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Re: Alabama Submerged Lands Leasing Programs (MASGC 11-008-02)

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Dear Bill,

As requested during our meeting on March 17, 2011, the Mississippi-Alabama Sea Grant Legal Program has been conducting research on some of the legal issues raised by your novel proposal to establish an oyster aquaculture "farming park" in Alabama. This memo, which is the second in a series, discusses provisions for leasing state-owned submerged lands in Alabama. The following research is provided for informational purposes only and does not constitute legal representation of the Auburn University Shellfish Laboratory or its constituents.

In Alabama, the Department of Conservation and Natural Resources (DCNR) has been given the authority to lease state lands.¹ Within the riparian area (defined as 600 yards from shore for oyster cultivation), "riparian easements" can be secured for the "placement and configuration of piers and other improvements" on state submerged lands. Additional processes have been developed for leasing submerged lands for pipeline rights-of-way and oil and gas development. Outside these three methods, a lease could be issued by the DCNR's State Lands Division in compliance with the Alabama Land Sales and Lease Act. A leasing program specific to aquaculture does not currently exist in Alabama, but DCNR regulations permit an individual or

¹ See, i.e., ALA. CODE §35-4-380. This statute provides that "[t]he commissioner of conservation and natural resources by and with the approval of the governor may lease the salt springs and lands granted to the state under the second clause of the sixth section of the act of congress of March 2, 1819, to the best advantage, in conformity with the provisions of the grant or any amendment thereto..." See also, ALA. CODE § 9-15-2 and § 9-15-18 (setting out the jurisdiction of the DCNR).

organization to propose a new process for leasing submerged lands. Individuals interested in advancing off-bottom oyster aquaculture in the state of Alabama could use this regulatory process to propose a new, more tailored submerged lands leasing program.

Riparian Easements

In 2003, DCNR adopted its rule on "Placement And Configuration Of Piers And Other Improvements On State Submerged Lands."² A "riparian easement" is required for piers, docks, and other similar activities over a certain size and "all revenue generating/income related activities" occurring on state submerged lands within the riparian area (600 yards).³ Terminology is important when dealing with property interests, so some additional background may be helpful to understand how an "easement" is different than a "lease." At its most basic level, an easement is "a right of use over the property of another."⁴ A lease, on the other hand, is a contract by which a person owning property grants another the right to possess, use, and enjoy it for a specified period of time.⁵ For both easements and leases, the property owner will be compensated through some sort of payment, such as rent.

Although the State of Alabama holds the title to the submerged lands seaward of the high water mark, riparian landowners have traditional rights to, among other things, "wharf out" (build wharves, docks, and piers to access and conduct commerce upon the water)⁶ and plant and gather oysters in the riparian area (600 yards) from shore.⁷ Courts in Alabama have long recognized, however, that such traditional rights are subject to "such general rules and regulations as the legislature may impose."⁸

Placed in this context, it seems appropriate that DCNR grant easements for the "Placement And Configuration Of Piers And Other Improvements On State Submerged Lands," as opposed to leases. DCNR defines an easement, for the purposes of this regulation, as "a non-possessory interest in state owned submerged lands created by a grant or agreement which confers upon the applicant the limited right, liberty, and privilege to use said lands for a specific purpose and for a specific time."⁹ Riparian landowners have never had exclusive possession of the submerged lands in front of their property, as the general public has the right to use public waters for fishing, recreation, and boating. DCNR, therefore, does not need to grant a riparian landowner exclusive possession of the submerged lands to facilitate the exercise of their riparian rights. In adopting this rule, DCNR has adhered to the traditional rules with respect to the exercise of riparian rights while also establishing some parameters for those activities to protect the public interest.

² ALA. ADMIN. CODE r 220-4-.09. Prior to 2003, the rule simply stated that "Lengths of piers in any waters over state-owned submerged lands shall not be disproportionate in length to other piers in the immediate area so as to create a hazard to navigation as determined by the department of conservation and natural resources." (ALA. ADMIN. CODE r. 220-4.09 (2002)).

³ *Id.* r. 220-4-.09(4)(e)(2); *see also*, e-mail from Phillip Hinesley, Coastal Section Chief, Alabama State Lands, to author (May 24, 2011) (on file with author).

⁴ BLACK'S LAW DICTIONARY 509 (6th ed. 1990).

⁵ *Id.*

⁶ ALA. CODE § 33-7-50.

⁷ *Id.* § 9-12-22.

⁸ *Cove Properties, Inc. v. Walter Trent Marina, Inc.*, 702 So.2d 472, 474 (Ala. Civ. App. 1997) (*quoting* *Mobile Docks Co. v. City of Mobile*, 40 So. 205, 207 (1906)).

⁹ ALA. ADMIN. CODE r. 22-4-.09(3)(f).

To obtain a riparian easement from DCNR, the proposed activity must comply with the management policies, standards, and criteria defined by the DCNR.¹⁰ For example, to obtain a riparian easement, the activity must be water-dependent and not contrary to the public interest. In addition, compensation must “be paid to the State Lands Division for leases and easements which generate revenues, monies or profits for the user or that limit or preempt general public use.”¹¹

Private versus State Owned Uplands

In addition, to obtain a riparian easement, the applicant must demonstrate “satisfactory evidence of sufficient upland interest” unless the activity will occur on state-owned submerged lands that are not riparian to uplands.¹² “Satisfactory evidence of sufficient upland interest” may be demonstrated by

documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. Other forms of documentation shall be accepted if they clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity.¹³

This provision ensures that the state does not unwittingly grant a riparian easement in front of an upland owner’s property without her knowledge. In our discussions, you raised the issue of private versus state owned uplands. If the state owns the uplands, presumably the state would have the same rights as a private riparian landowner, including the right to lease out its riparian rights to plant and harvest oysters. While it is unclear whether the State would wish to lease its riparian rights, our research has not discovered any provision that expressly prohibits such action. If the state did lease out its riparian rights, it would need to comply with state law that may impose a bidding requirement, discussed in more detail below.

Fee Schedule for Piers, Docks, and Similar Improvements

Although fees must be paid for all revenue-generating activities on state submerged lands, DCNR has only developed a fee schedule “for Riparian Easements relating to piers, docking facilities and other similar improvements on State-owned submerged lands.”¹⁴ For these activities, the base annual fee begins at roughly 12.5 cents per square foot with a minimum annual fee of \$500.¹⁵ At the rate of 12.5 cents per square foot, the proposed oyster farms would

¹⁰ *Id.* r. 220-4-.09(4). The management policies, standards, and criteria are used by DCNR “in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on state owned submerged lands.” *Id.*

¹¹ *Id.* r. 220-4-.09(4)(a)(4).

¹² ALA. ADMIN. CODE r. 220-4-.09(4)(c).

¹³ *Id.* r. 220-4-.09(3)(m).

¹⁴ *Id.* r. 220-4-.09(5).

¹⁵ *Id.* r. 220-4-.09(5)(a). It should be noted that the fees currently charged by DCNR might be higher than 12.5 cents per square foot. The regulations provide that “[t]he base fee shall be computed at a rate of 12.5 cents per square foot of riparian easement area per annum effective March 1, 2003 and shall be revised on

cost \$5,455 per acre annually. The 40-acre parcel alone would cost over \$200,000. Obviously, at this rate, the price of the leases would be prohibitively expensive.¹⁶

One of DCNR's stated purposes of its submerged lands leasing program is "To insure that all public and private activities on state owned submerged lands which generate revenues or exclude traditional public uses provide *just compensation* for such privileges."¹⁷ Applying the current fee schedule to oyster aquaculture is problematic. First, arguments could be made that an oyster farm is not a pier, dock or "similar improvement" and therefore r. 220-4-.09 and the fee schedule should not apply. DCNR, however, has determined that r. 220-4-.09 is applicable to your proposed project (i.e., your oyster cultivation system is a "similar improvement."). Second, charging \$5,455 per acre for an oyster farm is arguably not "just compensation" in light of the potential revenues from shellfish sales and therefore inconsistent with the purposes of the regulation. Because the oyster aquaculture park would be revenue generating, compensation will be required and this fee structure is currently the only one available. Fortunately, you've indicated that DCNR has suggested that the "preempted area" would be less than the actual footprint of the project and that the fee could potentially be offset with credits for environmental services, so the financial burden may ultimately be reduced.

Leasing Submerged Lands for Oil and Gas Development

A separate leasing program has been developed for oil and gas exploration, development, and production on state submerged lands. The Alabama Legislature has authorized the DCNR

to lease, upon such terms as [the Commission of Conservation and Natural Resources] may approve, any lands or any right or any interest therein under any navigable streams or navigable waters, bays, estuaries, lagoons, bayous or lakes and the shores along any navigable waters to high tide mark and *submerged lands*...for the exploration, development and production of oil, gas and other minerals...¹⁸

Submerged lands leased for oil and gas development by DCNR may be leased only upon the basis of competitive bids.¹⁹ The DCNR has promulgated a dense set of regulations governing the leasing of submerged lands for geophysical exploration.²⁰ As the specific provisions of this leasing program are not applicable to oyster aquaculture leasing, an overview of these requirements is beyond the scope of this memo.

March 1 of each year thereafter on the basis of fluctuations of the Consumer Price Index for All Urban Consumers ... as published by U.S. Department of Labor, Bureau of Labor Statistics."

¹⁶ According to a news article published in 2003, "industry leaders say \$5,000 per acre is the most a lease ever fetched on the open market, adding that it was clearly an exceptional property." Jeffrey Meitrodt & Aaron Kuriloff, *Affixing Value to Beds a Slippery Affair: Worth is Murky Under Water*, NOLA.COM, 5 May 2003, <http://www.nola.com/speced/shellgame/index.ssf?/speced/shellgame/value04.html>.

¹⁷ ALA. ADMIN. CODE r. 220-4-.09(1)(e) (emphasis added).

¹⁸ ALA. CODE §9-17-62.

¹⁹ *Id.* §9-17-65.

²⁰ ALA. ADMIN. CODE r. 220.4-.01. ("Geophysical Exploration for Mineral Resources" is defined as "any operation conducted upon lands owned by the State of Alabama and under the jurisdiction of the Department of Conservation and Natural Resources, which utilizes geophysical techniques, including, but not limited to gravity, magnetic, and various seismic methods, to produce information and data in support of possible exploration and development activity.")

Pipeline Right-of-Way Contracts

Lastly, DCNR has established a specialized leasing process for pipeline right-of-ways on state-owned submerged lands. "Any person, firm or corporation desiring a right-of-way for submerged pipeline construction purposes across state-owned water bottoms under the jurisdiction of the Department of Conservation and Natural Resources" must submit an application to the State Lands Division.²¹ Contracts are granted on 10-year renewable terms and the fees vary depending on the size and length of a pipeline, although the minimum fee is set at \$500 per year.²² Again, as the specific provisions of this leasing program are not applicable to oyster aquaculture leasing, an overview of these requirements is beyond the scope of this memo.

Alabama Land Sales and Lease Act

For activities on state submerged lands that fall outside the traditional riparian rights area and do not involve oil and gas development or pipeline rights-of-way, a lease would need to be obtained from DCNR's State Lands Division pursuant to the Alabama Land Sales and Lease Act enacted in 1995. The Land Sales and Lease Act "applies to all real property and interests therein owned by the State of Alabama and the departments, boards, bureaus, commissions, institutions, corporations, and agencies of the state with the exception of those sales, transfers, and reversions set out in Section 9-15-82."²³ Section 9-15-82 includes several real property transfers governed by other statutes, such as the sale and leasing of timber from school lands and swamp and overflow lands and the leasing of oil, gas, and other minerals.

Under the Land Sales and Lease Act, "[a]ll sales and leases made by, or on behalf of, the State of Alabama, or any department, board, bureau, commission, institution, corporation, or agency, of real property or any interest therein owned by the State of Alabama having an appraised value of more than twenty thousand dollars (\$20,000) shall be made by free and open competitive advertised public auction or advertised sealed bids to the highest bidder."²⁴ State Lands must obtain a written appraisal "by a real estate appraiser selected by the Lands Division who is licensed by the State Board of Appraisers prior to the advertisement of the sale of the property."²⁵ After obtaining the appraisal, State Lands is required to "establish and publish the minimum amount for which the real property may be sold or leased."²⁶ The property is to be sold or leased to the highest bidder, although if no bids are received during the public auction or sealed bidding process, or if the offered bids are rejected by the state, the sale or lease of the property can be negotiated.²⁷ However, "No sale or lease may be made at a price less than the highest bid received or the published minimum, whichever is highest."²⁸ Presumably, parcels of state lands valued at less than \$20,000 could be leased through a simply negotiation process, as the public auction or sealed bids would not be required.

²¹ *Id.* r. 220-4-.02.

²² *Id.* r. 220-4-.02(2).

²³ ALA. CODE § 9-15-70.

²⁴ *Id.* § 9-15-71.

²⁵ *Id.* § 9-15-73.

²⁶ *Id.* § 9-15-74.

²⁷ *Id.* §§ 9-15-78 and 9-15-79.

²⁸ *Id.*

proposal process could be a useful exercise for the shellfish industry in Alabama as it would force the industry to articulate why an alternative leasing and fee structure is necessary and what that alternative structure should look like.

Summary

As submerged lands have not previously been leased for off-bottom oyster cultivation in Alabama, the permitting process is a bit like trying to force a round peg in a square hole – it doesn't quite fit. DCNR has asserted that a riparian easement must be obtained and compensation paid, because your off-bottom oyster farm will be located within the riparian area and will generate revenue. As there is currently no Alabama Attorney General Opinions or case law that suggests this interpretation is incorrect, DCNR's interpretation is controlling. The only way to challenge this interpretation would be to petition for the adoption of a new rule, request a written opinion from the Attorney General, or file a lawsuit. If an off-bottom oyster farm was proposed outside the riparian area, leasing would likely proceed under the provisions of the Alabama Land Sales and Lease Act.

Sincerely,

Stephanie Showalter Otts

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