utility lines			PCN required if: <ul style="list-style-type: none"> utility line exceeds 500 linear feet in waters of the U.S. utility line runs parallel to a stream bed within jurisdictional area 		Must restore area to pre-construction contours
Utility line substations			PCN required if: <ul style="list-style-type: none"> Discharge results in the loss of >1/10 acre 		Separate footings for each tower leg should be used where feasible.
Foundations for overhead utility line towers, poles, and anchors			PCN required if: <ul style="list-style-type: none"> Discharge results in the loss of >1/10 acre 		Access roads must be constructed to minimize adverse effects to waters of the U.S.
Access roads			PCN required if: <ul style="list-style-type: none"> above-grade permanent access roads exceeding 500 feet; permanent access roads constructed with impervious materials 	Clarify that access road is included with other utility line activities that comprise a single and complete project, including the 1/2-acre that applies to each single and complete project.	

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 13 – Bank Stabilization	10/404	<ul style="list-style-type: none"> 500 feet along the bank (unless waived by DE) 1 cubic yard per running foot (unless waived by DE) 	<ul style="list-style-type: none"> PCN required if: <ul style="list-style-type: none"> >500 linear feet in length >1 cubic yard per running foot along bank below OHWM or HTL discharges into special aquatic sites 	Added language authorizing temporary structures, fills and work necessary to construct the activity. Invasive plant species may not be used for bioengineering or vegetative bank stabilization.	Activity cannot impair surface water flow into or out of waters of the U.S. Temporary fills must be removed in their entirety and the affected area returned to pre-construction elevations.
NWP 14 – Linear Transportation Projects	10/404	<ul style="list-style-type: none"> 1/2 acre in non-tidal waters of the U.S. 1/3 acre in tidal waters of the U.S. 	<ul style="list-style-type: none"> PCN required if: <ul style="list-style-type: none"> >1/10 acre discharges into special aquatic sites 	None	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. Does not authorize storage buildings, parking lots, train stations, aircraft hangars, or other non-linear transportation features.
NWP 16 – U.S. Coast Guard Approved Bridges	404	None	PCN not required	Clarified that the construction of the bridge structure must be authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws.	Causeways and approach fills for bridges are authorized by this NWP; those activities require separate section 404 authorization.
NWP 16 – Return Water From Upland Contained Disposal Areas	404	None	PCN not required	Clarified that disposal site may be in an area that has no waters of the United States.	
NWP 17 – Hydropower Projects	404	None	all activities	None	Applies to activities licensed by the Federal Energy Regulatory Commission or activities exempt from licensing requirements.
NWP 18 – Minor Discharges	10/404	<ul style="list-style-type: none"> 25 cubic yards discharged below plane of OHWM/HTL 1/10-acre of waters of the U.S. 	<ul style="list-style-type: none"> PCN required if: <ul style="list-style-type: none"> >10 cubic yards discharged below plane of OHWM/HTL discharges into special aquatic sites 	None	Does not authorize discharges for stream diversions.
NWP 19 – Minor Dredging	10/404	25 cubic yards below plane of OHWM/ MHWM	PCN not required	None	Does not authorize dredging or degradation through siltation of coral reefs, submerged aquatic vegetation beds, anadromous fish spawning areas, or wetlands.
NWP 20 – Response Operations for Oil and Hazardous Substances	10/404	None	PCN not required	Changed title. Also authorizes approved regional or local contingency plans, as well as temporary structures and fills for spill response training exercises.	Authorizes activities subject to the National Contingency Plan.
NWP 21 – Surface Coal Mining Activities	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) 	all activities	Added 1/2-acre limit and limits losses of stream beds to 300 linear feet unless district engineers waive in writing for intermittent and ephemeral streams. Agency coordination required for proposed waivers of the 300 linear foot limit. Does not authorize valley fills. Added definition of "valley fill."	Activities that were verified under the 2007 N 21 may be reauthorized without the limits, if 1 permittee submits a written request to the DE reauthorization by February 1, 2013. Expans in waters of the U.S. are not eligible for reauthorization. To be reauthorized, the distr engineer must issue a written verification.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 22 – Removal of Vessels	10/404	None	PCN required if: <ul style="list-style-type: none"> if vessel listed or eligible for National Register of Historic Places activities in special aquatic sites 	None	Does not authorize maintenance dredging, sho removal, or river bank snagging. Disposal of removed vessel in waters of the U.S. may require separate authorizations from EPA and Corps
NWP 23 – Approved Categorical Exclusions	10/404	None	PCN required for certain activities listed in RGL 05-07	None	Categorical exclusions must be approved by the Office of the Chief of Engineers. See RGL 05-07 for list of agencies and their activities that are currently eligible for NWP 23.
NWP 24 – Indian Tribe or State Administered Section 404 Program	10	None	PCN not required	None	Does not authorize activities in navigable water that require only a section 10 permit.
NWP 25 – Structural Discharges	404	None	PCN not required	None	Structure may require section 10 permit if located in navigable waters of the U.S. Does not authorize structures that support buildings or similar structures.
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities	10/404	None	PCN required for most activities, except for those activities that require reporting and a 30-day review period (e.g., activities under a binding agreement between the landowner and an agency)	Added rehabilitation or enhancement of tidal streams and tidal wetlands. Authorize discharges to restore stream channels after removing water control structures or fills. Clarified activities that may be authorized to re-establish wetland or stream hydrology. Authorize the re-establishment of submerged aquatic vegetation and tidal wetlands in areas where those habitats previously existed. Clarified that changes in wetland plant communities that occur after restoring wetland hydrology are not considered conversions. Clarified that compensatory mitigation is not required for NWP 27 activities. Included stream restoration or enhancement in the types of activities authorized, as long as they are included in the agreements. Activities subject to the reporting provision must include information on baseline ecological conditions, such as a delineation of wetlands, streams, and other aquatic habitats. Added U.S. Forest Service to the list of agencies in the notification provision.	Does not authorize stream channelization. Does not authorize relocation or conversion of tidal waters. Does not authorize conversion of natural wetlands or streams, except for relocation activities.
NWP 28 – Modifications of Existing Marinas	10	Previously authorized marina area	PCN not required	None	Does not authorize dredging, additional slips, dock spaces, or expansion in waters of the U.S.
NWP 29 – Residential Developments	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) 	all activities	Clarified that district engineers must make written determinations of minimal effects when waiving the 300 linear foot limit for losses of intermittent or ephemeral stream bed. Agency coordination required for proposed waivers of the 300 linear foot limit.	For residential subdivisions, the aggregate loss of waters of the U.S. cannot exceed 1/2-acre.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 30 – Moist Soil Management for Wildlife	404	None	PCN not required	None	Authorizes only on-going activities. Does not authorize construction of new dikes, roads, we control structures, etc. Does not authorize conversion of wetlands to uplands. Does not authorize impoundments. Does not authorize loss of aquatic functions and services. PCN must indicate location of dredged material disposal sites and baseline information.
NWP 31 – Maintenance of Existing Flood Control Facilities	10/404	Maintenance baseline approved by DE	all activities	Added that the NWP authorizes the removal of vegetation from levees associated with a flood control project. In those cases where a Corps permit is required, Clarified that disposal site may be in an area that has no waters of the United States.	
NWP 32 – Completed Enforcement Actions	10/404	<ul style="list-style-type: none"> 5 acres of non-tidal waters 1 acre of tidal waters also see text of NWP 	Notification through non-judicial settlement agreement with Corps, court decision, consent decree, or settlement agreement	None	
NWP 33 – Temporary Construction, Access, and Dewatering	10/404	None	all activities	Clarified that temporary fills must be deposited in an area that has no waters of the United States.	Associated primary activity must be authorized by Corps or U.S. Coast Guard, or be exempt from permit requirements. PCN must include restoration plan.
NWP 34 – Cranberry Production Activities	404	10 acres, and activity cannot result in net loss of wetland acreage	all activities	None	Does not authorize discharges in waters of the U.S. for attendant features, such as warehouse processing facilities, or parking areas.
NWP 35 – Maintenance Dredging of Existing Basins	10	Dredging to previously authorized depths or controlling depths, whichever is less	PCN not required	None	Dredged material must be deposited at upland site.
NWP 36 – Boat Ramps	10/404	<ul style="list-style-type: none"> 50 cubic yards, unless waived by DE 20 foot width, unless waived by DE 	PCN required if: <ul style="list-style-type: none"> >50 cubic yards >20 feet wide 	Clarified that district engineers must make written determinations of minimal effects when waiving the limits of 50 cubic yards and/or the 20 feet in width. Clarified that excavated materials must be removed to an area that has no waters of the United States.	Section 10 permit required if dredging navigable water is necessary for access to boat ramp. material in special aquatic sites.
NWP 37 – Emergency Watershed Protection and Rehabilitation	10/404	None	all activities	Updated reference to the U.S. Forest Service Burned Area Emergency Rehabilitation Handbook (FSH 2509.13). Also clarified the permittee should wait 45 calendar days before proceeding with the activity if the DE has not yet issued a verification letter.	In general, permittee should wait until District Engineer issues verification, but may proceed immediately if there is an unacceptable hazard to life or significant loss of property or economic hardship will occur.
NWP 38 – Cleanup of Hazardous and Toxic Waste	10/404	None	all activities	None	Does not authorize the establishment of new disposal sites or the expansion of existing disposal sites.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 39 – Commercial and Institutional Developments	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE) can waive for intermittent and ephemeral streams) 	all activities	Clarified that district engineers must make written determinations of minimal effects when waiving the 300 linear foot limit for losses of intermittent or ephemeral stream bed. Agency coordination required for proposed waivers of the 300 linear foot limit. Added requirement for DE to send PCN and verification letter to Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities. Removed prohibition against constructing oil or gas wells.	Does not authorize construction of new golf courses or new ski areas.
NWP 40 – Agricultural Activities	404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE) can waive for intermittent and ephemeral streams) 	all activities	Clarified that district engineers must make written determinations of minimal effects when waiving the 300 linear foot limit for losses of intermittent or ephemeral stream bed. Agency coordination required for proposed waivers of the 300 linear foot limit. Modified 300 linear foot limit so that it applies to all streams, not just drainage ditches constructed in streams.	NWP can be used for agricultural activities, regardless of whether applicant is USDA participant. Does not authorize aquaculture ponds.
NWP 41 – Reshaping Existing Drainage Ditches	404	None	PCN required if: <ul style="list-style-type: none"> Reshaping greater than 500 linear feet of drainage ditch 	None	Reshaping drainage ditch cannot increase capacity of ditch or drain additional waters of U.S. Does not authorize relocation of drainage ditches constructed in waters of the U.S.
NWP 42 – Recreational Facilities	404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE) can waive for intermittent and ephemeral streams) 	all activities	Clarified that district engineers must make written determinations of minimal effects when waiving the 300 linear foot limit for losses of intermittent or ephemeral stream bed. Agency coordination required for proposed waivers of the 300 linear foot limit.	Authorizes variety of recreational facilities, except for hotels, restaurants, racetracks, stadiums, arenas, or similar facilities (these must be authorized by NWP 39).
NWP 43 – Stormwater Management Facilities	404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE) can waive for intermittent and ephemeral streams) 	PCN required if: <ul style="list-style-type: none"> Construction or expansion of stormwater management facilities 	Clarified that district engineers must make written determinations of minimal effects when waiving the 300 linear foot limit for losses of intermittent or ephemeral stream bed. Agency coordination required for proposed waivers of the 300 linear foot limit. Clarified that stormwater management facilities determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States and generally \$404 permits are not required for maintenance activities. Added low impact development integrated management features to the examples of facilities authorized.	Does not authorize construction of new stormwater management facilities in perennial streams. Maintenance does not require PCN limited to restoring original design capacities.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes In 2012	Other Information
NWP 44 – Mining Activities	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) 	all activities	Added 300 linear foot limit for any activity causing the loss of stream bed, unless waived for intermittent and ephemeral stream. Agency coordination required for proposed waivers of the 300 linear foot limit.	PCN must include reclamation plan if reclamation is required by other statutes.
NWP 45 – Repair of Uplands Damaged by Discrete Events	10/404	Restore uplands to pre-event ordinary high water mark	all activities	Clarified beach restoration or nourishment is not authorized by this NWP. Clarified that the NWP authorizes discharges of dredged or fill material associated with the restoration of uplands.	PCN must be submitted to district engineer within one year of date of damage. Work must start or be under contract within two years of date of damage.
NWP 46 – Discharges in Ditches	404	1 acre of non-tidal waters of U.S.	all activities	None	NWP does not authorize discharges into ditches constructed in streams or other waters of the U.S., or in streams that have been relocated in uplands. Does not authorize discharges that increase the ditch capacity and drain additional jurisdictional waters.
NWP 48 – Existing Commercial Shellfish Aquaculture Activities	10/404	1/2-acre limit for impacts to submerged aquatic vegetation in new project areas	<ul style="list-style-type: none"> PCN required if: <ul style="list-style-type: none"> activity includes species not previously cultivated in waterbody change from bottom culture to floating or suspended dredge harvesting, filling, or harrowing in submerged aquatic vegetation activity is in a new project area 	Project area clarified as lease or permit area approved by state or local agency or an area identified through a treaty, easement, lease, deed, or contract. Removed the reporting requirement for activities that do not require a PCN. Added new activities, with a 1/2-acre limit in areas with submerged aquatic vegetation. Defines "aquatic nuisance species." Aquatic nuisance species not allowed and nonindigenous species not allowed unless currently cultivated. Changed PCN thresholds. Identifies information required for PCN.	Does not authorize nonindigenous species not previously cultivated in the waterbody, aquatic nuisance species, or attendant features such as docks or staging areas. Does not authorize the deposition of shell material back into waters of the U.S. as waste.
NWP 49 – Coal Remining Activities	10/404	Limited to sites that were previously mined for coal, but new mining may be conducted in adjacent areas if the newly mined area is less than 40 percent of the area being remined plus any unmined area needed for reclamation	all activities	Clarified how the 40% of newly mined area is determined. Corps will review the SMCRA determination regarding the amount of previously unmined area necessary for the reclamation and make an independent determination of the amount needed.	Permittee must demonstrate net increase in aquatic resource functions through reclamation activities must be authorized by the Department Interior, Office of Surface Mining, or by states with approved programs under Title IV and V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure; prospective permittee must receive written authorization prior to commencing the activity

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
NWP 50 – Underground Coal Mining Activities	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) 	all activities	Added 1/2-acre limit and a 300 linear foot limit for any activity causing the loss of stream bed. The 300 linear foot limit may be waived for intermittent and ephemeral streams through a written determination made by the DE. Agency coordination required for proposed waivers of the 300 linear foot limit.	Activities must be authorized by the Department of Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure. If reclamation required, a copy of the plan must be submitted with PCN. Does not authorize coal preparation and processing activities outside of the mine site. Prospective permittee must receive written authorization prior to commencing the activity
NWP 51 – Land-Based Renewable Energy Generation Facilities	10/404	<ul style="list-style-type: none"> 1/2 acre of non-tidal waters of U.S. 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) 	all activities	new NWP	Authorizes construction, expansion or modification of land-based renewable energy production facilities, including attendant features, if only activity requiring DA authorization is utility line, then NWP 12 shall be used. Utility lines transferring energy to a distribution system, regional grid, or other facility are generally considered to be separate single and complete linear projects. Requirement for DE to send Pre-Construction Notification (PCN) to Department of Defense and verification letter to Department of Defense Siting Clearinghouse, and the Clearinghouse to evaluate potential effects on military activities. Agency coordination required for proposed waivers of the 300 linear foot limit.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Changes in 2012	Other Information
<p>NWP 52 – Water-Based Renewable Energy Generation Pilot Projects</p>	<p>10/404</p>	<ul style="list-style-type: none"> • 1/2 acre of waters of U.S. • 300 linear feet of stream bed (DE can waive for intermittent and ephemeral streams) • No more than 10 generation units 	<p>all activities</p>	<p>new NWP</p>	<p>Authorizes construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Limited to "pilot projects." Placement of a transmission line on bed of a navigable water of U.S. from generation unit to land-based collection facility is considered a structure under Section 10 and is not considered a loss of waters of the U.S. Prohibits activities in coral reefs. Structures in anchorage areas must comply with U.S. Coast Guard requirements. Does not authorize structures in established danger zones, restricted areas, etc. Upon completion of pilot project, associated structures and/or fills must be removed unless authorized by separate DA permit. Utility lines transferring energy to a distribution system, regional grid, or other facility are generally considered to be separate single and complete linear projects. Requirement for DE to send PCN and verification letter to Department of Defense Siting Clearinghouse, and the Clearinghouse will evaluate potential effects on military activities. An activity located on existing maintained Corps project requires separate approval under 33 USC 406. Agency coordination required for proposed waivers of the 300 linear foot limit.</p>



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

CESAM-RD-C-A

September 30, 2011

**SPECIAL PUBLIC NOTICE
U.S. ARMY CORPS OF ENGINEERS**

**GENERAL PERMITS FOR MINOR STRUCTURES AND ACTIVITIES
IN WATERS OF THE UNITED STATES, LOCATED WITHIN THE STATE OF ALABAMA
AND IN OUTER CONTINENTAL SHELF WATERS OFF THE COAST OF ALABAMA**

TO WHOM IT MAY CONCERN:

The U.S. Army Corps of Engineers (Corps) in conjunction with the Alabama Department of Environmental Management (ADEM) hereby re-authorize the Alabama General Permit Program (ALG) until **October 1, 2016**. General permits are reviewed every five (5) years before re-issuance. Should the proposed general permits not be renewed by the Corps by **October 1, 2016**, the Corps general permits with associated State WQC and CCC will expire. Please refer to attached for activities that can be evaluated under this Program.

The ALG contain certain limitations intended to protect the aquatic environment and natural and cultural resources. Conformance with the conditions contained in the ALG does not necessarily guarantee authorization under the General Permit. In most instances, a proposed project complying with the conditions of the ALG can receive specific authorization. Any proposed project not complying with the conditions of a General Permit will be evaluated as a Letter of Permission or Standard Permit and will be individually coordinated with third parties, including the Federal and State resource agencies.

Applicants are required to provide a completed Joint Application and Notification U.S. Department of Army, Corps of Engineers, Alabama Department of Environmental Management. The application must include a vicinity map, a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for project evaluation. Information to be provided also includes, in part, the purpose and need for the proposed activity; scheduling of the activity; and the names and addresses of adjoining property owners.

A copy of the Joint Application, additional information about the Regulatory program and/or the Alabama General Permit program may be found at <http://www.sam.usace.army.mil/RD/reg>, the Regulatory Division's Website. For additional information, please contact the U.S. Army Corps of Engineers, Attention: Regulatory Division, Post Office Box 2288, Mobile, Alabama 36628-0001. You may call the Corps at (251) 690-2658.

Please contact the Project Manager, **Mr. Donald E. Mroczko**, if you have any questions concerning this publication. He can be reached via e-mail at donald.e.mroczko@usace.army.mil or telephone number (251) 690-3185. Please refer to the specific permit and its applicable Public Notice Number.

MOBILE DISTRICT
U.S. Army Corps of Engineers

Enclosures



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

REPLY TO
ATTENTION OF:

CESAM-RD

**GENERAL PERMITS FOR MINOR STRUCTURES AND ACTIVITIES
IN WATERS OF THE UNITED STATES, LOCATED WITHIN THE STATE OF ALABAMA
AND IN OUTER CONTINENTAL SHELF WATERS OFF THE COAST OF ALABAMA**

U.S. ARMY CORPS OF ENGINEERS

AUTHORITY

Pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403), Section 404 of the Clean Water Act (33 USC 1344), and Section 4(e) of the Outer Continental Shelf Lands Act of 1953 (67 stat. 463; 43 USC 1333(e)), the Mobile District, U.S. Army Corps of Engineers (Corps) will regulate activities via the herein-identified general permits for minor structures and activities in waters of the United States, located within the State of Alabama.

The Alabama Department of Environmental Management (ADEM) has issued Water Quality Certification (WQC) conditions, which are included herein, in accordance with Section 401(a)(1) of the Clean Water Act (CWA). ADEM has determined that the proposed activities, if conducted in accordance with the ADEM proposed WQC conditions and the requirements of the Corps general permits, will comply with the requirements of CWA Section 401(a)(1).

ADEM has issued Alabama Coastal Zone Management (CZM) Program consistency with conditions, which are included herein, in accordance with ADEM Administrative Code R.335-8. ADEM has determined that the proposed activities, if conducted in accordance with the ADEM CZM Program conditions and the requirements of the Corps general permits, will comply with the requirements of ADEM Administrative Code R.335-8.

Public Trust Land, i.e., submerged property below mean high tide and the bottoms of navigable rivers and creeks, are the property of the State of Alabama and managed by the State Lands Division (SLD) of the Alabama Department of Conservation and Natural Resources (ADCNR) for the proprietary interest of the citizens of Alabama. Any activities adjacent to these properties require review of the proposed activities and may require a separate permit and/or lease from the SLD. Notification to SLD is made by the applicant forwarding a completed copy of the Joint Permit Application to the ADCNR State Lands Division, 31115 Five Rivers Boulevard, Spanish Fort Alabama 36527, telephone number (251) 621-1238. The SLD will then notify the applicant if the activity requires a separate permit and/or lease from ADCNR or if additional information is required by the SLD to complete their review.

Properties listed in or eligible for the National Register of Historic Places (NRHP) may be affected by work proposed under ALG01-2011, ALG03-2011, ALG07-2011, ALG09-2011, ALG11-2011 and/or ALG26-2011. The National Register of Historic Places and the Alabama Archeological Site File will be consulted on these projects which may affect listed or eligible cultural resources. This review will constitute the full extent of cultural resources investigations unless a site is identified which may be affected by authorized work, or information is developed that adequately documents that a potential exists for significant sites or properties within the area. *Please note Special Condition.SP-7 on page number 19 and General Condition GC-4 on page number 22.* Copies of this notice have been sent to the

Office of the State Historic Preservation Officer (SHPO) and the U.S. Department of the Interior, National Park Service; Division of Archeological Services.

Preliminary review of these general permits indicates that the proposed activities will not adversely affect listed endangered or threatened species, or their critical habitat. However, the potential exists that a given proposal will impact a listed species. Each application for authorization will be reviewed with this in mind. Please note *Special Condition SP-6 on page number 19*.

Applicants are required to provide a completed Joint Application and Notification U.S. Department of Army, Corps of Engineers, Alabama Department of Environmental Management. The application must include a vicinity map, a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for project evaluation. Information to be provided also includes, in part, the purpose and need for the proposed activity; scheduling of the activity; and the names and addresses of adjoining property owners.

A copy of the Joint Application, additional information about the Regulatory program and/or the Alabama General Permit program may be found at <http://www.sam.usace.army.mil/RD/reg>, the Regulatory Division's Website. For additional information, please contact the U.S. Army Corps of Engineers, Attention: Regulatory Division, Post Office Box 2288, Mobile, Alabama 36628-0001. You may call the Corps at (251) 690-2658.

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* This permit is placed under *Reserved* status pending further review and coordination by the U.S. Army Corps of Engineers, Mobile District. Should this permit be re-authorized, a Public Notice announcement will then be issued.

SAM-2010-1470-DEM

ALG01-2011 - CONSTRUCTION OR MODIFICATION OF BOAT SLIPS (Authority: Sections 10 and 404). The project (new work) must involve the dredging of less than 500 cubic yards of material from below mean high tide or below ordinary high water. All dredging water ward of mean high tide or ordinary high water to reach the controlling navigational depth of the receiving waters must be authorized under ALG03-2011-New Work Channel Dredging or ALG02-2011-Maintenance Dredging.

- **Residential-Use:** A limit of three (3) residential-use boat berthing areas per project site, including berthing for personal watercraft, can be authorized under this Permit.
- **Slip Specifications (ALG01):** The depth of the boat slip shall be no greater than the controlling navigational depth of the receiving waters, the length may not exceed 50 feet, and the length may not exceed twice the width, i.e., a 50-foot-long boat slip must have a minimum width of 25 feet. Length is defined as the measurement perpendicular to the bank or shoreline.
- **Side Stabilization (ALG01):** The installation of sheet pile or other approved stabilization material may be authorized within the boat slip under ALG01. However, ALG01 does not authorize bank and/or shoreline stabilization for areas other than the sides and terminal end of the boat slip.
- **Modification of an Existing Slip (ALG01):** If an existing slip is being modified (enlarged) the total volume dredged originally, plus that being proposed to be dredged, cannot exceed 500 cubic yards of material below mean high tide or ordinary high water. The modified slip must meet all conditions of ALG01.
- **Shoreline Buffer (ALG01):** In waterbodies which have no man-made shoreline protection such as a bulkhead, riprap, etc., a 10-foot-wide buffer shall be maintained between the proposed work and any wetlands and/or submerged grassbeds; and a 3:1 (horizontal: vertical) side slope or flatter shall be maintained.

- Dredge Material Disposal (ALG01):
 - Dredged materials shall not be placed in adjacent waters or wetlands unless specifically authorized under other General Permits, Nationwide Permits, Exemptions, or Individual Permits.
 - The dredged material shall be deposited in an approved upland area and properly contained to prevent reentering the waterway or adjacent wetlands.
 - Special ADEM Conditions (ALG01): In the coastal area, the excavation of new boat slips may only be authorized in areas where it is demonstrated that the construction of a pier and dock will obstruct navigation.
 - ADCNR requirements for dredging of State water bottoms (ALG01):
 - A minimum distance of 10 feet shall be maintained between the authorized structure and the adjacent upland property lines and adjacent riparian lines. Contact ADCNR-State Lands Division (SLD) for guidance regarding the location of the riparian area boundaries.
 - ADCNR-SLD may require a separate permit and fee for removal of dredged material from State water bottoms. The ADCNR-SLD will determine if the dredged material consists primarily of sands, specifically beach quality sands and, if so, whether the dredged material can be used as fill. *Project coordination with ADCNR-SLD is the permittee's responsibility.*
 - Excluded Activities (ALG01): This permit does not authorize (1) dredging in or disposal of dredged material in (a) wetlands, (b) submerged grassbeds, (c) natural shellfish beds; or (2) the construction of ancillary shoreline stabilization structures such as wing walls, groins, jetties, or any solid structures roughly perpendicular to the shore or bank.
 - Excluded Areas (ALG01): Areas fronting the waters of the Gulf of Mexico, Pelican Bay, the recognized boundaries of the Weeks Bay National Estuarine Research Reserve and the man-made canals on Ono Island.
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SAM-2010-1471-DEM

ALG02-2011 - MAINTENANCE DREDGING (Authority: Sections 10 and 404). Maintenance dredging of up to 500 cubic yards of material may be authorized. The dredging must be a single and complete project, associated with navigation, and is limited to previously authorized and dredged dimensions. Before and after hydrographic surveys may be required.

- Maintenance Dredging (ALG02): Maintenance dredging must be associated with navigation and must be located within a valid boat/mooring slip and/or existing navigation channel.
- Maintenance Dredging of Residential Boat Slips (ALG02): Maintenance dredging in a residential boat slip is limited to 500 cubic yards of material.
- Dredged Material Disposal (ALG02):
 - The dredged material shall be placed in an approved upland area and properly contained to prevent re-entering the waterway or adjacent wetlands.
 - Dredged materials shall not be placed in adjacent waters or wetlands unless specifically authorized under other General Permits, Nationwide Permits, Exemptions, or Individual Permits.
- ADCNR requirements for dredging of State water bottoms (ALG02): ADCNR-State Lands Division (SLD) may require a separate permit and fee for removal of dredged material from State water bottoms. The ADCNR-SLD will determine if the dredged material consists primarily of sands, specifically beach quality sands and, if so, whether the dredged material can be used as fill. *Project coordination with ADCNR-SLD is the permittee's responsibility.*
- Excluded Areas (ALG02): This permit does not authorize (1) dredging or disposal of dredged material in (a) wetlands, (b) submerged grassbeds, (c) natural shellfish beds; or (2) the recognized boundaries of the Weeks Bay National Estuarine Research Reserve.

NOTE: Exceptions to the above may be made for dredging of noxious vegetation in man-made waterbodies.

SAM-2010-1472-DEM

ALG03-2011 - NEW WORK CHANNEL DREDGING (Authority: Sections 10 and 404). Dredging of up to 1,000 cubic yards of material may be authorized. Authorization under this permit is limited to open water channels for navigation access and must be a single and complete project. Dredging depth is limited to the controlling navigational depth of the receiving waters. The applicant may be required to submit a study by a qualified professional engineer that will demonstrate that construction of a new channel will not interfere with the lateral movement of sediments such that adjacent up- and downstream shorelines are negatively impacted, i.e. sediment starved. Before and after hydrographic surveys may be required. Dredging for fill material shall not be authorized; however, navigation projects may use the dredged material for fill in an approved disposal area.

- **Dredged Material Disposal (ALG03):**
 - The dredged material shall be placed in an approved upland disposal area and properly contained to prevent reentering the waterway or adjacent wetlands.
 - Dredged materials shall not be placed in adjacent waters or wetlands unless specifically authorized under other General Permits, Nationwide Permits, Exemptions, or Individual Permits.
- **Shoreline Buffer (ALG03):** In waterbodies which have no man-made shoreline protection such as a bulkhead, riprap, etc., a 10-foot buffer shall be maintained from wetlands and/or submerged grassbeds; and a 3:1 (horizontal: vertical) or flatter side slope shall be maintained.
- **Special ADEM Conditions (ALG03):**
 - In the coastal area, new work channel dredging may not be used in association with the construction of new piers and docks unless it can be demonstrated that a hazard to navigation would be created by extending the pier to navigational depths.
 - It is the responsibility of the permittee to comply with Water Quality conditions as specified in Conditions, Section III and all other conditions of this General Permit Program.
- **ADCNR requirements for dredging of State water bottoms (ALG03):** ADCNR-State Lands Division (SLD) may require a separate permit and fee for removal of dredged material from State water bottoms. ADCNR-SLD will determine if the dredged material consists primarily of sands, specifically beach quality sands and, if so, whether the dredged material can be used as fill. *Project coordination with ADCNR-SLD is the permittee's responsibility.*
- **Excluded Areas (ALG03):** This permit does not authorize (1) dredging within or the disposal of dredged material in (1) wetlands, (2) submerged grassbeds, (3) natural shellfish beds or (4) areas fronting the Gulf of Mexico, Pelican Bay, and the recognized boundaries of the Weeks Bay National Estuarine Research Reserve.

SAM-2010-1473-DEM

ALG04-2011 - DEBRIS REMOVAL (Authority: Sections 10 and 404). Debris may be removed from any waterway for navigational or drainage purposes only. The work must front the applicant's property. Debris includes but is not limited to fallen trees / woody debris, appliances, lumber, metal objects, etc. Trees embedded in a bank may be cut off above ground.

- Trees and other woody vegetation which are still rooted in the bank must remain in place or be cut off above ground elevation before removal. Tree and/or other woody vegetation root mass cannot be

removed from the bank or a stream bed. Trees and/or wood vegetation may be removed provided they are (1) not rooted, or (2) have been cut above ground elevation so that the root mass remains intact.

- **Debris Disposal (ALG04):** All debris must be properly placed in an approved landfill. Alternative disposal sites for woody debris may be authorized on a case-by-case basis, but only after full coordination with the Corps and the U.S. Fish and Wildlife Service. Any proposed open burning shall be coordinated with the ADEM Air Division. *Please contact ADEM's Air Division at (334) 271-7700.*
- **Excluded Activities (ALG04):** This permit does not authorize: (1) dredging of gravel, sand, silt, or (2) the removal of hazardous materials, etc.

SAM-2010-1474-DEM

ALG05-2011 - CONSTRUCTION AND MODIFICATION OF PIERS, WHARVES, AND THEIR NORMAL APPURTENANCES SUCH AS STAIRWAYS AND WALKWAYS (Authority: Section 10).

Authorized structures shall be of sufficient length to reach navigational depths adequate for the proposed use to the extent that a hazard to navigation, as determined by the controlling authority, will not be created. Structures shall be designed and constructed such that impacts to wetlands and submerged grassbeds are minimized.

- **Residential-Use:** A limit of three (3) residential-use boat berthing areas per project site, including berthing for personal watercraft, may be authorized under this Permit.
- **Existing Marinas:** Within the authorized footprint of an existing marina, alterations to pier configurations and/or berthing spaces may be permitted.
- **Special conditions for structures spanning emergent non-forested wetlands or submerged grassbeds (ALG05):**
 - A pier, wharf, or walkway over emergent non-forested wetlands or water with submerged grassbeds shall be no more than five (5) feet wide and the height of the structure above ground surface over wetland or the water surface at mean high tide or ordinary high water must at least equal its width (i.e., a five-foot-wide walkway/pier would be constructed at a five foot elevation).
 - The minimum space between the finished decking boards must be no less than 0.75-inch to allow for light penetration.
 - In areas vegetated with submerged grassbeds, pilings should be driven. Jetting may be restricted in such areas.
 - Operation of heavy equipment in wetlands is strictly prohibited.
- **Natural Shellfish Beds (ALG05):** In areas of natural shellfish beds, the applicant must coordinate the activity with the Department of Conservation and Natural Resources - Marine Resources Division (ADCNR-MRD), (*Dauphin Island Office at telephone number (251) 861-2882 or the Gulf Shores Office at telephone number (251) 968-7576*). The recommendation of the ADCNR-MRD must be included with the applicant's Joint Application to the Corps for project authorization.
- **Pier Length (ADEM Condition) (ALG05):** In the coastal area, new piers and docks shall be of sufficient length to reach navigational depths adequate for the proposed use unless the structure creates a hazard to navigation as determined by the Corps.
- **ADCNR-SLD Riparian-Use requirements for activities in State water bottoms (ALG05):**
 - A minimum distance of 10 feet shall be maintained between the authorized structure, including any moored vessels, and the adjacent upland property lines and adjacent riparian lines. *Contact ADCNR-SLD for guidance regarding the location of the riparian area boundaries.*

- All structures may not extend greater than 25-percent of the waterway, must not extend closer than 100 feet to a federally-maintained navigation channel and may be further restricted by the Alabama Marine Police.
- If the area of the structure exceeds 10 square feet for every linear foot of shoreline or if the permit application is for other than single-family residential use, a riparian easement from the ADCNR - State Lands Division (ADCNR-SLD) may be required. *Contact ADCNR-SLD for guidance regarding the location of the riparian area boundaries.*
- Coordination with ADCNR-SLD (ALG05): ADCNR-SLD may require a separate permit, riparian easement and/or fee for the proposed activity. *Project coordination with ADCNR is the permittee's responsibility.*
- Excluded Structures (ALG05): This permit does not authorize the following activities: (1) structures for the permanent mooring of houseboats, (2) fueling facilities, (3) toilets, (4) habitable structures (defined by ADEM as "any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes") over navigable waters of the United States, (5) new marinas, and (6) the expansion of an existing marina beyond the existing authorized footprint.
- Excluded Areas (ALG05): Areas fronting the waters of the Gulf of Mexico, Pelican Bay, and the recognized boundaries of the Weeks Bay National Estuarine Research Reserve.

SAM-2010-1475-DEM

ALG06-2011 - CONSTRUCTION AND MODIFICATION OF BOAT SHELTERS, GAZEBOS, HOISTS, ETC. (Authority: Section 10).

Structures under this permit include covered, open-sided structures such as boat shelters, boat hoists, gazebos and covered decks.

- Residential-Use: A limit of three (3) residential-use boat berthing areas per project site, including berthing for personal watercraft, may be authorized under this Permit.
- ADCNR-SLD Riparian-Use requirements for activities in State water bottoms (ALG06):
 - A minimum distance of 10 feet shall be maintained between the authorized structure, including any moored vessels, and the adjacent upland property lines and adjacent riparian lines. *Contact ADCNR-SLD for guidance regarding the location of the riparian area boundaries.*
 - All structures may not extend greater than 25-percent of the waterway, must not extend closer than 100 feet to a federally-maintained navigation channel, and may be further restricted by the Alabama Marine Police.
 - If the area of the structure exceeds 10 square feet for every linear foot of shoreline or if the permit application is for other than single-family residential use, a riparian easement from the ADCNR, State Lands Division may be required.
- Coordination with ADCNR-SLD (ALG06): ADCNR-SLD may require a separate permit, riparian easement and/or fee for the proposed activity. *Project coordination with ADCNR-SLD is the permittee's responsibility.*
- Excluded structures (ALG06): This permit does not authorize: (1) structures for the permanent mooring of houseboats, (2) fueling facilities, (3) toilets, (4) habitable structures (defined by ADEM as "any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes") over navigable waters of the United States, (5) structures in/over emergent non-forested wetlands, submerged grassbeds or natural shellfish beds.

- Excluded Areas (ALG06): Areas fronting the waters of the Gulf of Mexico, Pelican Bay, and the recognized boundaries of the Weeks Bay National Estuarine Research Reserve.
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SAM-2010-1476-DEM

ALG07-2011 - CONSTRUCTION AND MODIFICATION OF BOAT RAMPS OR MARINE WAYS (Authority: Sections 10 and 404). Dredging/filling of less than 250 cubic yards of material below mean high tide or ordinary high water may be authorized. Care should be taken in the placement of boat ramps to avoid interrupting the natural movement of sediments. Storm water runoff from boat ramp approaches and parking areas should be directed away from the boat ramp. Care should be taken to prevent erosion of side banks.

- Should it be determined that the boat ramp has the potential to act as a jetty/groin, the applicant may be required to provide a study by a qualified professional engineer that will demonstrate that construction of boat ramp will not interfere with the lateral movement of sediments such that adjacent up- and downstream shorelines are negatively impacted, i.e. sediment starved.
 - The applicant must demonstrate that there is adequate upland parking to support the anticipated use of the boat ramp and/or marine way.
 - Only clean fill material, pursuant to State guidelines, can be used for the construction of the boat ramp. This includes the ramp surface and any fill used for site preparation.
 - Dredged Material Disposal (ALG07):
 - Dredged materials shall not be placed in adjacent waters or wetlands unless specifically authorized under other General Permits, Nationwide Permits, Exemptions, or Individual Permits.
 - The dredged material shall be placed in an approved upland area and properly contained to prevent reentering the waterway or adjacent wetlands.
 - ADCNR Riparian-Use requirements for activities in State water bottoms (ALG07): A minimum distance of 10 feet shall be maintained between the authorized structure and the adjacent upland property lines and adjacent riparian lines. *Contact ADCNR for guidance regarding the location of the riparian area boundaries.*
 - Coordination with ADCNR (ALG07): ADCNR-State Lands Division (SLD) may require a separate permit and fee for removal of dredged material from State water bottoms. The ADCNR-SLD will determine if the dredged material consists of primarily of sands, specifically beach quality sands and, if so, whether the dredged material can be used as fill. *Project coordination with ADCNR is the permittee's responsibility.*
 - Exclusions (ALG07): This permit **does not authorize**: (1) ancillary structures such as wing walls, groins, jetties, or any solid structures roughly perpendicular to the shore or bank; (2) dredging in wetlands, submerged grassbeds, or natural shellfish beds; and (3) boat ramps and/or marine ways where adverse impacts to submerged grassbeds or natural shellfish beds would occur as a result of normal use.
 - Excluded Areas (ALG07): Areas fronting the waters of the Gulf of Mexico, Pelican Bay, and the recognized boundaries of the Weeks Bay National Estuarine Research Reserve.
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SAM-2010-1477-DEM

ALG08-2011 - MOORING PILINGS, DOLPHINS AND SINGLE-PILE STRUCTURES (Authority: Section 10): A minimum distance of 10 feet shall be maintained between the authorized structure, including any moored vessel, and the adjacent upland property lines and adjacent riparian lines.

- Coordination with ADCNR (ALG08): ADCNR-State Lands Division may require a separate permit,

riparian easement and/or fee for the proposed activity. *Project coordination with ADCNR is the permittee's responsibility.*

- **Residential-Use:** A limit of three (3) residential-use boat berthing areas per project site, including berthing for personal watercraft, can be authorized. This would include any berthing authorized under ALG06-2011.
- **Exclusions (ALG08):** This permit does not authorize: (1) structures for the permanent mooring of houseboats, and/or (2) adverse impact to submerged grassbeds or natural shellfish beds. For projects that are near submerged grassbeds, the structures would have to be driven to prevent any sedimentation on nearby submerged grassbeds. The applicant must demonstrate that the vessel mooring would not shade or otherwise cause adverse impacts to submerged grassbeds (such as prop wash, etc).
- **Excluded Areas (ALG08):** Areas fronting the waters of the Gulf of Mexico and Pelican Bay.

SAM-2010-1478-DEM

ALG09-2011 - OYSTER REEFS - RESERVED

ALG10-2011 - LIVING SHORELINES GENERAL PERMIT (Authority: Sections 10 and 404):

This general permit provides for the preservation and restoration of dunes, beaches, wetlands, submerged grassbeds, protection and propagation of essential fish habitat, shoreline restoration and nourishment. Due to the dynamic and variable nature of various shoreline types, to the maximum extent possible, shoreline stabilization shall be accomplished by the establishment of vegetation communities representative of the targeted habitat. Some situations may be adequately stabilized using established vegetation, such that, additional amendments may not be warranted. Reef and/or breakwater construction, when used in conjunction with living shorelines principals or other means to encourage shoreline enhancement or restoration, shall incorporate construction design(s) to address natural sediment transport and promote low wave energy abatement and shall not create a navigational hazard. Structures should be limited in size but provide adequate protection needed in high energy environments without causing adverse impacts to surrounding properties or resources. In some cases, hydrologic studies may be required prior to permit issuance. This general permit does not authorize land reclamation activities.

- **Protection Location (ALG10):** Protection locations for living shorelines may extend from the existing shoreline at MHW and extend water-ward. Authorizations for project locations, including reef construction, are dependent upon site conditions, project purpose and appropriate coordination and authorization from other jurisdictional agencies.
- **Protection fronting Wetlands and Sensitive Habitats (ALG10):** No wetlands shall be filled, although protection may be provided for wetland areas as long as the wetlands are not otherwise adversely impacted. If the area or any portion to be protected is a wetland:
 - No fill will be placed in wetland areas;
 - The shore protection device must be designed to allow the normal hydrologic regime to be maintained in wetland areas; and
 - If scarping has occurred due to scour or scalloping, fill discharges shall be limited to the minimum yardage necessary to achieve adjacent wetland elevation. Detached breakwaters should contain an appropriate number of gaps to ensure adequate tidal flushing and shoreline habitat access for marine and terrestrial organisms.
- **Types of Protection (ALG10):**
 - **Oyster Shell and Oyster Shell Support Structures:** Oyster shell quantity and placement shall be limited to the minimum amount necessary to achieve stabilization. Oyster shell shall be placed

- in a manner to prevent its migration to surrounding areas (i.e., bagged oyster shell, Hesco barriers, reef balls, and reef cradles) and should be placed on a stable substrate to avoid sinking. Reef profile should be high enough to avoid siltation of shells.
- **Concrete:** Cured concrete used in fabricated units specifically designed for artificial reefs or rubble razed from buildings, sidewalks, roadways and bridges may be used in reef construction provided it is clean of solid waste and other construction debris. "Green" or uncured concrete is not authorized as it may be toxic to some aquatic organisms.
 - **Natural Materials:** Natural materials, including downed trees, root wads, limbs, brush, may be used in low velocity areas to provide short-term shoreline protection during marsh restoration and enhancement activities provided it is not placed in a way to cause adverse impacts to surrounding properties or resources. Chemically treated, processed lumber is not authorized for use in this application.
 - **Riprap:** Only clean riprap material free of exposed rebar, asphalt, plastic, soil, etc., may be used. Riprap may be authorized to augment other protection methods. Note: If a channel is being protected by riprap, the backfill is limited to one (1) cubic yard per linear foot for each side. There is no limit to the linear feet of shoreline or bank that may be protected by installation of riprap. Use of appropriate filter fabric is required. Riprap materials, pervious interlocking brick systems, filter mats, and other similar stabilization methods should be utilized in lieu of vertical seawalls and bulkheads wherever feasible.
 - **Other:** Other shoreline protection devices and reef construction materials shall be evaluated on a case-by-case basis prior to being authorized for use.
- **Submerged Grassbeds:** Prior to permit issuance and/or placement of structures, project locations within areas with conditions which may support submerged grassbeds or areas where submerged grassbeds have historically been known to occupy may be subject to an submerged grassbeds survey. With the exception of rhizome cross-sectional surveys, submerged grassbed surveys must be conducted not earlier than the first of June or later than the end of September.
 - **Invasive Species (ALG10):** The shoreline shall be monitored for presence of invasive or undesirable species for the life of the project. These species shall be removed upon discovery and the area replanted with desired target community vegetation to discourage future re-infestation.
 - **Coordination with ADCNR (ALG10):** Authorization from the ADCNR is required for land reclamation activities. In some cases, ADCNR-State Lands Division may require a separate permit, riparian easement and/or fees for the proposed activity. Shoreline accretion resulting from permitted activities undertaken by use of the general permit may not result in a change in property boundaries. *Project coordination with ADCNR is the permittee's responsibility.*
 - **Coordination with SHPO (ALG10):** Coordination with the Alabama Historical Commission is required to ensure no impacts will occur to historic entities or other items which may be of historic significance.
 - **Markers and Signage (ALG10):** All constructed shorelines and reef complexes must display proper signage, markers and/or lighting to inform waterway users of their presence and in accordance with the United States Coast Guard.
 - **Exclusions (ALG10):** This permit does not authorize (1) placement of fill in wetlands; (2) ancillary structures such as wing walls, groins, jetties, or any solid structures roughly perpendicular to the shore or bank; (3) activities which result in land reclamation; (4) activities constructed for the purpose of land reclamation; (5) an activity which creates a hazard to navigation; and (6) loose or bagged oyster shell can only be used in areas classified as "Conditionally Approved" by the Alabama Department of Public Health.
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SAM-2010-1479-DEM

ALG11-2011 - ARMORING SYSTEMS (RIPRAP), BULKHEADS, RIVER TRAINING STRUCTURES, Bioengineering, and other Standard Shoreline Protection/Stabilization Devices roughly paralleling, and at the Existing Shoreline or Bank (Authority: Sections 10 and 404): This permit is only applicable where it is demonstrated to the satisfaction of the Corps that there are no feasible non-structural alternatives available including, but not limited to, preservation and restoration of wetlands, submerged grassbeds, shoreline restoration and/or nourishment.

- **Protection Location (ALG11):** Protection must be along the existing shoreline at the plane of ordinary high tide, the plane of ordinary high water or landward of all jurisdictional wetlands at the time of construction, unless otherwise specifically authorized.
 - **Protection Fronting Wetlands (ALG11):** No wetlands shall be filled, although protection may be provided for wetland areas as long as the wetlands are not otherwise adversely impacted. If the area or any portion to be protected is a wetland: (1) no fill will be placed in wetland areas; and (2) the shore protection device must be designed to allow the normal hydrologic regime to be maintained in wetland areas.
 - **Bank Dressing (ALG11):** Should the shore, bank or channel require dressing, the bedding placed below the plane of ordinary high water or the plane of ordinary high tide may not exceed an average of one (1) cubic yard per linear foot of shoreline being protected.
 - **Types of Protection (ALG11):** To the maximum extent possible, shoreline stabilization should be accomplished by the establishment of appropriate native vegetation. Riprap materials, pervious interlocking brick systems, filter mats, and other similar stabilization methods should be utilized in lieu of vertical seawalls and bulkheads wherever feasible.
 - **Riprap:** Only clean riprap material free of exposed rebar, asphalt, plastic, soil, etc., may be used. Riprap may be authorized to augment other protection methods. NOTE: If a channel is being protected by riprap, the backfill is limited to one (1) cubic yard per linear foot for each bank. There is no limit to the linear feet of shoreline or bank that may be protected by installation of riprap. Use of appropriate filter fabric is required.
 - **Bulkheads:** Bulkhead placement is limited to a total project length of 1,000 linear feet. Vertical face structures intended to replace failed erosion control structures shall not extend more than 24-inches waterward from the base of the failed structure. Use of appropriate filter fabric is required. Only clean material free of waste, metal and organic trash, unsightly debris, etc., may be used as backfill. The use of solid waste is specifically excluded from use as backfill or riprap material. NOTE: Bulkhead installation is specifically excluded from areas fronting the waters of Weeks Bay and Ono Island man-made canals.
 - **Other:** Shoreline protection devices, other than bulkhead or riprap installation, will have to be specifically authorized.
 - **Coordination with ADCNR (ALG11):** ADCNR-State Lands Division may require a separate permit, riparian easement and/or fee for the proposed activity. *Project coordination with ADCNR is the permittee's responsibility.*
 - **Exclusions (ALG11):** This permit **does not authorize** (1) placement of fill in wetlands or submerged grassbeds; (2) ancillary structures such as wing walls, groins, jetties, or any solid structures roughly perpendicular to the shore or bank; or (3) any activity to regain land lost to erosion, or otherwise accrete land.
 - **Excluded Areas (ALG11):** Areas fronting the waters of the Gulf of Mexico, Pelican Bay and the man-made canals on Ono Island.
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SAM-2010-1480-DEM

ALG12-2011 - MAINTENANCE DREDGING OF MAN-MADE DITCHES (Authority: Section 10).
Maintenance is limited to the original bottom depth, width, and length of an existing, currently serviceable ditch. Wetland and aquatic vegetation which has invaded previously dredged area may be removed during maintenance operations.

- **Dredged Material Disposal (ALG12):**
 - Dredged material shall not be placed in adjacent waters or wetlands unless specifically authorized under other General Permits, Nationwide Permits, Exemptions, or Individual Permits.
 - The dredged material shall be deposited in an approved upland area and contained so as not to reenter the waterway or adjacent wetlands.
 - The dredged material shall be deposited in an approved upland area and contained so as not to reenter the waterway or adjacent wetlands.
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SAM-2010-1481-DEM

ALG13-2011 - FILLING OF PREVIOUSLY DREDGED AREAS (such as Boat Slips, Man-made Ditches, etc.) (Authority: Sections 10 and 404). Only clean material free of waste, metal products, organic materials, unsightly debris, etc. may be used as fill. In areas invaded by noxious or invasive aquatic vegetation, authorization to fill will be determined on a case-by-case basis. If the area to be filled had previously been a wetland or natural channel, the fill may not exceed the original elevations or dimensions of the previously dredged area.

- **Coordination with ADCNR (ALG13):** ADCNR-State Lands Division may require a separate permit, riparian easement and/or fee for the proposed activity, and to insure that the proposed area for impact is not dedicated for public use or has a history of use by the general public. *Project coordination with ADCNR is the permittee's responsibility.*
 - **Excluded Activities (ALG13):** This permit does not authorize filling of (1) wetlands, (2) submerged grassbeds, (3) natural streams, (4) natural channels, or (5) areas providing mitigation, enhancement, or flushing of an aquatic system.
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ALG14-2011 through ALG16-2011 – Reserved.

GENERAL PERMITS FOR WILDLIFE MANAGEMENT AREAS, REFUGES AND PARKS

SAM-2010-1483-DEM

ALG17-2011 - CREATION AND MAINTENANCE OF FIREBREAKS

* This permit is placed under Reserved status pending further review and coordination by the Corps of Engineers, Mobile District. Should this permit be re-authorized, a Public Notice announcement will then be issued.

SAM-2010-1484-DEM

ALG18-2011 - CLEAR AREAS FOR WILDLIFE MANAGEMENT

* This permit is placed under Reserved status pending further review and coordination by the Corps of Engineers, Mobile District. Should this permit be re-authorized, a Public Notice announcement will then be issued.

SAM-2010-1485-DEM

ALG19-2011 - AGRICULTURAL TYPE ACTIVITIES FOR THE CREATION OF HABITAT OR FOOD PLOTS

* This permit is placed under Reserved status pending further review and coordination by the Corps of Engineers, Mobile District. Should this permit be re-authorized, a Public Notice announcement will then be issued.

SAM-2010-1486-DEM

ALG20-2011 - WATER MANAGEMENT

* This permit is placed under Reserved status pending further review and coordination by the Corps of Engineers, Mobile District. Should this permit be re-authorized, a Public Notice announcement will then be issued.

ALG21-2011 through ALG23-2011 – Reserved.

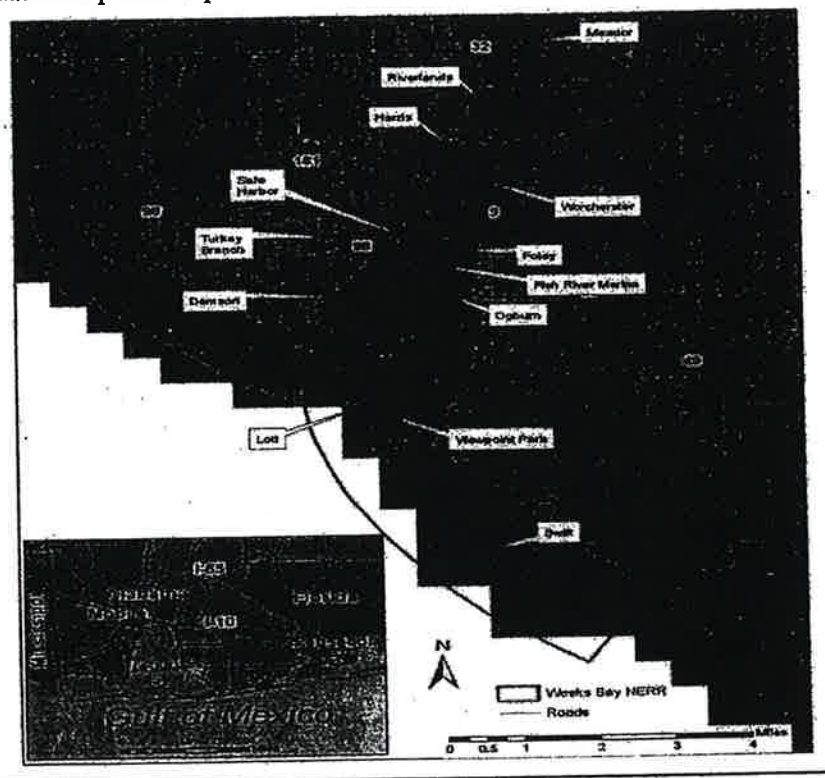
**GENERAL PERMITS
FOR THE
WEEKS BAY NATIONAL ESTUARINE RESEARCH RESERVE**

Permits ALG24 through ALG26 are specifically for activities within the recognized boundaries of the Weeks Bay National Estuarine Research Reserve (the Reserve). The Reserve establishes those areas dedicated to education, research and resource protection and subject to the policies, management strategies and rules of the Reserve as set forth in their management plan and as agreed upon by ADCNR, ADEM, and other applicable agencies.

The Reserve encompasses those properties currently owned by the State of Alabama dedicated to the Reserve and currently includes those lands brought into the Reserve since it was established in 1985. The Reserve includes: the water bottoms (submerged lands) up to the mean high tide line of Weeks Bay; the water bottoms of Fish and Magnolia Rivers, and their tributaries, up to the termination of tidal influence; the water bottoms of Bon Secour Bay adjacent to the Swift tract and north across the mouth of Weeks Bay; the Foley tract (178 acres); the Ogburn tract (157 acres); the Swift tract (615 acres); View

Point Park (2 acres); the Damson tract (360 acres); the Fish River Marina tract (22 acres); the Riverlands tract (90 acres); the Worcester tract (49 acres); the Harris tract (64 acres); the Turkey Branch tract (20 acres), the Meador tract, the Lott tract, and the Safe Harbor Tract.

The water bottoms within the Reserve, up to mean high tide, is considered to be the core areas of critical habitat where no disturbance should occur that would affect the integrity of that area. All other lands within the Reserve boundary should serve as a buffer to protect the core and provide additional protection for estuarine-dependent species.



The Weeks Bay Coastal Area is delineated as that portion of the Alabama coastal area surrounding Weeks Bay extending from the mouth of the Bon Secour River to Bryant Landing at the intersection of US Highway 98 and County Road 1. The Weeks Bay Coastal Area as delineated above is designated as a Geographic Area of Particular Concern (GAPC) in the Alabama Coastal Area Management Plan (ACAMP).

SAM-2010-1487-DEM

ALG24-2011 - CONSTRUCTION AND MODIFICATION OF PIERS, DECKS, AND THEIR NORMAL APPURTENANCES SUCH AS STAIRWAYS AND WALKWAYS.

- **Pier Length (ALG24):** For structures fronting Weeks Bay, the entire structure may extend from mean high tide (MHT) to the three-foot contour line or a depth of three feet at mean low tide (MLT) plus 20 feet waterward, or 300 feet waterward of MHT, whichever distance is shorter. For structures fronting riverine or canal areas, the distance waterward will be determined on a case-by-case basis.

- **Pier and/or Walkway Specifications (ALG24):** The maximum width of the pier shall be limited to five feet and the height of the pier must be at least five feet above MHT.
 - If the property is fronted by wetlands, the maximum width of the walkway shall be limited to five feet and the height of the walkway must be at least five feet above wetlands elevation.
 - The spacing between the decking boards of the walkway over wetlands and of the pier must be no less than 0.75-inch when finished to allow for light penetration. Light penetration may also be achieved by the use of metal grating.
 - Decking boards shall be no wider than 12-inches.
 - *NOTE: for ALG24-2011, the term "wetlands" or "wetland area" applies to a non-forested wetland, a marsh or a marsh fringe. This condition does not apply to forested wetlands.*
 - **Deck (ALG24):** There shall be no more than one deck area per single project. The deck shall be no larger than 10 feet by 10 feet (100 square feet including the pier width). The deck may be covered (roofed) and have screened walls (no enclosed or solid walls).
 - **Conditions (ALG24):**
 - Adverse impacts to the wetlands area must be avoided during construction and future use.
 - Support pilings for the walkway crossing wetlands shall be installed by hand with no heavy machinery operating in the wetland area.
 - Excess material excavated for installation of the pilings shall be removed from the wetland area so that the existing elevation remains unaltered.
 - **Excluded Activities (ALG24):** This permit does not authorize: (1) fueling facilities, (2) plumbing (toilets, water lines, etc.) and/or (3) habitable structures (defined by ADEM as "any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes") over the waters of the Reserve.
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SAM-2010-1488-DEM

ALG25-2011 - CONSTRUCTION / INSTALLATION OF MOORING PILINGS AND/OR BOAT HOISTS:

- A limit of two (2) residential-use boat berthing areas, including berthing for personal watercraft, can be authorized under this Permit. The boat berthing area(s) may be up to 20 feet by 26 feet. The berthing areas will be uncovered and non-enclosed.
 - A total of six (6) mooring pilings may be installed. The mooring pilings will be installed parallel to and a maximum of 20 feet waterward of the pier/deck/access dock.
 - One two-foot-wide by 10-foot-long boat access dock may be constructed per berthing area. The access dock(s) may be constructed lower than the pier decking.
 - Boats berthed at permitted structures must be a minimum of ten feet inside the lateral riparian line. *Contact ADCNR for guidance regarding the location of the riparian area boundaries.*
 - Berthed vessels should not neither physically preclude nor have the effect of precluding public access to public waters adjacent to the upland.
 - **Excluded Activities (ALG25):** This permit does not authorize: (1) fueling facilities, (2) plumbing (toilets, water lines, etc.) and/or (3) habitable structures (defined by ADEM as "any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes") over the waters of the Reserve.
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SAM-2010-1489-DEM

ALG26-2011 - SHORELINE / BANK PROTECTION: Shoreline protection shall only be considered in those areas where the riparian vegetation proves inadequate in preventing erosion. The shoreline protection is LIMITED TO the placement of riprap.

- Protection must be along the existing shoreline at the plane of ordinary high tide, or landward of all jurisdictional wetlands at the time of construction, unless otherwise specifically authorized.
- The activity shall not exceed one cubic yard per linear foot placed along the bank below the mean high tide line. Only clean material, free of exposed rebar, asphalt, plastic, soil, etc., may be used. Use of filter cloth is required.
- Protection fronting wetlands (ALG26): No wetlands shall be filled, although protection may be provided for wetland areas as long as the wetlands are not otherwise adversely impacted. If the area or any portion to be protected is wetlands, no fill will be placed on the wetlands and the shoreline protection must be designed to allow the normal hydrologic regime to be maintained in wetland areas.
- Bank Dressing (ALG26): Should the shore or bank require dressing, the bedding placed below the plane of mean high tide may not exceed an average of one (1) cubic yard per linear foot of shoreline being protected, unless otherwise specifically authorized.
- Excluded Activities (ALG26): This permit does not authorize (1) filling of wetlands or submerged grassbeds; (2) the construction of ancillary structures such as wing walls, groins, jetties, or any solid structures roughly perpendicular to the shore or bank; or (3) any activity to regain land lost to erosion, or otherwise accrete land.

CONDITIONS FOR GENERAL PERMITS WITHIN THE RECOGNIZED BOUNDARIES OF THE WEEKS BAY NATIONAL ESTUARINE RESEARCH RESERVE (WB-1 THROUGH WB-9): All Special and General Conditions, including all ADEM Water Quality Certification and Coastal Zone Management Consistency conditions are applicable in the Reserve. In addition, the following nine conditions (prefixed by WB) apply to the areas fronting the waters of the Reserve:

Riparian area boundaries and other riparian information: *Contact the Alabama Department of Conservation and Natural Resources – State Lands Division (ADCNR-SLD) for guidance regarding the location of the riparian area boundaries.*

WB-1. Ownership: Permit applicants must provide evidence of riparian ownership with an affirmation of accuracy as part of the application package.

WB-2. Lateral Riparian Lines: The burden of locating riparian lines is the responsibility of the riparian owner.

WB-3. Riparian Rights Area: All structures and other activities must be within the riparian rights area of the applicant and must be designated in a manner that will not restrict or otherwise infringe upon the riparian right of adjacent upland riparian owners. Configuration, location or design of the structure may not either physically preclude nor have the effect of precluding public access to public waters adjacent to the upland. It is recommended that the structure be centered on the applicant's property.

WB-4. Setback: All structures shall be setback a minimum of twenty-five (25) feet from the applicant's lateral riparian rights line. However, a 10-foot setback from the applicant's lateral riparian rights line may be approved should the applicant's riparian area be inadequate to maintain a 25-foot setback for each riparian rights line.

WB-5. Submerged Grassbeds: A survey for submerged grassbeds may be required prior to final evaluation of a permit application. Pier construction shall be done in such a way as to prevent damage to any submerged grassbeds.

WB-6. Lease Requirement: Facilities and activities which constitute exclusive use of state-owned submerged land, or have the effect of precluding public access to those lands, may require an appropriate lease from the ADCNR-SLD, who may require a separate permit, riparian easement and/or fee for the proposed activity. *Project coordination with ADCNR is the permittee's responsibility.*

WB-7. State and Local Requirements: It is the permittee's responsibility to comply with all State and local requirements applicable to the permittee's activity. This permit DOES NOT supersede any other mandated requirements.

WB-8. Dredging: No dredging to create channels, or any other similar bottom disturbance, is authorized by this General Permit. Prop dredging is strictly prohibited. *This condition does not apply to the minimum bottom disturbance which occurs during the installation of support or mooring pilings.*

WB-9. Community Piers: Communal areas which share riparian ownership may construct a "community pier" to provide riparian access. Permits will take into consideration the number of riparian owners involved in the project. Joint projects *must be coordinated* with the ADCNR-SLD.

ADMINISTRATION

Applications may be made to and authorizations issued by the following:

- a. Regulatory Division
U.S. Army Corps of Engineers
Post Office Box 2288
Mobile, Alabama 36628-0001
Telephone (251) 690-2658
- b. If a proposed activity is located on one of the following U.S. Army Corps of Engineers' lakes in the State of Alabama, the plans must be reviewed and approved by the Resource Manager. Additionally, the Resource Manager in some cases may issue an authorization in lieu of the Mobile District Office.

(1) Black Warrior – Tombigbee River Lakes (Coffeeville, Demopolis, Warrior Lakes):

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

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

U.S. Army Corps of Engineers
Holt Resource Office
Post Office Box 295
Peterson, AL 35478
(205) 553-9373

- (3) Alabama River Lakes (Woodruff Lake):
U.S. Army Corps of Engineers
Alabama River Lakes Site Office
8493 U.S. Highway 80 West
Hayneville, AL 36040-2934
(334) 872-9554
- (4) Alabama River Lakes (Dannelly, Claiborne Lakes):
U.S. Army Corps of Engineers
Millers Ferry Resource Office
1226 Powerhouse Road
Camden, AL 36726-9109
(334) 682-4244
- (5) Tennessee – Tombigbee Waterway (Gainesville & portions of Aliceville Lake):
U.S. Army Corps of Engineers
Tenn – Tom Project Management Office
3606 West Plymouth Road
Columbus, MS 39701-9504
(662) 327-2142

If the proposed activity is located on a lake managed by a power company, or similar entity with a lakeshore use plan, permit requests may be directed through them. NOTE: Not all lakes which meet these criteria have entered into agreements with the Mobile District which would allow this. Check with the Resource Manager to see if they qualify.

CONDITIONS

NOTE: The term “you” and its derivations, means the permittee or any future transferee. The term “district” or “we” or “us” refers to the Mobile District, U.S. Army Corps of Engineers, and/or resource agencies which administers the general permits within the area of their management.

I. SPECIAL CONDITIONS (SP-1 through SP-9): The above-described structures and/or activities may be authorized under these general permits subject to the following conditions:

SP-1. An authorization will not be issued if you have been found by this office to be in noncompliance with any prior Corps permit, or have been cited for unauthorized work, until the noncompliance or violation has been resolved.

SP-2. Authorizations will not be issued for structures and activities that are found to be hazardous to navigation, or may produce adverse effects on the chemical, physical, or biological integrity of water bodies such as dredging or filling of wetland areas. The term “wetland” means those areas that are inundated or saturated by surface or ground water at a frequently and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Such areas serve important purposes relating to water quality, fish and wildlife, recreation, and other elements in the general public interest. As environmentally vital areas, they constitute productive and valuable public resources, the unnecessary alteration or destruction of which are contrary to the public interest.

Activities which would result in the alteration or destruction of bottom land hardwoods may not be authorized unless full coordination with the U.S. Fish and Wildlife Service is performed.

SP-3. You must submit a complete Joint Application and satisfactory plans. You are advised that all State and local permits must be obtained before work can be initiated. *A copy of the Joint Application may be found at the Regulatory Website: <http://www.sam.usace.army.mil/RD/reg>.*

SP-4. Conformance with descriptions and qualities contained herein does not necessarily guarantee consideration and/or subsequent authorizations. Additionally, you must have the requisite property rights to perform the requested work.

SP-5. These general permits will be valid for a five-year period or until suspended, revoked, or extended. They may be suspended or revoked, in whole or in part, if it is determined that the cumulative effects of any activities pursuant to them adversely affect water quality, navigation, or other public interest factors. Such suspension shall be effective upon issuance of a public notice which shall indicate the date periodically to determine if continuation of these permits is in the overall public interest. These general permits will be re-advertised via public notice every five years as part of a public interest review.

SP-6. Authorizations will not be issued which will adversely impact threatened or endangered species, or their critical habitat.

SP-7. Authorizations will not be issued which will impact, affect, or otherwise degrade cultural resources such as archaeological, scientific, prehistoric, or historic sites or data. Activities which will impact cultural resources will be evaluated as individual permits. If you discover any previously unknown historic or archeological remains while accomplishing an authorized activity, you must immediately notify the Mobile District, U.S. Army Corps of Engineers of what you have found. We will initiate the Federal and State coordination required to determine if the site warrants recovery efforts or if it is eligible for listing in the National Register of Historic Places.

SP-8. Authorizations will not be issued for activities located in State or National Wild and Scenic streams, rivers, or components thereof, or other areas provided special protection unless the administering agency concurs.

SP-9. Authorization will be suspended if State water quality and/or coastal consistency standards are not met.

II. ADEM CONDITIONS FOR COASTAL ZONE MANAGEMENT CERTIFICATION: Pursuant to the Alabama Coastal Area Management Program, ADEM issued project consistency for a period not to exceed five (5) years from the date of issuance [1 October 2016]. ADEM reserves the right to suspend or revoke any general permit which may be determined to have a significant impact on coastal resources or which is found to be inconsistent with the management program. To ensure that activities which are conducted within the coastal area of Alabama and authorized by the general permits are in compliance with the Alabama Coastal Area Management Program, the consistency determination was conditioned as follows:

NOTE: Special condition CZM-4 only pertains to the Alabama General Permit ALG10-2011 - Living Shorelines.

CZM-1. Tear sheet General Permits may not be issued within Mobile and Baldwin Counties in Alabama.

CZM-2. A copy of the General Permit authorization and corresponding joint application for Mobile and Baldwin Counties must be provided to the ADEM Coastal/Facility Section, 4171 Commanders Drive, Mobile, Alabama 36615.

CZM-3. Failure by the permittee to comply with applicable water quality certification conditions may constitute a violation of this coastal consistency certification resulting in suspension of State certification to the permittee's individual General Permit authorization.

CZM-4. Applicable to ALG10-2011 - Living Shorelines only. For activities to be conducted in Mobile and Baldwin Counties the applicant shall provide copies to the ADEM Coastal Program Office of any/all wetland delineations, hydrographic surveys, submerged grassbed surveys and/or rhizome cross-sectional surveys required by the Corps of Engineers as part of the application.

III. ADEM CONDITIONS FOR WATER QUALITY CERTIFICATION (WQ-1 through WQ-12):

Because action pertinent to water quality certification is required by Section 401(a)(1) of the Clean Water Act, 33 U.S.C. Section 1251, *et. seq.*, and the Alabama Coastal Area Management Program, the ADEM issued official project certification for a period not to exceed five (5) years from the date of issuance, **1 October 2016**, of the Corps general permits referenced herein, unless extended in writing by ADEM. ADEM stated that if the project is conducted in accordance with the prescribed conditions, that there is reasonable assurance that the discharge resulting from the proposed activities as submitted will not violate applicable water quality standards established under Section 303 of the Clean Water Act and Section 22-22-9(g), Code of Alabama (1975). ADEM certified that there are no applicable limitations under Sections 301 and 302 nor applicable standards under Sections 306 and 307 of the Clean Water Act in regard to the activities specified. However, regulations promulgated by EPA requiring discharge permits for stormwater runoff from individual and commercial facilities may be applicable. The ADEM certification does not address the requirements of those regulations. The ADEM certification contains the below listed twelve (12) special conditions (WQ-1 through WQ-12):

WQ-1. During project implementation, the applicant shall ensure compliance with applicable requirements of ADEM Admin. Code Chapter 335-6-6 [National Pollutant Discharge Elimination System (NPDES)], Chapter 335-6-10 (Water Quality Criteria), and Chapter 335-6-11 (Water Use Classifications for Interstate and Intrastate Waters).

WQ-2. Please be advised that ADEM permit coverage may be required prior to commencing and/or continuing certain activities/operations relating to or resulting from the project. If you have any questions regarding ADEM regulated activity, or the need for NPDES permit coverage, please contact ADEM's Water Division at (334) 271-7823. If you have any questions regarding ADEM's regulated activity or the need for air permit coverage, please contact ADEM's Air Division at (334) 271-7869. If you have any questions regarding ADEM regulated activity or the need for hazardous, toxic, and/or solid waste permit coverage, please contact ADEM's Land Division at (334) 271-7730.

WQ-3. Upon the loss or failure of any treatment facility, best management practice (BMP), or other control, the applicant shall, where necessary to maintain compliance with this certification, suspend, cease, reduce or otherwise control work/activity and all discharges until effective treatment is restored. It shall not be a defense for the applicant in a compliance action that it would have been necessary to halt or reduce work or other activities in order to maintain compliance with the conditions of this certification.

WQ-4. The applicant shall retain records adequate to document activities authorized by this certification for a period of at least three years after completion of work/activity authorized by the certification. Upon written request, the applicant shall provide ADEM with a copy of any record/information required to be retained by this paragraph.

WQ-5. The applicant shall prepare a detailed Best Management Practice (BMP) Plan. Effective BMPs shall be implemented and continually maintained for the prevention and control of sediment and other sources of pollutants, including measures to ensure permanent revegetation or cover of all of disturbed areas, during and after project completion.

WQ-6. The applicant shall implement a Spill Prevention Control and Countermeasures (SPCC) Plan for all temporary or permanent onsite fuel or chemical storage tanks or facilities consistent with the requirements of ADEM Admin. Code R. 335-6-6-.12(r), Section 311 of the Federal Water Pollution Control Act, and 40 CFR Part 112. The applicant shall maintain onsite or have readily available sufficient oil and grease absorbing material and floatation booms to contain and clean-up fuel or chemical spills and leaks. The applicant shall immediately notify ADEM after becoming aware of significant visible oil sheen in the vicinity of the proposed activity. In the event of a spill with the potential to impact groundwater or other waters of the State, the applicant should immediately call the National Response Center at 1-800-424-8802 and the Alabama Emergency Management Agency at 1-800-843-0699. The caller should be prepared to report name, address and telephone number of person reporting spill, the exact location of the spill, the cause of the spill, the nearest downstream water with the potential to receive the spill, and the actions taken for containment and cleanup.

WQ-7. The applicant shall conduct or have conducted, at a minimum, weekly comprehensive site inspections until completion of the proposed activity to ensure that effective Best Management Practices (BMPs) are properly designed, implemented, and regularly maintained (i.e. repair, replace, add to, improve, implement more effective practice, etc.) to prevent/minimize to the maximum extent practicable discharges of pollutants in order to provide for the protection of water quality.

WQ-8. Additional, effective BMPs shall be fully implemented and maintained on a daily basis as needed to prevent to the maximum extent possible potential discharges of pollutants from activities authorized by this certification, directly to or to a tributary or other stream segment, that have the potential to impact a State water currently considered impaired [waterbody is identified on the 303(d) list, a total maximum daily load (TMDL) has been finalized for the waterbody, and/or the waterbody is otherwise considered a Tier 1 water pursuant to ADEM Admin. Code Ch. 335-6-10]. The applicant shall inspect all BMPs as often as necessary (daily if needed) for effectiveness, need for maintenance, and the need to implement additional, effective BMPs. Additional effective BMPs shall immediately be implemented as needed to ensure full compliance with the ADEM requirements and the protection of water quality in the impaired waterbody.

WQ-9. All construction and worker debris (e.g. trash, garbage, etc.) must be immediately removed and disposed in an approved manner. If acceptable offsite options are unavailable, effective onsite provisions for collections and control of onsite worker toilet wastes or gray waters (i.e. port-o-let, shower washdown, etc.) must be implemented and maintained. Soil contaminated by paint or chemical spills, oil spills, etc. must be immediately cleaned up or be removed and disposed in an approved manner. Also, the applicant shall manage and dispose of any trash, debris, and solid waste according to applicable state and federal requirements.

WQ-10. All materials used as fill, or materials used for construction of structures in a waterbody, must be non-toxic, non-leaching, non-acid forming, and free of solid waste or other debris.

WQ-11. The applicant shall implement appropriate measures to minimize the potential for a decrease in instream dissolved oxygen concentrations as a result of project implementation. In addition, the applicant shall ensure that the activities authorized by this certification do not significantly contribute to or cause a violation of applicable water quality standards for instream dissolved oxygen.

WQ-12. The applicant shall implement appropriate, effective BMPs, including installation of floating turbidity screens as necessary, to minimize downstream turbidity to the maximum extent practicable. The applicant shall visually monitor or measure background turbidity. The applicant must suspend operations should turbidity resulting from project implementation exceed background turbidity by more than 50 NTUs. Operations may resume when the turbidity decreases to within acceptable levels.

IV. GENERAL CONDITIONS (GC-1 through GC-5): In addition to Special Conditions (SP-1 through SP-9), conditions of Coastal Zone Management certification above, and conditions of Water Quality certification (WQ-1 through WQ-12) above, the following General Conditions (GC-1 through GC-6) will apply:

GC-1. The time limit for completing an authorized activity ends three (3) years from the date of the authorization. If you need more time to complete the authorized activity, submit your request for a time extension to us for consideration at least one month before the expiration date.

GC-2. Expiration of the General Permit Program. The Chief of Engineers will periodically review each of the permits within the General Permit Program and their conditions and will decide to modify, reissue, or revoke the permits. If a General Permit is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an authorized General Permit will remain authorized provided the activity is completed within twelve months of the date of the individual permit's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 325.7. Activities completed under the authorization of a General Permit which was in effect at the time the activity was completed continue to be authorized by that General Permit.

GC-3. You must maintain the authorized activity in good condition and in conformance with the terms and conditions of your authorization. You are not relieved of this requirement if you abandon the authorized activity.

GC-4. If you discover any previously unknown historic or archeological remains while accomplishing the authorized activity, you must immediately notify the Corps, Mobile District, of what you have found. We will initiate the Federal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

GC-5. If you sell the property associated with an authorization, you must obtain the signature of the new owner at the bottom of the authorization and forward a copy of it to us to validate the transfer.

GC-6. You must allow Federal and State resource agency representatives to inspect the proposed an/or authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your authorization.

FURTHER INFORMATION:

a. Limits of this Authorization:

- (1) An authorization does not obviate the need to obtain other Federal, State, or local authorization required by law.
- (2) An authorization does not grant any property rights or exclusive privileges.
- (3) An authorization does not authorize any injury to the property or rights of others.
- (4) An authorization does not authorize interference with any existing proposed Federal Project.

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

c. Reliance on Applicant's Data: In part, the determination by us that issuance of an authorization is not contrary to the public interest was made in reliance on the information you provided.

NOTE: You must have the requisite property rights to do any work pursuant to any of these permits.

d. Re-evaluation of Permit Decision: We may re-evaluate our decision on an authorization at any time the circumstances warrant. Circumstances that could require a re-evaluation include, but are not limited to, the following:

- (1) You fail to comply with the terms and conditions of your authorization.
- (2) The information provided by you in support of your application proves to have been false, incomplete, or inaccurate (See c. above.)
- (3) Significant new information surfaces which we did not consider in reaching the original public interest decision. Such a re-evaluation may result in a determination that is appropriate to use the suspension, modification, and relocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your authorization and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by us and if you fail to comply with such directives, we may, in certain situations (such as those specified in 33 CFR 209.170), accomplish the corrective measures by contract or otherwise, and bill you for the cost.

e. Time Extensions: General Condition (GC-1) establishes a time limit for the completion of the authorized activity. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, we will normally give favorable consideration to a request for an extension of this time limit, provided it does not exceed the expiration date of the Program. Also, refer to GC-2 regarding expiration of the Program.

f. Additional Coordination with the State Lands Division: Certain activities may require additional coordination with the Alabama Department of Conservation and Natural Resources (ADCNR), State Lands Division, regarding state property rights pertaining to the proposed activity. Please contact the State Lands Division for further information. The State Lands Division may be reached at: ADCNR, State Lands Division, 31115 Five Rivers Boulevard, Spanish Fort, Alabama 36527, or by telephone at

(251) 621-1238.

For all activities impacting public submerged lands, the following information is required by ADCNR:

(1) Ownership: Permit applicants must provide evidence of riparian ownership with an affirmation of accuracy as part of their application package to ADCNR.

(2) Lateral Riparian Lines: The burden of locating riparian lines is the responsibility of the riparian owner.

(3) Riparian Rights Area: All structures and other activities must be within the riparian rights area of the applicant and must be designated in a manner that will not restrict or otherwise infringe upon the riparian right of adjacent upland riparian owners. Configuration, location or design of the structure may not either physically preclude nor have the effect of precluding public access to public waters adjacent to the upland. It is recommended that the structure be centered on the applicant's property.

g. Failure to secure authorization as specified herein or failure to comply with conditions of any authorizations issued under these general permits may result in enforcement actions by the U.S. Army Corps of Engineers, Alabama Department of Environmental Management or the Alabama Department of Conservation and Natural Resources.

STEVEN J. ROEMHILDT, P.E.
Colonel, Corps of Engineers
District Commander

APPROVED BY: 

CRAIG J. LIVTEKEN
Chief, Regulatory Division

DATE: 9/30/2011

Stars: 3

Deaths: 9-10

Weather: 11

Dave Helms/City Editor
dhelms@press-register.com
Phone: 251-219-5692 **

SUNDAY, MAY 27, 2012

Baldwin commissioner questions limits on boathouses

Recent permits denied for structures larger than 100 square feet on Fish and Magnolia rivers

By Connie Baggett
cbaggett@press-register.com

FAIRHOPE — Some Baldwin County property owners are confused after being denied permits for what had been average-sized piers and boathouses along Fish and Magnolia rivers, according to

officials. Baldwin County Commissioner Tucker Dorsey, during a recent commission work session, questioned the fairness of enforcing regulations that limit boathouses to 10 feet by 10 feet, plus six uncovered mooring pilings for piers. Questions arose in March after permits for bigger structures were rejected citing regulations for the Weeks Bay Reserve that are listed in the reserve's management plan. According to correspondence between state and local officials,

"It's just unacceptable. The people on Magnolia and Fish rivers have done more to preserve those areas than any state agency ever has."

— Baldwin County Commissioner Tucker Dorsey

the regulations were adopted in 1995 and adapted in 2007. The Department of Environmental Management, the state Department of Conservation and Natural Resources and the U.S. Army Corps of Engineers.

In a letter to property owners Tim and Michelle Ballard, several agencies, including the Alabama Department of Environmental Management, the state Department of Conservation and Natural Resources and the U.S. Army Corps of Engineers.

Baldwin

continued from page 1C

residents.

"I just think it is fundamentally unfair to change the rules," Dorsey said. "And most boats on the river

are bigger than 10-by-10. What is the property worth if you can't build a decent-sized boathouse?" Dorsey said his research on the issue shows the regulations have been in place since 1992 but were never enforced until now. "It's just unacceptable,"

Commissioner Frank Burr said that the commission is planning to consider a resolution that would oppose the 100-square-foot size limitation for structures on the Fish and Magnolia rivers, and that he would throw his support behind that resolution.

ADEM's Scott Brown wrote that the reserve is defined as a Special Management Area, "giving it the highest priority for resources protection."

A structure the couple asked to build "does not comply" with size restrictions, Brown wrote.

Yet dozens of piers and boathouses built in recent years within the reserve boundaries are far larger, according to county commissioners and several area

See Baldwin, Page 10C



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

CESAM-RD-C-A

July 12, 2012

**SPECIAL PUBLIC NOTICE
U.S. ARMY CORPS OF ENGINEERS**

**PROPOSED ADDITION OF FOUR NEW GENERAL PERMITS TO THE
ALABAMA GENERAL PERMIT PROGRAM FOR MINOR STRUCTURES AND ACTIVITIES
WITHIN THE STATE OF ALABAMA, LOCATED WITHIN THE REGULATORY
BOUNDARIES OF THE
MOBILE DISTRICT, U.S. ARMY CORPS OF ENGINEERS**

SPECIAL PUBLIC NOTICE NUMBERS:

**PROPOSED GENERAL PERMITS FOR WATERS IN THE RIVERINE EXTENT OF THE
ESTABLISHED BOUNDARY OF THE WEEKS BAY NATIONAL ESTUARINE
RESEARCH RESERVE**

**SAM-2012-0791-DEM; ALG27 for Piers, Decks, Boat shelters and their Normal Appurtenances
SAM-2012-0792-DEM; ALG28 for Private Boat Ramps
SAM-2012-0793-DEM; ALG29 for Shoreline Protection
SAM-2012-0794-DEM; ALG30 for Dredging**

TO WHOM IT MAY CONCERN: The U.S. Army Corps of Engineers, (Corps) Mobile District, proposes authorization and issuance of the above listed four additional Alabama General Permits (ALG) for minor structures and activities located in waters of the United States, specifically within the riverine extent of the established boundary of the Weeks Bay National Estuarine Research Reserve (Reserve), and within the Regulatory boundaries of the Mobile District, subject to Section 10 of the Rivers and Harbors Act of 1899 (33 USC403), Section 404 of the Clean Water Act (33 USC 1344), and/or Section 4(e) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 USC 1333 (e)). The waterbody reaches within the Reserve boundary are:

- a. **FISH RIVER and tributaries upstream of the US Highway 98 bridge to the downstream side of the Baldwin County Road 32 Bridge and**
- b. **The mouth of the MAGNOLIA RIVER and tributaries eastward to the downstream side of the Baldwin County Road 49 Bridge.**

See enclosure for proposed Weeks Bay Riverine General Permits.

The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

a. Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

b. The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, State or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.

General permits are a way to reduce the burden of the regulatory program on the public and ensure timely issuance of permits while effectively administering the laws and regulations that establish and govern the program. In an effort to eliminate unnecessary duplication of efforts between agencies and to streamline the permitting process for routine projects resulting in only minimal impacts, the following ALG are proposed for authorization, renewal, and/or revision. The activities proposed as ALG include minor structures and activities within the overlapping regulatory jurisdictions of the Corps and the Alabama Department of Environmental Management (ADEM) and the Alabama Department of Conservation and Natural Resources – State Lands Division (SLD). The Corps will apply for certification from the State (1) in accordance with Section 401(a)(1) of the Clean Water Act, and upon completion of the required advertising, a determination relative to certification will be made by the ADEM; and (2) to insure that all proposed activities shall comply with and will be conducted in a manner that is consistent with the State Coastal Zone Management Program. A determination relative to consistency will be made by the ADEM.

General permits are reviewed every five years. The ALG contain certain limitations intended to protect the aquatic environment and natural and cultural resources. Conformance with the conditions contained in the ALG does not necessarily guarantee authorization under the General Permit. In most instances, a proposed project complying with the conditions of the ALG can receive specific authorization. Any proposed project not complying with the conditions of a General Permit will be evaluated as a Letter of Permission or Standard Permit and will be individually coordinated with third parties, including the Federal and State resource agencies.

For project specific authorization under the ALG, applicants are required to provide a completed Joint Application and Notification, U.S. Department of the Army Corps of Engineers, Alabama Department of Environmental Management form. The application form can be accessed at our website, www.sam.usace.army.mil/rd/reg. The following information is typically required for authorization under the ALG:

- a. Joint Application and Notification Form completed in its entirety;
- b. Applicant name, address, and contact information;
- c. Agent name, address, and contact information as well as an agent authorization statement from the applicant;
- d. Location of the proposed project including street address and latitude and longitude;
- e. Project description, purpose, and need;

- f. 8½ inches x 11 inches vicinity map indicating project location;
- g. 8½ inches x 11 inches diagrams and plan views of the entire property and the proposed project;
- h. 8½ inches x 11 inches cross-section diagrams of the proposed structures and/or areas of dredge and fill;
- i. Delineation of wetlands and/or submerged aquatic vegetation;
- j. Distance across the waterway; and
- k. Notification of any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places located on the subject property or would be affected by the proposed activity.

Drafts of the ALG proposed for issuance are attached as Attachment 1. The special conditions included are applicable to all proposed ALG.

This public notice is being distributed to all known interested persons in order to assist in developing facts on which a decision by the Corps can be based. For accuracy and completeness of the record, all data in support of or in opposition to the renewal of the general permit program should be submitted in writing setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition. The decision whether to reissue the general permit program will be based on an evaluation of the probable impact, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources.

The benefit which reasonably may be expected to accrue from the proposed activities must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the general permit will be considered, including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people.

The Corps is soliciting comments from the public; Federal, State, and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of the proposed activity. Any comments received will be considered by the Corps to determine whether to re-issue, modify, condition, or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider the proposed activity. Requests for public hearings shall state with particularity, the reasons for holding a public hearing.

Evaluation of the probable impacts involving deposits of dredged or fill material into "waters of the United States" will include the application of guidelines established by the Administrator of the U.S. Environmental Protection Agency.

The State Historic Preservation Officer (SHPO) will be contacted regarding the proposed reissuance of this General Permit. The Corps would coordinate all proposed activities with the SHPO regarding any properties listed in or eligible for the National Register which might be affected by the proposed work. This review would constitute the full extent of cultural resources investigations unless comment to this notice is received documenting that significant sites or properties exist which may be affected by this work, or that adequately documents that a potential exists for the location of significant sites or properties within the permit area. Copies of this notice are being sent to the State Historic Preservation Officer and the U.S. Department of the Interior, National Park Service, Division of Archeological Services.

The Corps would coordinate all proposed activities with the U.S. Department of the Interior List of Endangered and Threatened Wildlife and Plants regarding listed endangered or threatened species or their critical habitat.

Permit specific comments should refer to the applicable Public Notice Number and should be directed to the District Engineer, U.S. Army Engineer District, Mobile, Post Office Box 2288, Mobile, Alabama 36628-0001, Attention: Regulatory Division, with a copy to the Alabama Department of Environmental Management, Attention: Mr. Scott Brown, 4171 Commanders Drive, Mobile Alabama 36615, in time to be received not later than **August 12, 2012**.

If you have any questions concerning this publication, you may contact the Regulatory Division project manager, **Mr. Donald E. Mroczko**, via e-mail at donald.e.mroczko@usace.army.mil or telephone number **(251) 690-3185**. Please refer to the specific permit and its applicable Public Notice Number.

MOBILE DISTRICT
U.S. Army Corps of Engineers

Enclosures

Weeks Bay Reserve Criteria (Reserve Criteria) for Structures within the Riverine Extent of the Established Boundary of the Weeks Bay National Estuarine Research Reserve (Fish River and Magnolia River).

Purpose: These criteria would be applicable in the riverine segments of the state and federally established and recognized boundary of the Weeks Bay National Estuarine Research Reserve (Reserve). The expressed purpose of these criteria is the protection of public trust resources and water quality critical to the research, education and stewardship missions of the Reserve. This criteria in no manner eliminate the requirement to obtain all applicable permits required for the construction activity.

Reserve Criteria Riverine Locations: The waterbody reaches within the Reserve boundary on which these criteria apply are:

- a. Fish River and tributaries upstream of the US Highway 98 bridge to the downstream side of the Baldwin County Road 32 bridge.
- b. The mouth of the Magnolia River and tributaries eastward to the downstream side of the Baldwin County Road 49 bridge.

Definitions for Reserve Criteria:

- a. "Existing Structure" means an existing validly permitted activity or structure built before enactment of this rule and maintained in current serviceable condition and not in need of significant repair.
- b. "Pier" means a linear walkway built on pilings for the purpose of connecting structures built within the preempted area.
- c. "Preempted area" means the area of state owned submerged lands from which the traditional public uses have been or would be excluded to any extent by an activity. The area may include, but is not limited to, the state owned submerged lands occupied by the docks and other structures, the area between the docks and out to any mooring pilings and the area between the docks and the shoreline.
- d. "Public Trust Resources" means those living, mineral, land or water resources held in trust for the citizens of Alabama and managed by the Alabama Department of Conservation and Natural Resources.
- e. "Riparian rights" means those rights incident to lands bordering upon navigable waters, as recognized by the courts and common law.
- f. "Significant Repair" means repair to support pilings and/or a related support structure is required for the structure to provide safe access to navigable water.
- g. "Water dependent activity" means an activity which can only be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or state owned submerged lands for transportation, recreation, energy production or transmission, or source of water, and where the use of the water or state owned submerged lands is an integral part of the activity.

Reserve Criteria:

a. Construction Requirements:

1. Where practicable, construction of the pier must be located at the center of property based on setbacks. All setbacks must meet requirements of Alabama Department of Conservation and Natural Resources (ADCNR) Administrative Code 220-4-.09 *Near-shore management of activities, structures and other improvements on public trust tidal and submerged lands*. All piers and boathouses must be located to maximize the non-preempted areas between adjacent riparian use areas and permitted existing structures:

(a) Riparian Lots equal to or greater than 100 feet in width at the shoreline will maintain a 20-foot setback from each adjacent riparian use area,

(b) Riparian Lots equal to or greater than 75 feet in width at the shoreline will maintain a 10-foot setback from each adjacent riparian use area,

(c) Riparian Lots equal to or greater than 50 feet in width at the shoreline will maintain a setback of 5 feet from each adjacent riparian use area, or

(d) Riparian Lots with 25 feet or less in width at the shoreline will maintain a setback as determined on a case by case evaluation.

2. All activity associated with construction to comply with all state and local requirements applicable.

3. Facilities and activities which generate revenue or profit or constitute exclusive use of state-owned submerged land, or have the effect of precluding public access to those lands, require an appropriate lease from the Lands Division of the ADCNR.

4. All Applicable Permit(s) Required: These pier criteria in no manner eliminate the requirement to obtain all applicable permits required for the construction activity.

b. Riparian Rights (Water Access Rights):

1. All activity associated with construction must comply all state or local requirements governing riparian rights.

2. Configuration, location or design of the structure within the preempted area may neither physically preclude nor have the effect of precluding public access to public waters adjacent to the upland. It is recommended that the structure be centered on the applicant's property.

SAM-2012-00791-DEM

ALG27-2011 - PIERS, DECKS, BOAT SHELTERS AND THEIR NORMAL APPURTENANCES.

- **Pier Length:** Piers shall be of sufficient length to reach a navigational depth of 3 feet below ordinary low water adequate for the proposed use of the structures within the preempted area, to the extent that a hazard to navigation will not be created and not exceed 25% across the waterbody.
- **Pier Width and Height:** Piers shall be constructed on pilings that permit a reasonable unobstructed ebb and flow of the tide. The maximum width of the pier shall be limited to 5 feet. The minimum height shall be 5 feet based on the ordinary high water mark. If the property is fronted by a marsh or a marsh fringe, the maximum width of the walkway shall be limited to 5 feet and the height of the walkway must be not less than 5 feet above marsh ground elevation.
 - *NOTE: for ALG27-2011, the term "wetlands" or "wetland area" applies to a non-forested wetland, a marsh or a marsh fringe. This condition does not apply to forested wetlands.*
- Preempted area excluding pier connecting structure within the preempted area to the land shall not exceed **920 square feet**.
- Structures built in the preempted area excluding pier connecting structures to the land should be located at the waterward end of the pier and shall not be constructed over wetlands or over, in or immediately adjacent to submerged grassbeds.
- Structures built within the preempted area shall not be habitable. Structures may be screened in but have no rigid walls. No plumbing shall be located on the structure within the preempted area including the pier.
- It is permissible to cover structures within the preempted area with a roof or upper deck not to exceed 920 square feet.

- Boat access walkways are included in the preempted area dimensions but may be lower to the water.
 - **Community Piers:**
 - Communal areas which share riparian ownership may construct a community pier to provide access to waters of the State of Alabama. Design and construction must meet the stipulations set forth in the Criteria, but in no manner eliminate the requirements of other applicable federal, state and local permits required.
 - For two adjoining property owners constructing a shared structure in the preempted area, the structure must still meet the requirements set forth in the Criteria except that an additional 520 square feet may be preempted.
 - **Conditions:**
 - Impacts to Habitat: Adverse impacts to the marsh must be minimized to the maximum extent practicable during construction and future use.
 - All Applicable Permit(s) Required: These pier criteria in no manner eliminate the requirement to obtain all applicable permits required for the construction activity.
 - Construction of any structure within the preempted area is not allowed in, over or immediately adjacent to submerged grassbeds.
 - Pilings shall be driven and not jetted.
 - **Excluded Activities:** This permit does not authorize: (1) fueling facilities, (2) plumbing (toilets, water lines, etc.) and/or (3) habitable structures (defined by ADEM as "any structure which, by virtue of its design, size or appurtenances, is suitable for occupation as a residence on a temporary or permanent basis, or any similar structure used for commercial purposes") over the waters of the Reserve.
-

SAM-2012-00792-DEM

ALG28-2011 – PRIVATE BOAT RAMPS.

- Dredging of up to 25 cubic yards of material below ordinary high water for the construction of a private boat launch is allowed.
- Construction of a private boat ramp must be placed on a sandy shoreline that includes no emergent vegetation, contains wetlands nor is adjacent to submerged grassbeds.
- These pier criteria in no manner eliminate the requirement to obtain all applicable permits required for private boat ramp constructions including any dredging or filling activity. Dredging beyond the mean high tide requires ACDNR State Lands Division permit and fees. ADCNR State Lands Division regulations allow fill only for reclamation or by ADCNR Commissioner approval.

Note: All requirements stated in Alabama General Permit Program ALG07-2011 - CONSTRUCTION AND MODIFICATION OF BOAT RAMPS OR MARINE WAYS must be met.

SAM-2012-00793-DEM

ALG29-2011 – SHORELINE PROTECTION.

- Shoreline protection shall only be considered in those areas where the existing riparian vegetation proves inadequate in preventing erosion.
 - Shoreline protection must follow permit requirements established in the US Army Corp of Engineers (Corps) Alabama General Permit ALG10-2011 - Living Shorelines General Permit.
 - If river morphology and landscape topography allow for no alternative to shoreline protection, then all shoreline protection must meet requirements included in both the Alabama Department of Environmental Management Administrative Code r. 335-8-2-.06 and the ADCNR State Lands Division Regulation r. 220-4-.09.
 - Projects are reviewed on a case by case basis.
-

SAM-2012-00794-DEM

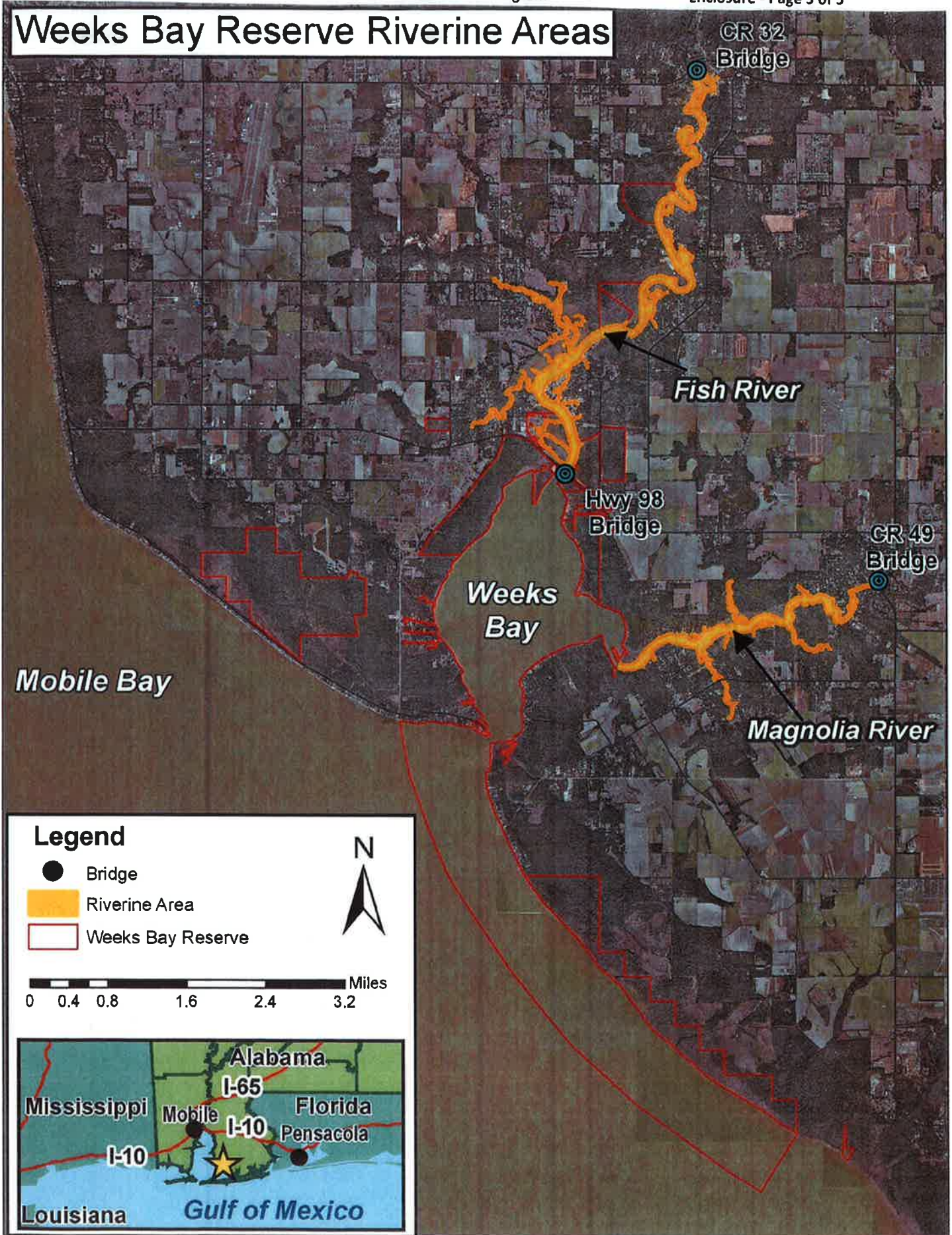
ALG30-2011 – DREDGING.

- New channel dredging may not be used in association with the construction of structures within the preempted area unless it can be demonstrated that a hazard to navigation would be created by extended structures to navigable depths.
- Dredging is limited to 25 cubic yards to reach or maintain access to navigable waters at 3 feet depth below the ordinary low water mark or to construct a boat launch.
- Dredging is allowed for the construction of a private boat ramp on a sandy shoreline that includes no emergent vegetation, contains wetlands or is immediately adjacent to submerged grassbeds. Disposal of spoil must occur in uplands or be hauled away.
 - Refer to 8) *Private Boat Ramps* for construction information.

Note: These criteria in no manner eliminate the requirement to obtain all applicable permits required for dredging activity. Dredging beyond the mean high tide requires ACDNR State Lands Division permit and fees.

Please refer to attached vicinity map (Enclosure – Page 5 of 5).

Weeks Bay Reserve Riverine Areas



F



REPLY TO
ATTENTION OF:

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

CESAM-RD-I-S

August 22, 2011

JOINT PUBLIC NOTICE SAM-2011-1062-SBC
U.S. ARMY CORPS OF ENGINEERS
AND
STATE OF ALABAMA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

**FILLING OF WATERS OF THE UNITED STATES IN CONJUNCTION WITH THE
CONSTRUCTION OF AN ACCESS ROAD AND TWO OIL WELL PADS NEAR THE
CITY OF EVERGREEN, CONECUH COUNTY, ALABAMA**

TO ALL CONCERNED: The U.S. Army Corps of Engineers, Mobile District, (Corps) has received an after-the-fact application for a Department of the Army permit pursuant to Section 404 of the Clean Water Act (33 USC 1344). This public notice is being distributed to all known interested persons to assist in developing facts on which a decision by the Corps can be based. Please communicate this information to interested parties.

APPLICANT: Midroc Operating Company
Attention: Mr. Donald L. Clark
Post Office Box 191407
Dallas, Texas 75219

AGENT: Wetland Resources
Attention: Ms. Gena Todia
Post Office Box 2694
Daphne, Alabama 36526

LOCATION OF WORK: On west side of Frank Carter Road, in Sections 13 and 14 of Township 5 North, Range 13 East, Evergreen, Conecuh County, Alabama (Latitude 31.395°N, Longitude -86.717°W).

NEAREST WATERBODY: Sepulga River, which drains to the Conecuh River.

PROJECT PURPOSE: The overall project purpose is to construct two well pads for the production of oil and to construct a road for access to the well pads.

PROPOSED WORK: The applicant has filled approximately 4.79 acres of bottomland hardwood wetlands to construct a 350 foot x 350 foot well pad site, a 350 foot x 425 foot well pad site, and a 25-30 foot wide by 2,800 foot long access road.

AVOIDANCE & MINIMIZATION: The applicant has stated the following concerning avoidance and minimization to Waters of the United States: "Wetland impacts have been minimized by keeping the road fill footprint to the narrowest feasible. The road easement is 50 feet wide, but only 25 to 30 feet have been filled." The Corps has not verified the adequacy of the

applicant's avoidance and minimization at this time.

MITIGATION: The applicant has stated the following concerning mitigation for impacts to Waters of the United States: "Mitigation credits will be purchased from an approved mitigation bank. Since there is no bank whose service area includes the project site, it is understood that a proximity factor will be applied." The Corps has not verified the adequacy of this mitigation proposal at this time.

WATER QUALITY: The applicant has applied for certification from the State of Alabama in accordance with Section 401(a)(1) of the Clean Water Act, and upon completion of the required advertising, a determination relative to certification will be made by the Alabama Department of Environmental Management.

HISTORIC PROPERTIES: In accordance with Section 106 of the National Historic Preservation Act, and Appendix C of 33 CFR 325, the undertaking defined in this notice is being considered for the potential to affect cultural and historic properties within the permit area. Although the extent of federal control and responsibility for these considerations are confined to the limits of the permit area for this particular project, the potential indirect effects that may occur to historic properties as a result of the this undertaking are also being considered. We are seeking comment from the State Historic Preservation Officer, federally-recognized American Indian tribes, local historical societies, museums, universities, the U.S. Department of the Interior, National Park Service, Division of Archeological Services, and concerned citizens regarding the existence or the potential for existence of significant cultural and historic properties within the permit area.

ENDANGERED SPECIES: The U.S. Fish and Wildlife Service (USFWS) lists 8 endangered, threatened, or candidate species as occurring or potentially occurring in Conecuh County. Preliminary review of this application and the U.S. Department of the Interior List of Endangered and Threatened Wildlife and Plants indicate that the activities at the project site may affect but not adversely affect listed endangered or threatened species, or their critical habitat. This determination is being coordinated with the U.S. Fish and Wildlife Service via this Public Notice.

COMMENTS: This public notice is being distributed to all known interested persons and serves to solicit comments from the public, Federal, State, and local agencies and officials, Indian Tribes, and other interested parties, in order to assist in developing facts on which a decision by the U.S. Army Corps of Engineers (Corps) can be based.

Any comments received will be considered by the Corps to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National

Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state with particularity, the reasons for holding a public hearing.

For accuracy and completeness of the record, all data in support of or in opposition to the proposed work should be submitted in writing setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition. The decision whether to issue a permit will be based on an evaluation of the probable impact, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources.

The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people.

Correspondence concerning this notice should refer to Public Notice Number SAM-2011-1062-SBC and should be directed to:

District Engineer
U.S. Army Engineer District, Mobile
Attention: Regulatory Division, Inland Branch
Post Office Box 2288
Mobile, Alabama 36628-0001

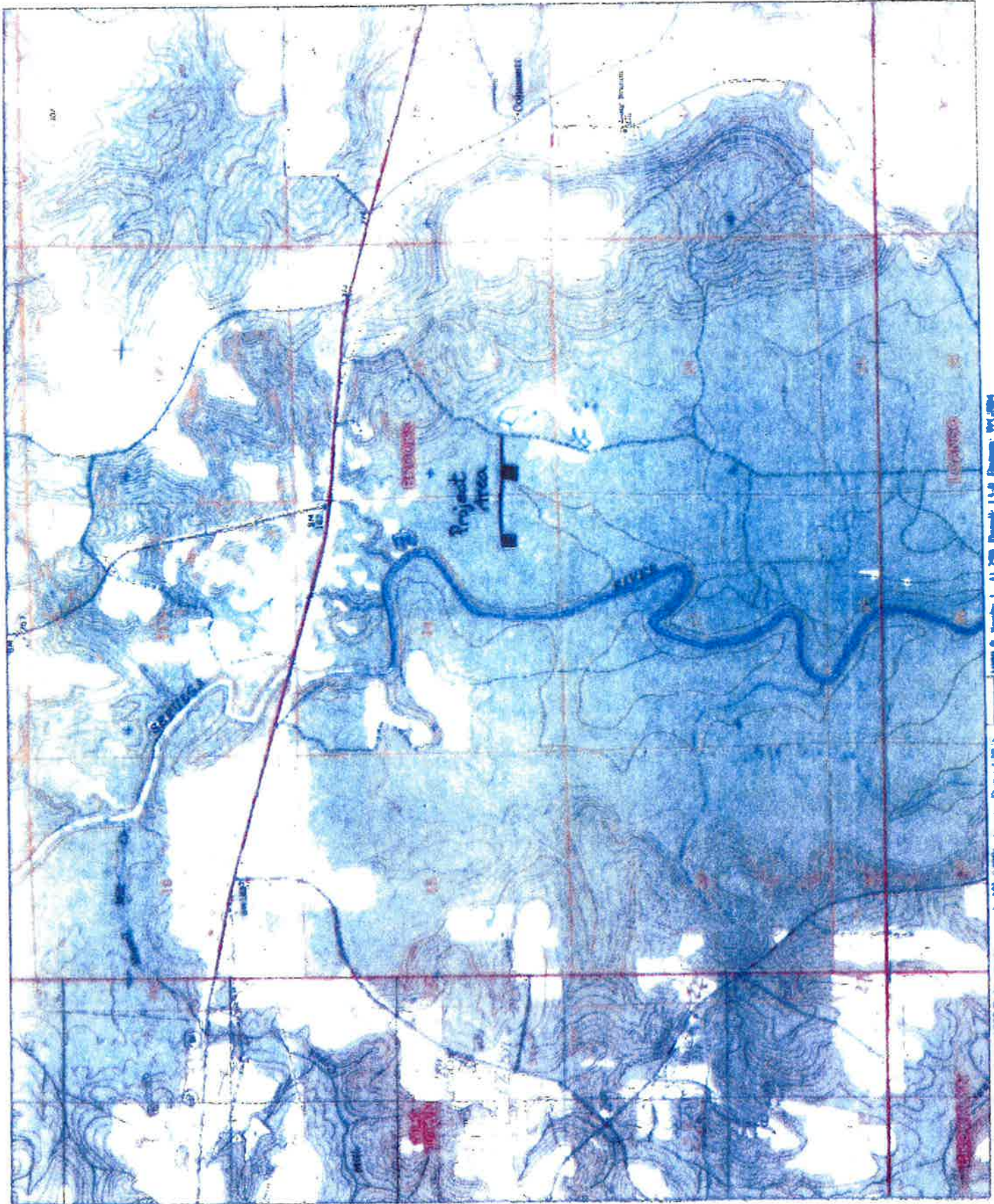
With copies to:

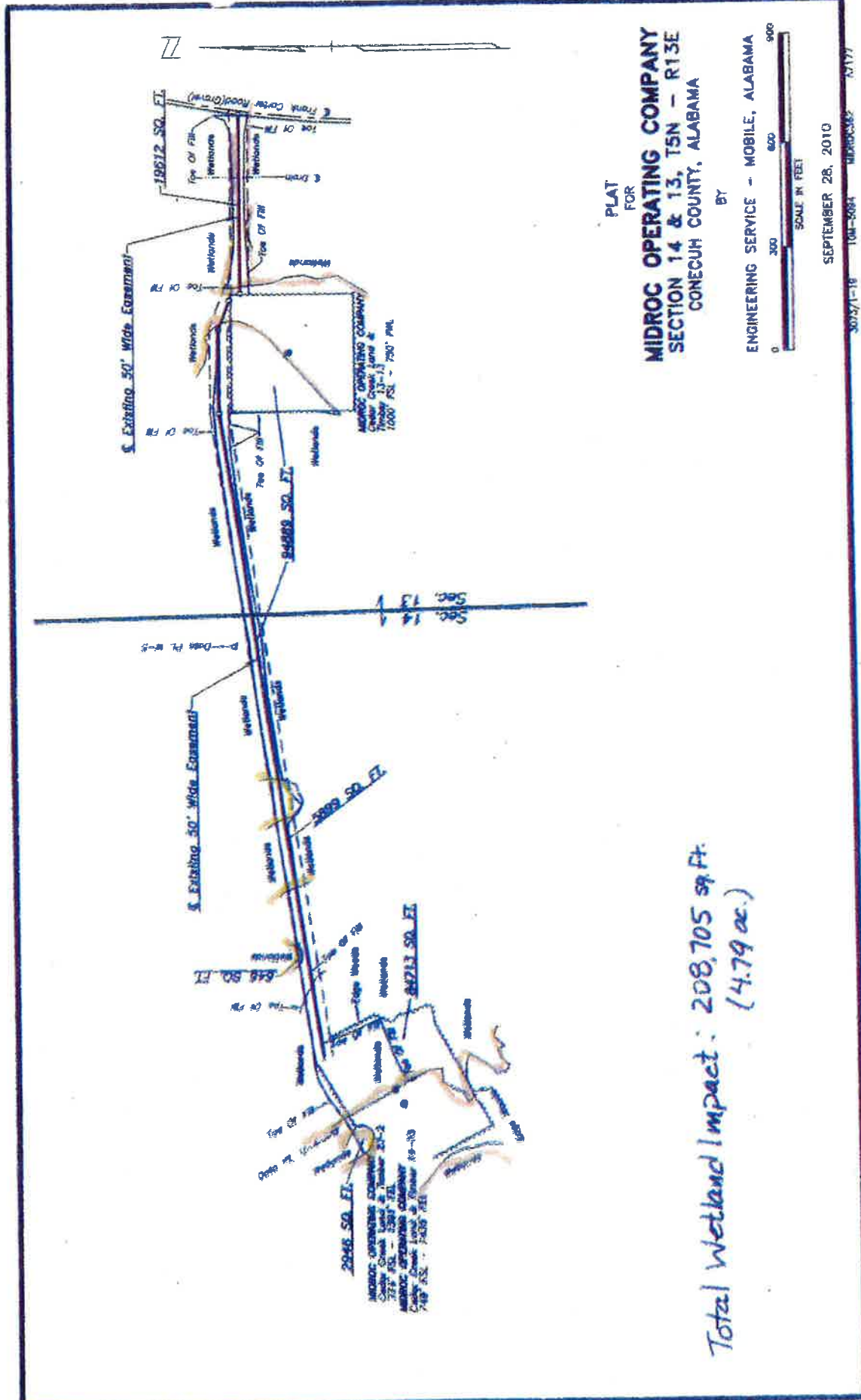
Alabama Department of Environmental Management
Water Division
1400 Coliseum Boulevard
Montgomery, Alabama 36110

Comments should be received no later than 30 days from the date of this Public Notice.

If you have any questions concerning this publication, you may contact the project manager, Mr. S. Brad Crosson at telephone number (251) 694-3664, or via e-mail at steven.b.crosson@usace.army.mil Please refer to the above public notice number.







PLAT FOR
MIDROC OPERATING COMPANY
 SECTION 14 & 13, T5N - R13E
 CONECUH COUNTY, ALABAMA

BY
 ENGINEERING SERVICE - MOBILE, ALABAMA



SEPTEMBER 26, 2010
 302571-18 101-2084 MIDROC382 2177

Total Wetland Impact: 208,705 sq. ft.
 (4.79 ac.)

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

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

October 11, 2011

MIDROC OPERATING COMPANY
ATTN DONALD CLARK
P O BOX 191407
DALLAS TX 75217

RE: Clean Water Act (CWA) Section 401 Water Quality Certification Waived
Corps of Engineers (COE) JPN# SAM-2011-01062-SBC Issued August 22, 2011
After-The-Fact wetland fill for the purpose of construction of an access road and two well pads
Conecuh County (035)

Dear Mr. Clark:

This office has completed a review of the above-referenced joint public notice and all associated materials submitted related to the proposed project. Comments made during the public notice period have also been forwarded to us for review.

From our review it is understood that the applicant has filled approximately 4.79 acres of bottomland hardwood wetlands to construct a 350 foot x 350 foot well pad site, a 350 foot x 425 foot well pad site, and a 25-30 foot wide by 2, 800 foot long access road.

As a matter of practice, this office does not issue water quality certification in regard to completed projects. Therefore, pursuant to Section 401 of the Clean Water Act, the Department hereby waives certification for the after-the-fact project referenced above. This waiver of authority under the Act does not relieve the applicant from the obligation to comply fully with the Alabama Water Pollution Control Act.

By copy of this letter, the Department requests that the Mobile District Corps of Engineers give consideration to the following:

1. During project implementation, the applicant should ensure compliance with applicable requirements of ADEM. Admin. Code Chapter 335-6-6 [National Pollutant Discharge Elimination System (NPDES)], Chapter 335-6-10 (Water Quality Criteria), and Chapter 335-6-11 (Water Use Classifications for Interstate and Intrastate Waters).
2. Please be advised that ADEM permit coverage may be required prior to commencing and/or continuing certain activities/operations relating to or resulting from the project. If you have any questions regarding ADEM regulated activity or the need for NPDES permit coverage, please contact ADEM's Water Division at (334) 271-7823. If you have any questions regarding ADEM regulated activity or the need for air permit coverage, please contact ADEM's Air Division at (334) 271-7869. If you have any questions regarding ADEM regulated activity or the need for hazardous, toxic, and/or solid waste permit coverage, please contact ADEM's Land Division at (334) 271-7730.
3. Upon the loss or failure of any treatment facility, best management practice (BMP), or other control, the applicant should, where necessary to maintain compliance with this certification, suspend, cease, reduce or otherwise control work/activity and all discharges until effective treatment is restored. It shall not be a defense for the applicant in a compliance action that it would have been necessary to halt or reduce work or other activities in order to maintain compliance with the conditions of this certification.
4. The applicant should retain records adequate to document activities authorized by this certification including but not limited to, inspection reports, monitoring information, copies of any reports and all data used to complete the above reports or the application for this certification, for a period of at least three years after completion of work/activity authorized by the certification. Upon written request, the applicant shall provide ADEM with a copy of any record/information required

Birmingham Branch
110 Vulcan Road
Birmingham, AL 35209-4702
(205) 942-6168
(205) 941-1803 (FAX)

Decatur Branch
2715 Sandlin Road, S. W.
Decatur, AL 35603-1333
(256) 353-1713
(256) 340-9359 (FAX)



Mobile Branch
2204 Parameter Road
Mobile, AL 36618-1131
(251) 450-3400
(251) 479-2593 (FAX)

Mobile-Grand
4171 Commenders Drive
Mobile, AL 36618-1421
(251) 432-6533
(251) 432-6568 (FAX)

to be retained by this paragraph. The applicant shall notify ADEM in writing upon completion of the proposed project that the pollution control measures specified in the Corps permit and any special conditions specified by ADEM have been properly implemented.

5. The applicant should prepare a detailed Best Management Practices (BMP) Plan. Effective BMPs should be implemented and continually maintained for the prevention and control of nonpoint and other sources of pollutants, including measures to ensure permanent revegetation or cover of all disturbed areas, during and after project implementation.
6. The applicant should implement a Spill Prevention Control and Countermeasures (SPCC) Plan for all temporary and permanent onsite fuel or chemical storage tanks or facilities consistent with the requirements of ADEM Admin. Code R. 335-6-6-.12(r), Section 311 of the Federal Water Pollution Control Act, and 40 CFR Part 112. The applicant should maintain onsite or have readily available sufficient oil & grease absorbing material and flotation booms to contain and clean-up fuel or chemical spills and leaks. The applicant shall immediately notify ADEM after becoming aware of a significant visible oil sheen in the vicinity of the proposed activity. In the event of a spill with the potential to impact groundwater or other waters of the State, the applicant should immediately call the National Response Center at 1-800-424-8802 and the Alabama Emergency Management Agency at 1-800-843-0699. The caller should be prepared to report the name, address and telephone number of person reporting spill, the exact location of the spill, the company name and location, the material spilled, the estimated quantity, the source of spill, the cause of the spill, the nearest downstream water with the potential to receive the spill, and the actions taken for containment and cleanup.
7. The applicant should conduct, at a minimum, weekly comprehensive site inspections to ensure that effective Best Management Practices (BMPs) are properly designed, implemented, and regularly maintained (i.e. repair, replace, add to, improve, implement more effective practice, etc.) utilizing good engineering practices to prevent/minimize to the maximum extent practicable discharges of pollutants in order to provide for the protection of water quality. The inspections should be conducted by a qualified credentialed professional (QCP), qualified personnel under the direct supervision of a QCP, or an ADEM recognized qualified credentialed inspector (QCI), until completion of the proposed activity.
8. Additional, effective BMPs should be fully implemented and maintained on a daily basis as needed to prevent to the maximum extent possible potential discharges of pollutants from activities authorized by this certification, directly to or to a tributary or other stream segment, that have the potential to impact a State water currently considered impaired [waterbody is identified on the Alabama 303(d) list, a total maximum daily load (TMDL) has been finalized for the waterbody, and/or the waterbody is otherwise considered a Tier I water pursuant to ADEM Admin. Code Ch. 335-6-10]. The applicant should inspect all BMPs as often as is necessary (daily if needed) for effectiveness, need for maintenance, and the need to implement additional, effective BMPs. Additional effective BMPs should immediately be implemented as needed and may include but are not limited to sediment retention basins, greater capacity in sediment retention structures, hydroseeding with application of non-toxic tackifiers, grass sodding, non-toxic chemical treatment, erosion control blankets, other effective innovative/alternative technologies, etc. to ensure full compliance with ADEM requirements and the protection of water quality in the impaired waterbody.
9. All construction and worker debris (e.g. trash, garbage, etc.) should be immediately removed and disposed in an approved manner. If acceptable offsite options are unavailable, effective onsite provisions for collection and control of onsite worker toilet wastes or gray waste waters (i.e. port-o-let, shower washdown, etc.) should be implemented and maintained. Soil contaminated by paint or chemical spills, oil spills, etc. should be immediately cleaned up or be removed and disposed in an approved manner. Also, the applicant should manage and dispose of any trash, debris, and solid waste according to applicable state and federal requirements.
10. All materials used as fill, or materials used for construction of structures in a waterbody, should be non-toxic, non-leaching, non-acid forming, and free of solid waste or other debris.
11. The applicant should implement appropriate measures to minimize the potential for a decrease of instream dissolved oxygen concentrations as a result of project implementation. In addition, the applicant should ensure that the activities authorized by this certification do not significantly contribute to or cause a violation of applicable water quality standards for instream dissolved oxygen.

12. The applicant should implement appropriate, effective BMPs, including installation of floating turbidity screens as necessary, to minimize downstream turbidity to the maximum extent practicable. The applicant should visually monitor or measure background turbidity. The applicant should suspend operations should turbidity resulting from project implementation exceed background turbidity by more than 50 NTUs. Operations may resume when the turbidity decreases to within acceptable levels.

In recognition that projects are site specific in nature and conditions can change during project implementation, the Department reserves the right to require the submission of additional information or require additional management measures to be implemented, as necessary on a case by case basis, in order to ensure the protection of water quality.

Please be advised that liability and responsibility for compliance with this waiver of certification are not delegable by contract or otherwise. The applicant shall ensure that any agent, contractor, subcontractor or other person employed by, under contract, or paid a salary by the applicant complies with this waiver of certification. Any violations resulting from the actions of such person shall be considered violations of this waiver of certification.

ADEM waiver of certification decisions are predicated on current regulatory requirements, established engineering standards and technical considerations, best management practices information, and formal administrative procedures in conformance with Departmental regulations and applicable Alabama law. Issuance of a waiver of certification by ADEM neither precludes nor negates an operator/owner's responsibility or liability to apply for, obtain, or comply with other ADEM, federal, state, or local government permits, certifications, licenses, or other approvals.

Finally, this waiver of certification in no way purports to vest in the applicant title to lands now owned by the State of Alabama nor shall it be construed as acquiescence by the State of Alabama of lands owned by the State of Alabama that may be in the applicant's possession.

Should you have any questions on this or related matters, please do not hesitate to contact Aaron Peters, Office of Field Services, by email at dapeters@adem.state.al.us or by phone at (334) 394-4310.

Sincerely,



Steven O. Jenkins, Chief
Field Operations Division

SOJ/DAP

File: WQ401

c: Inland Branch, Mobile COE
Permits & Services Division, ADEM
Wetlands Section, EPA Region IV



REPLY TO
ATTENTION OF:

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

oil & gas well

*NWP 12
(with line)
Pad*

CESAM-RD-I-S

April 25, 2012

JOINT PUBLIC NOTICE SAM-2012-0404-SBC
U.S. ARMY CORPS OF ENGINEERS
AND
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF POLLUTION CONTROL

PROPOSED FILLING OF WATERS OF THE UNITED STATES IN CONJUNCTION
WITH THE CONSTRUCTION OF AN OIL AND NATURAL GAS WELL PAD AND
ASSOCIATED PIPELINES IN THE COMMUNITY OF HIWANNEE, WAYNE COUNTY,
MISSISSIPPI.

TO ALL CONCERNED: The U.S. Army Corps of Engineers, Mobile District, (Corps) has received an application for a Department of the Army permit pursuant to Section 404 of the Clean Water Act (33 USC 1344). This public notice is being distributed to all known interested persons to assist in developing facts on which a decision by the Corps can be based. Please communicate this information to interested parties.

APPLICANT: Tellus Operating Group, LLC
Attention: Mr. Clarke Thomas
602 Crescent Place, Suite 100
Ridgeland, Mississippi 39157

AGENT: Wildlife Technical Services, Incorporated
Attention: Mr. J. Clay Cromwell
Post Office Box 820188
Vicksburg, Mississippi 39182-0188

LOCATION OF WORK: On Doveland Road, approximately 0.5 miles west of U.S. Highway 45, in Sections 16 and 21 of Township 10 North, Range 7 West, Hiwannee, Wayne County, Mississippi (Latitude 31.8302° N, Longitude -88.7008° W).

NEAREST WATERBODY: Unnamed Tributary to the Chickasawhay River.

PROJECT PURPOSE: The overall project purpose is to expand an existing oil and natural gas well pad and install pipelines to transport produced fluids from the well.

PROPOSED WORK: The applicant proposes to grade and permanently fill approximately 0.549 acre of forested wetlands in order to expand an existing oil and natural gas well pad at

CESAM-RD-I

Public Notice Number SAM-2012-0404-SBC

BOE 16-14 #2 drill site. Wetland impacts proposed for the original well pad site were verified on March 12, 2010 under Nationwide Permit 12, Utility Line Activities, which authorized approximately 0.43 acre of permanent fill. This previously permitted activity has been completed.

The proposed project would increase the current size of the well pad at the BOE 16-14 #2 drill site from 120' x 190' (.52 acre) to 225' x 250' (1.29 acres) in order to provide additional area for the incorporation of production and process equipment for future field pressure maintenance. New equipment would include an injection compressor, flash gas compressor, air compressor, 400-barrel capacity tank with firewalls, pig catcher, meter run, separators, flare stock, monitoring equipment, and miscellaneous connecting pipe. The expansion would also allow for operations at the site to be in compliance with the Mississippi Oil & Gas Board-mandated 100-foot distance between fired vessels, tanks, flares, and wellheads.

The applicant also proposes to install two 4" to 6" pipelines and three 2" to 4" pipelines extending from the BOE 16-14 #2 drill site to the Hiwannee 16-12 #1 drill site located to the northwest. These pipelines would extend approximately 2,369 linear feet and would be located within a 40-foot easement. Installation of the pipelines would be accomplished by horizontal directional drilling (HDD) techniques, with no impacts to any wetlands or other waters of the United States. The pipelines will cross the Chickasawhay River (a Section 10 Navigable Water) and will be installed a minimum of 15 feet below the river bottom. The 40-foot pipeline easement will not be cleared, but will be marked with identification signs.

In addition, the applicant proposes to install a single pipeline between the BOE 16-14 #2 drill site and the Bishop Cooley Tank Battery which is located directly south. This pipeline would be approximately 2061 linear feet in length and be installed within an existing 30-foot pipeline easement that follows an existing gravel road extending from the Doveland Road. This pipeline would be installed using open-trench methods, with material temporarily sidecast within the easement. This pipeline would cross three emergent wetland areas, and the activity would temporarily impact approximately 0.135 acre of wetlands. All temporary impact areas would be restored to pre-impact elevations.

AVOIDANCE & MINIMIZATION: The proposed project is an expansion of an existing drill site, and therefore is limited to the area immediately surrounding the site. The existing drill site is completely surrounded by wetlands which would preclude any expansion without impacts to those waters of the United States. Impacts were minimized by limiting the size of the proposed well pad to the minimum necessary to provide the functions required. The applicant also minimized impacts by expanding the site to the north and west and thereby incorporating a small area of uplands to the proposed site, and avoiding an intermittent stream located to the east of the existing site.

CESAM-RD-I

Public Notice Number SAM-2012-0404-SBC

Impacts due to installation of the pipelines were minimized by utilization of HDD techniques where possible and by utilization of an existing pipeline easement. The Corps has not verified the adequacy of the applicant's avoidance and minimization at this time.

MITIGATION: The applicant has stated the following concerning mitigation for unavoidable impacts to Waters of the United States: "there are currently no approved mitigation banks with a service area that encompasses our project site. As a result, it is respectfully requested that all compensatory wetland mitigation requirements be completed within the Cohay Conservation Area Permittee Responsible Mitigation (PRM) area." "The Cohay Conservation Area is located in a portion of Section 33, Township 2 North, Range 7 East, Smith County, Mississippi. The mitigation site is also located within the 8-digit Hydrologic Unit Code (HUC) 03170004. The mitigation site would provide in-kind mitigation located within the same watershed as the project site." The Corps has not verified the adequacy of this mitigation proposal at this time.

WATER QUALITY: The applicant has applied for certification from the State of Mississippi in accordance with Section 401(a)(1) of the Clean Water Act, and upon completion of the required advertising, a determination relative to certification will be made by the Mississippi Department of Environmental Quality Office of Pollution Control.

HISTORIC PROPERTIES: The applicant requested a cultural resources assessment from the Mississippi Department of Archives and History (MDAH) prior to submitting their application. The MDAH subsequently issued a letter of concurrence with the proposed project, stating that "no cultural resources are likely to be affected" by the project as proposed.

In accordance with Section 106 of the National Historic Preservation Act, and Appendix C of 33 CFR 325, the undertaking defined in this notice is being considered for the potential to affect cultural and historic properties within the permit area. Although the extent of federal control and responsibility for these considerations are confined to the limits of the permit area for this particular project, the potential indirect effects that may occur to historic properties as a result of the this undertaking are also being considered. In addition to the State Historic Preservation Officer, we are seeking comment from the federally-recognized American Indian tribes, local historical societies, museums, universities, the U.S. Department of the Interior, National Park Service, Division of Archeological Services, and concerned citizens regarding the existence or the potential for existence of significant cultural and historic properties within the permit area.

ENDANGERED SPECIES: The applicant submitted a request to the U.S. Fish and Wildlife Service (USFWS) for a review of the project in regards to potential impacts to threatened and endangered species. The USFWS responded with a letter requesting that the applicant avoid removing large bald cypress or tupelo gum trees that might provide den habitat for the Louisiana black bear (*Ursus a. luteolus*).

CESAM-RD-I

Public Notice Number SAM-2012-0404-SBC

Preliminary review of this application and the U.S. Department of the Interior List of Endangered and Threatened Wildlife and Plants indicate that the proposed activity may affect but not adversely affect listed endangered or threatened species. This determination is being coordinated with the U.S. Fish and Wildlife Service via this Public Notice.

COMMENTS: This public notice is being distributed to all known interested persons and serves to solicit comments from the public, Federal, State, and local agencies and officials, Indian Tribes, and other interested parties, in order to assist in developing facts on which a decision by the U.S. Army Corps of Engineers (Corps) can be based.

Any comments received will be considered by the Corps to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state with particularity, the reasons for holding a public hearing.

For accuracy and completeness of the record, all data in support of or in opposition to the proposed work should be submitted in writing setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition. The decision whether to issue a permit will be based on an evaluation of the probable impact, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources.

The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people.

CESAM-RD-I

Public Notice Number SAM-2012-0404-SBC

Correspondence concerning this notice should refer to Public Notice Number SAM-2012-0404-SBC and should be directed to:

District Engineer
U.S. Army Engineer District, Mobile
Attention: Regulatory Division, Inland Branch South
Post Office Box 2288
Mobile, Alabama 36628-0001

A copy of all correspondence is to be sent to:

Mississippi Department of Environmental Quality
Office of Pollution Control
Post Office Box 2261
Jackson, Mississippi 39225

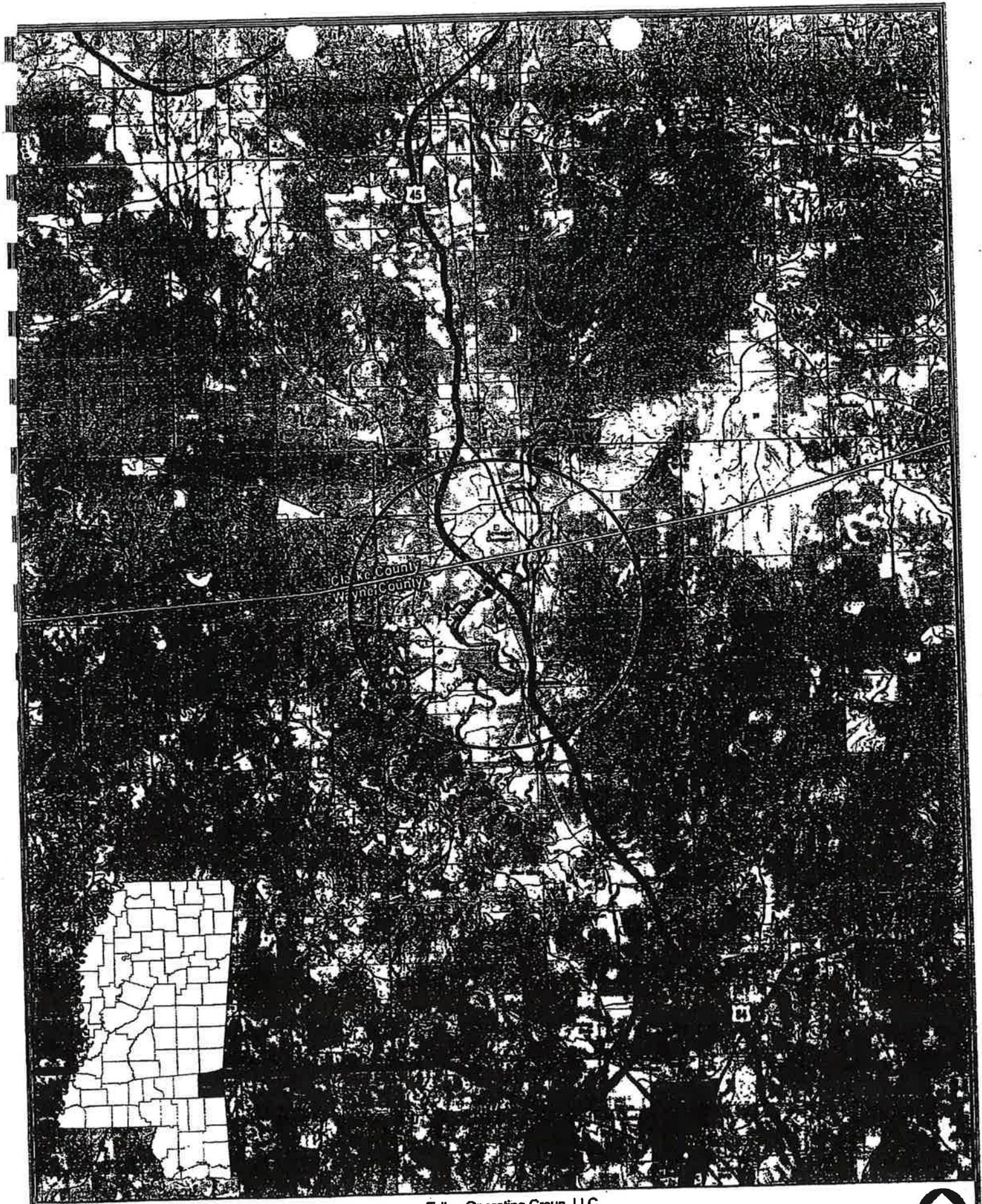
Comments should be received no later than **30 days** from the date of this Public Notice.

If you have any questions concerning this publication, you may contact the project manager, Mr. S. Brad Crosson at telephone number (251) 694-3664, or via e-mail at steven.b.crosson@usace.army.mil Please refer to the above public notice number.

For additional information about our Regulatory Program, please visit our web site at www.sam.usace.army.mil/RD/reg, and please take a moment to complete our customer satisfaction survey while you're there. Your responses are appreciated and will allow us to improve our services.

MOBILE DISTRICT
U.S. Army Corps of Engineers

Enclosures



Cis Ke County
Wynne County

Tellus Operating Group, LLC
BOE 16-14 #2 Site Expansion Project
Mississippi County, Mississippi



16

Hiwannee 16-12 #1










BOE 16-14 #2 to
Hiwannee 16-12 #1
Pipeline (HDD)

BOE 16-14 #2

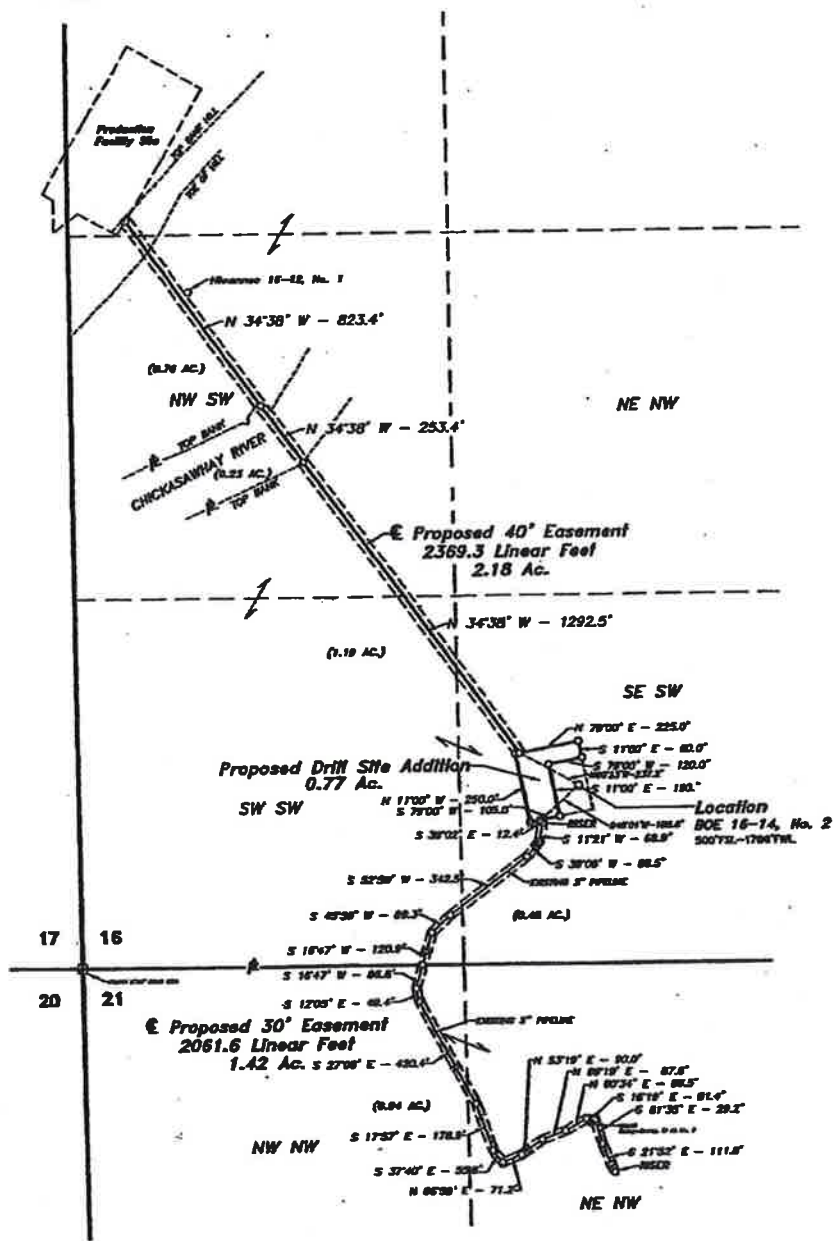
BOE 16-14 #2 Tank
Battery Pipeline

Bishop Cooley
Tank Battery

Legend

-  BOE 16-14 #2
-  BOE 16-14 #2 Expansion (0.75 ac)
-  BOE 16-14 #2 Tank Battery Pipeline
-  Hiwannee 16-12 #1
-  BOE 16-14 #2 to Hiwannee 16-12 #1 Pipeline (HDD)
-  Bishop Cooley Tank Battery
-  Scrub-Shrub Wetland (0.549 ac)
-  Emergent Wetland (0.135 ac)
-  GPS Waypoint





PROPOSED DRILL SITE ADDITION & 30° EASEMENTS

FOR

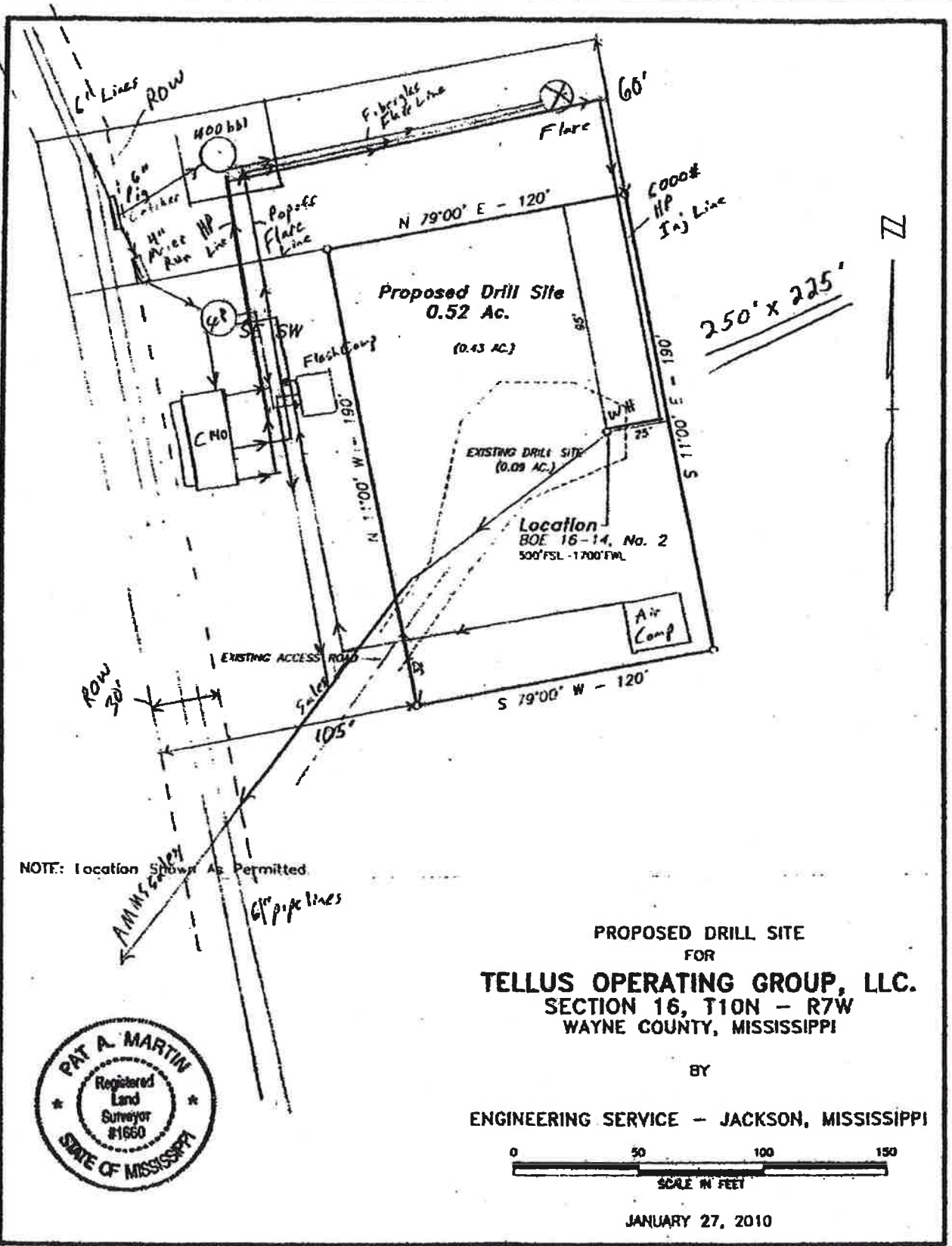
TELLUS OPERATING GROUP, LLC.
SECTIONS 16 & 21, T10N - R7E
WAYNE COUNTY, MISSISSIPPI

BY

ENGINEERING SERVICE - JACKSON, MISSISSIPPI



MARCH 26, 2012



NOTE: Location Shown As Permitted.



PROPOSED DRILL SITE
FOR
TELLUS OPERATING GROUP, LLC.
SECTION 16, T10N - R7W
WAYNE COUNTY, MISSISSIPPI

BY
ENGINEERING SERVICE - JACKSON, MISSISSIPPI



JANUARY 27, 2010

“What’s Up With That?
Size and Placement Do Matter!
July 26, 2012
Weeks Bay National Estuarine Research Reserve
“Wetland Regulations and Compliance Workshop”

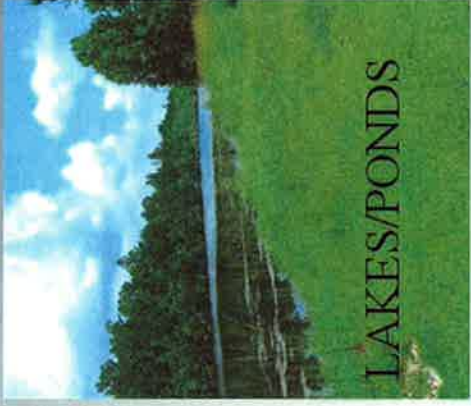
Materials Prepared and Presented by:

Neil C. Johnston, Esq.
Christopher S. Williams, Esq.
njohnston@handarendall.com
cwilliams@handarendall.com

Hand Arendall, LLC
11 N. Water Street, Suite 30200
Mobile, Alabama 36602
251-432-5511

Abbey L. Thompson, 2nd year Law Student
Cumberland School of Law
Tripp Dubose, 3rd year Law Student
University of Alabama School of Law

ENVIRONMENTALLY SENSITIVE AREAS



Jurisdictional Issues

Navigable Waters

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

“Waters of the United States”

- Clean Water Act § 502 (7)
- 33 USC § 1362 (7) [“navigable waters” are “The Waters of the United States, including Territorial Seas.”]
- 33 CFR § 328



Cases

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

Guidance Documents

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

Guidance Comparison

2008

- Focused on criteria that would satisfy the *Rapanos* plurality and Justice Kennedy's "significant nexus"
- Hydrologic and ecologic factors considered in the significant nexus determination
- **Section 404 only**

(Proposed) 2011

- Expand the jurisdiction over waters of the United States under all CWA programs that use that term including Sections 303
- water quality standards, Section 311 oil spill program
- Section 401 state water quality certification process
- Section 402 NPDES
- Section 404

Piers & Minor Structures

General Permits are **STILL** Required under CWA § 404 and RHA § 10 for piers, wharfs, marinas and minor structures in “Waters of the U.S.” and on “State Waters and Water Bottoms.”

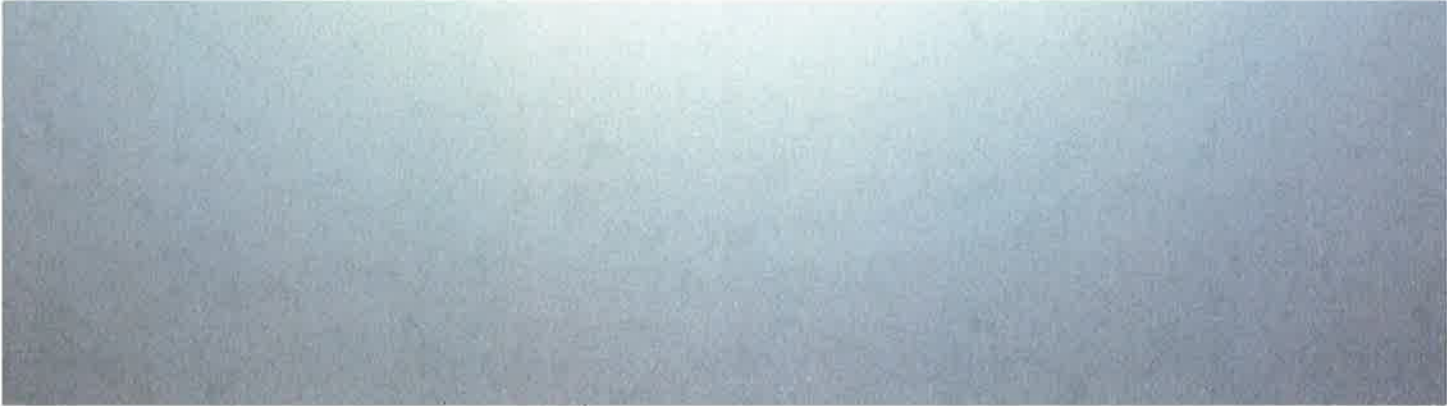
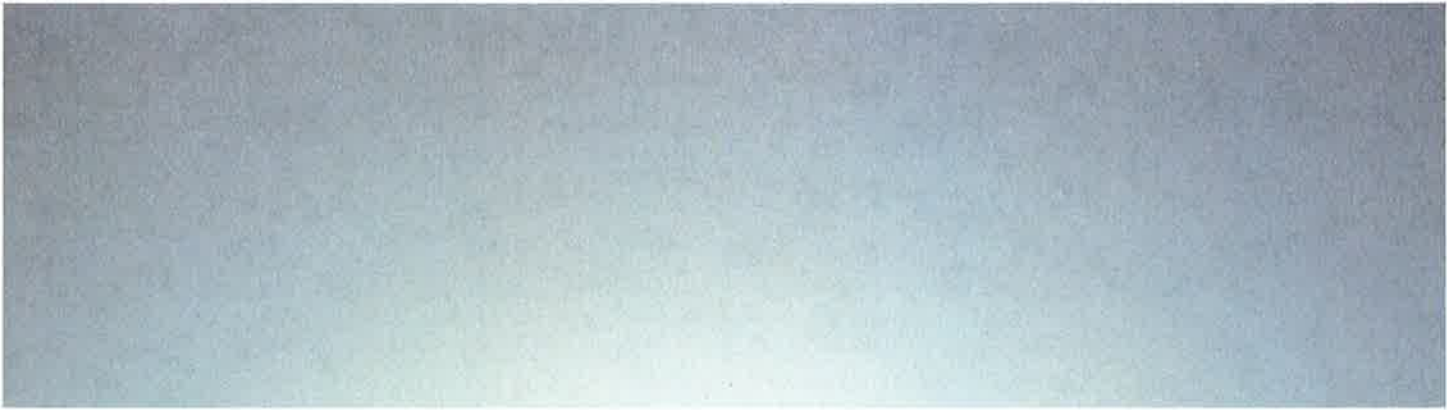
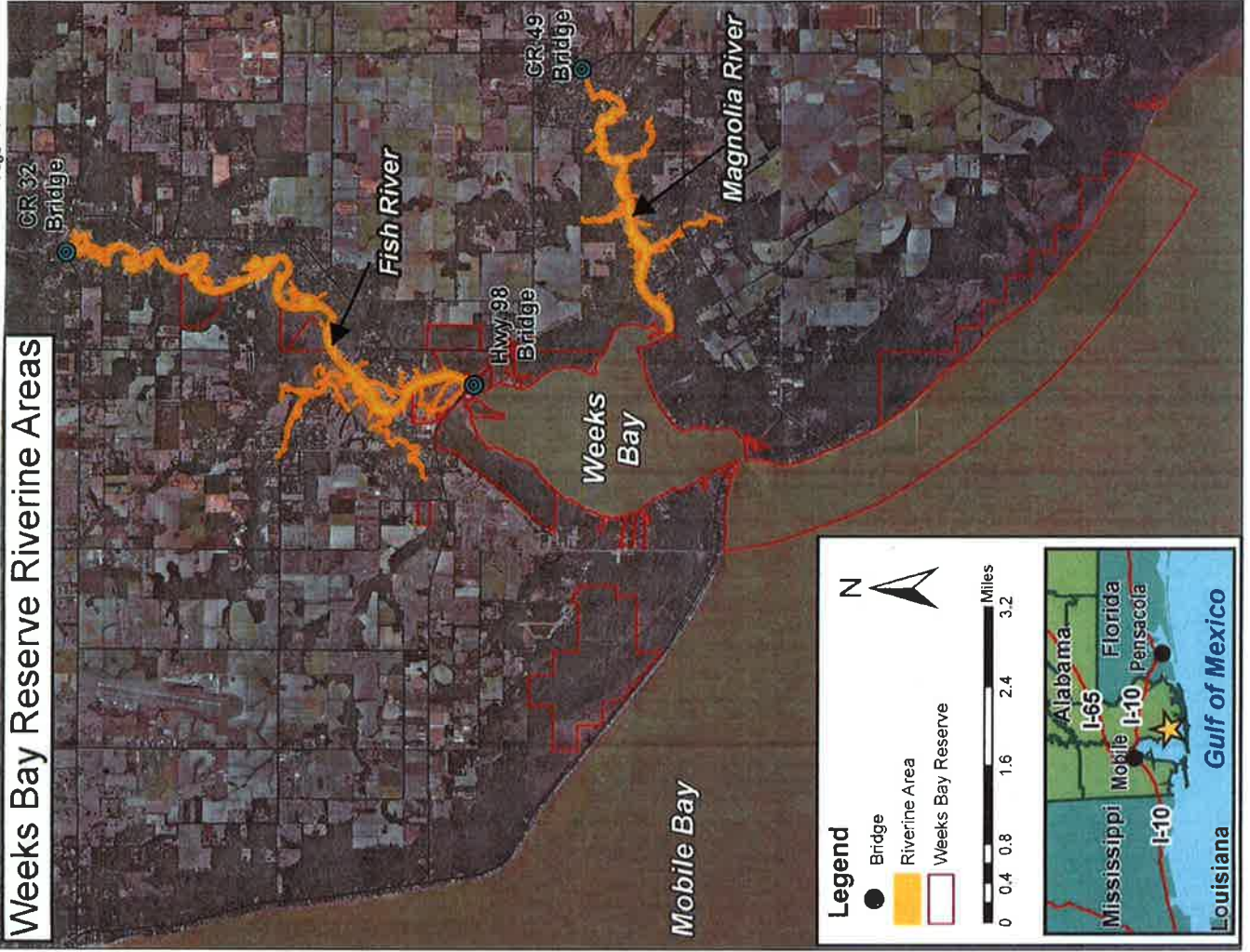
- a) General Permits
- b) ADCNR – State Lands Division – Coastal Permit
- c) ADEM WQ Certification
- d) ADEM Coastal Certification and Conditions
- e) Weeks Bay and Riverine Requirements and Conditions







Weeks Bay Reserve Riverine Areas















No permit required? Think Again.

Oil & Gas operations activities site preparations, access roads drilling fluids/mud pits, storage pipelines, all involve discharges, landclearing, etc.

Drill Site Permit- State Oil & Gas Boards

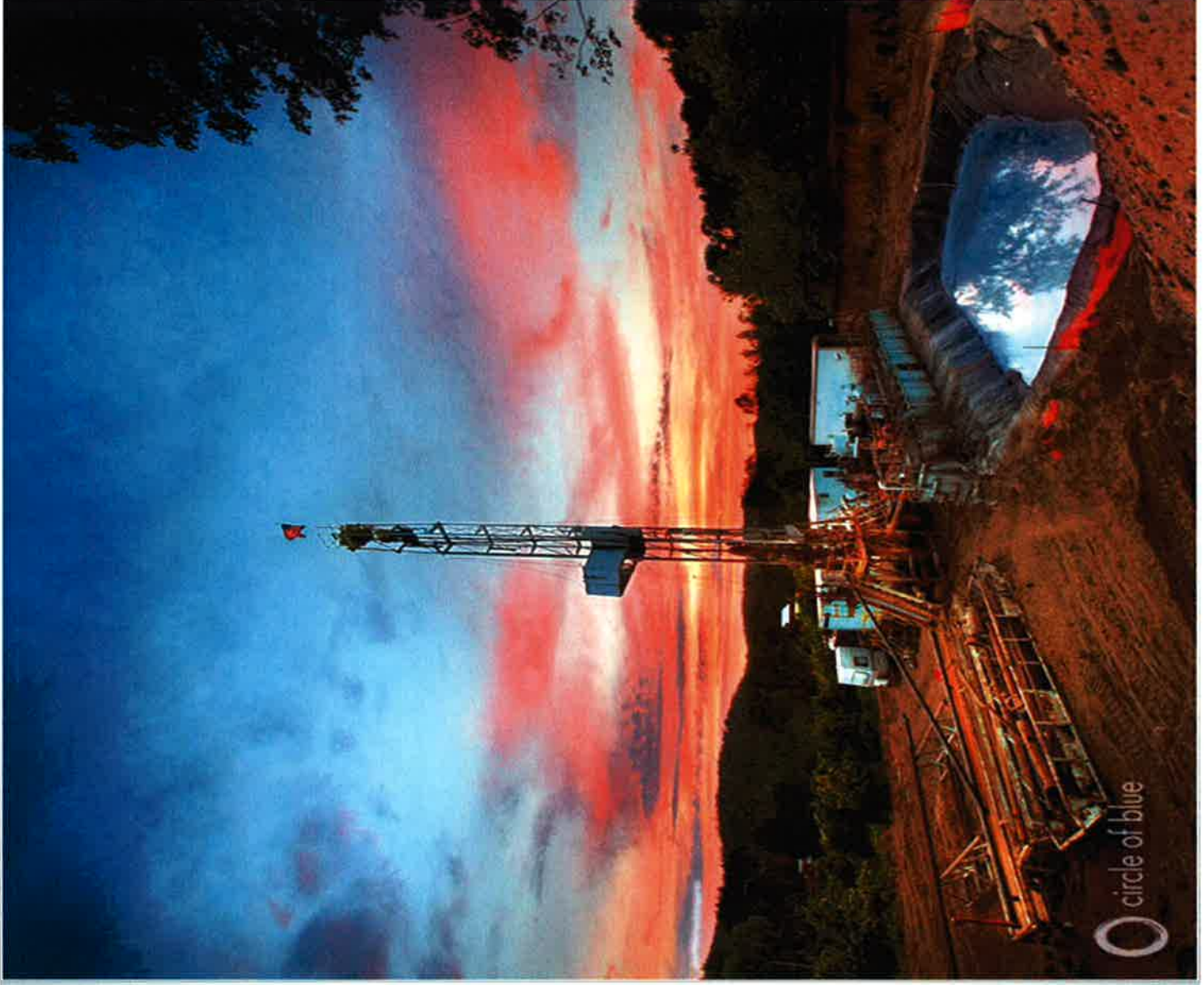
Discharge Permits:

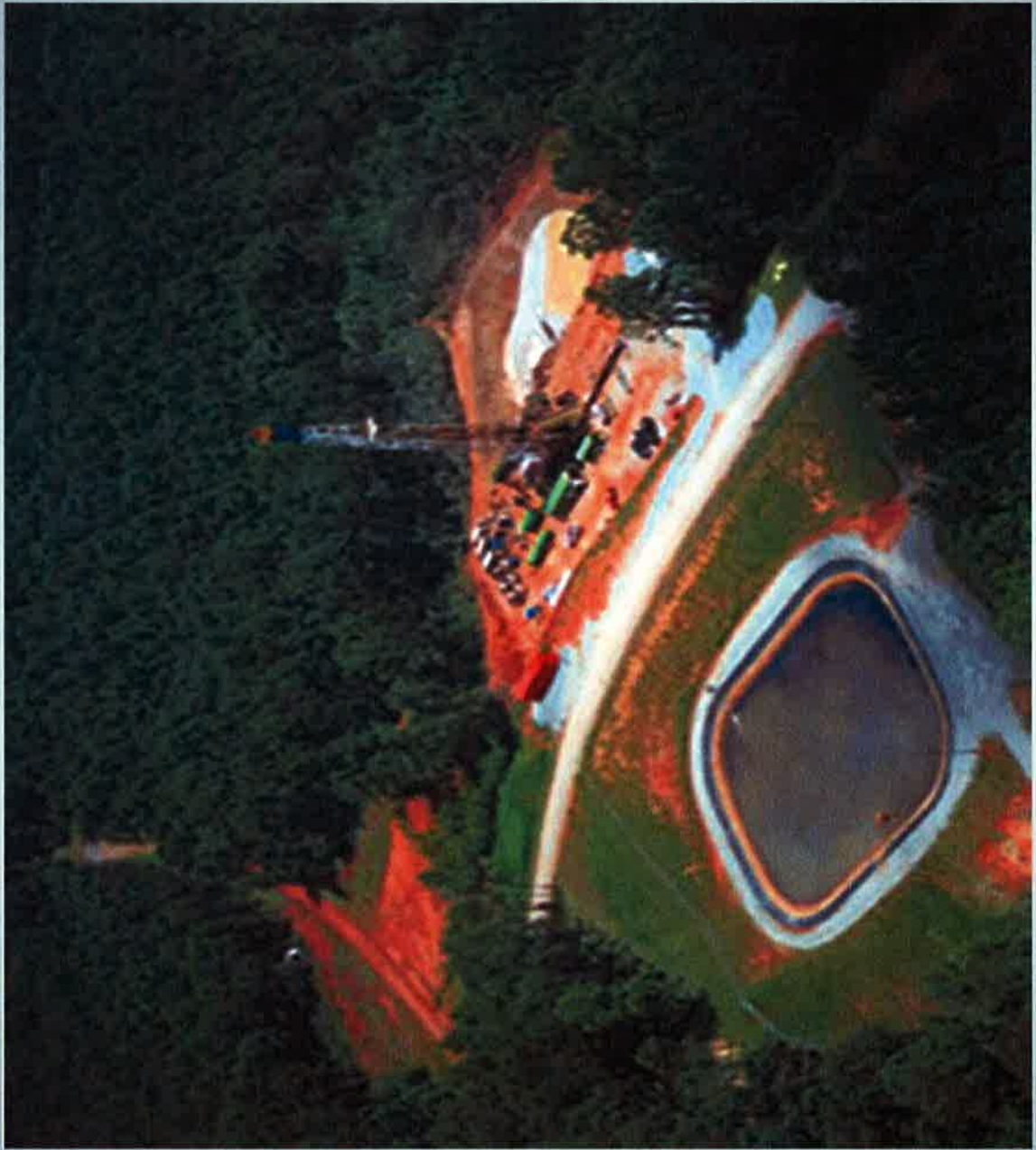
- NPDES
- Storm water
- Disposal of drill fluid
- Dredged and fill

See Handout - Midroc

See Handout - NWP 12

See Handout- Corps of Engineers Districts' General and Regional Permits





Supporting

Alabama Department of Conservation and Natural Resources
The Weeks Bay National Estuarine Research Reserve
Weeks Bay Reserve Foundation

As Alabama, Alabama Department of Conservation and Natural Resources, The Weeks Bay National Estuarine Research Reserve and Weeks Bay Reserve Foundation have grown and diversified, we have grown to become one of the largest law firms in the state. Just as we take pride in the services to our clients, we take great pride in our service affecting the natural resources of the Gulf Coast, and to the consulting community and the regulatory community. For over 50 years our firm has consistently adhered to our philosophy of supporting our partners and giving back to the communities that have contributed to our success, and the success of responsible and sustainable resources and businesses.

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

HAND  ARENDALL
LLC ■ LAWYERS

Neil C. Johnston
Christopher S. Williams
Abbey L. Thompson
Tripp Dubose

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