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Re: Impacts of Living Shoreline Installations on Alabama Property Rights (MASGC 11-008-05)

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Dear Roberta and Tom:

In your email of April 14, 2011, you requested legal research on property rights issues related to a proposed living shorelines project by Mobile Bay National Estuary Program along Mon Louis Island, Alabama. The Mississippi-Alabama Sea Grant Legal Program conducted research on those issues and presented this information to local homeowners at a meeting held on May 26, 2011 in Coden, Alabama. This memo is in follow-up to that meeting. The memo includes a summary of the materials presented at the meeting as well as additional information on questions raised during the May meeting. The following information is intended as advisory research only and does not constitute legal representation of Mobile Bay National Estuary Program (MBNEP) or its constituents. It represents our interpretations of the relevant laws and regulations.

Waterfront property owners along Mon Louis Island raised numerous questions about how the proposed living shoreline project would impact their property rights and responsibilities. As I understand the project, MBNEP received federal funding to construction a living shoreline demonstration project along the shore of Mon Louis Island, Alabama. The proposed project will install submerged reef-like structures on state owned waterbottoms. The installation will run parallel to the shore for about 1,000 feet and will be located approximately 50 feet or more offshore. MBNEP will only install the structures off shorelines where MBNEP has upland owner support for the project. The project is designed to mitigate and reduce erosion along the shoreline.

Because many of the questions raised related to erosion, accretion and avulsion, an overview of shoreline property boundaries under Alabama law is provided. In addition, you requested information on necessary signs, upland owner liability for accidents, statutes of limitations for land reclamation, waiver of riparian oyster rights, and storm repair responsibility for the structures. Relevant questions are grouped together and addressed as one issue where appropriate.

### Shoreline Property Boundaries

At statehood, all states acquired title to lands underlying navigable waters including tidal waters.<sup>1</sup> States hold these submerged lands in trust for the public under a principle known as the public trust doctrine. Each state, however, has flexibility to define the precise nature of state owned submerged lands and private property rights. This information focuses on Alabama.

Alabama expressly claims ownership of submerged lands: “All the beds and bottoms of the rivers, bayous, lagoons, lakes, bays, sounds and inlets within the jurisdiction of the state of Alabama are the property of the state of Alabama to be held in trust for the people thereof . . . .”<sup>2</sup> The boundary line between state owned submerged lands and private property is the mean high tide line (MHTL) in tidal areas and the mean low water mark along non-tidal navigable waterways.<sup>3</sup> The boundary line along Mon Louis Island is MHTL.

State owned submerged lands are subject to certain public uses through the public trust doctrine. Alabama recognizes the public’s right to use these waters for navigation, commerce, fishing, and swimming.<sup>4</sup> In addition, waterfront property owners may also exercise riparian rights over waters abutting their shoreline. Riparian rights include the right to access the water, the right to construct piers,<sup>5</sup> and the right to harvest oysters.<sup>6</sup>

Changes in the shoreline can impact waterfront property rights. Shorelines are ambulatory and may shift because of slow natural changes, sudden avulsive events, or artificial man-made actions. In some instances, the property line will move with the MHTL. In other cases, the property line becomes fixed at a set location. The following details those distinctions.

### *Naturally Occurring Accretion and Erosion*

Alabama law distinguishes between naturally occurring erosion or accretion and artificially caused erosion and accretion. Alabama courts have defined natural accretion as “the result of a slow, gradual and imperceptible addition to the shoreline resulting from natural forces.”<sup>7</sup> Natural

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<sup>1</sup> Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

<sup>2</sup> ALA. CODE § 9-12-22. See also ALA. ADMIN. CODE r. 220-4-.09(3)(n) (defining state owned submerged lands as including but not limited to “tidal lands, sand bars, shallow banks, and lands waterward of the mean low water line beneath navigable fresh water or the mean high tide line beneath tidally-influenced waters, to which the State of Alabama acquired title on December 14, 1819, by virtue of statehood, or thereafter and which have not been heretofore conveyed or alienated”).

<sup>3</sup> ALA. ADMIN. CODE r. 220-4-.09.

<sup>4</sup> ALA. ADMIN. CODE r. 222-4-.09(c).

<sup>5</sup> ALA. CODE § 33-7-50 through 33-7-53.

<sup>6</sup> ALA. CODE § 9-12-22.

<sup>7</sup> Reid v. State, 373 So.2d 1071, 1072 (Ala. 1979).

erosion similarly refers to the gradual loss of shoreline as a result of natural forces. When these two processes cause the MHTL to move, the property boundary between the upland owner and the state moves to the new MHTL.<sup>8</sup> What does this mean for the upland owner? If their property accretes land, then they now own the newly gained land.<sup>9</sup> If the upland owner loses land, the state owns the newly submerged land. Upland owners have no legal right to reclaim land lost by naturally occurring erosion.<sup>10</sup>

### *Avulsion*

Avulsion addresses sudden gains or losses of land. Alabama defines avulsion as “the sudden or perceptible loss or addition to land by the action of water.”<sup>11</sup> Occurrences like hurricanes or flooding may cause avulsion along the shoreline. Unlike naturally occurring accretion and erosion, avulsive events do not change property boundaries between upland owners and state owned submerged lands.<sup>12</sup> Property lines remain fixed at the MHTL prior to the avulsive event.

#### ○ *Land lost by avulsion*

If a property owner loses land because of avulsion, the landowner may seek to reclaim this land from the state. To do so, the property owner must request a permit from the Alabama Department of Conservation and Natural Resources State Lands Division (State Lands) to refill the lost land. A property owner must act within a reasonable time to reclaim the lost land. State Lands requires reclamation permits be made within five years of the avulsive event.<sup>13</sup> The person seeking to reclaim lost land is responsible for proving that avulsion caused the land loss.<sup>14</sup>

During the May 26th meeting in Coden, Ala., a landowner asked whether he could reclaim land lost by avulsion without refilling the land. In other words, could he publicly assert his intentions to reclaim the lost land and exert ownership over the newly submerged land without actually refilling the submerged area? Alabama judicial decisions suggest the answer is no. In 1998, the Alabama Supreme Court held that state approval of a landowner’s petition to reclaim lands is insufficient to shift ownership to the upland owner; the upland owner must actually accomplish the proposed reclamation.<sup>15</sup>

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<sup>8</sup> *Greenfield v. Powell*, 118 So. 556, 558 (Ala. 1928) (where the change is gradual and imperceptible, whether caused by accretion, reliction, or encroachment, the boundaries shift with the shifting of the channel or shore).

<sup>9</sup> *Reid*, 373 So.2d at 1074.

<sup>10</sup> *Greenfield v. Powell*, 118 So. at 558 (If the land of a riparian owner is diminished by erosion, he has no recourse for the loss).

<sup>11</sup> ALA. ADMIN. CODE r. 220-4-.09(3)(b).

<sup>12</sup> *Greenfield v. Powell*, 118 So. at 558 (where, by a sudden and violent or artificial change, the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected, and remain in their original position).

<sup>13</sup> Personal communication with State Lands.

<sup>14</sup> ALA. ADMIN. CODE r. 220-4-.09(4)(b)(5) (reclamation activities on state owned submerged lands shall be approved only if avulsion or artificial erosion is affirmatively demonstrated).

<sup>15</sup> *West Dauphin Ltd. Partnership v. Callon Offshore Production, Inc.*, 725 So.2d 944, 952 (Ala.1998) (Ala. Code § 33-7-53, a statute allowing a riparian owner to reclaim tidelands in certain instances, required a completed fill, not merely a publication of intent to fill).

- *Land gained by avulsion*

If new land is exposed above the MHTL following an avulsive event (in other words land that was once submerged is now dry land), the newly created dry land still belongs to the State of Alabama because an avulsive event does not change the property lines. However, the property owner may still cross the land for access to the water and exercise riparian rights.

*Artificially Occurring Accretion and Erosion*

Alabama defines artificial erosion as “the slow and imperceptible loss or washing away of sand, sediment, or other material from property caused by man-made projects and operations.”<sup>16</sup> Accretions caused by man-made activities, like U.S. Army Corps of Engineer’s dredging projects, are artificial accretions.<sup>17</sup> Accretions or erosions resulting from living shoreline installations fall within this category.

- *Lands gained by artificial accretion*

To determine who owns land accreted by artificial means, you must first establish who caused the artificial accretion to occur. Under Alabama law, upland property owners cannot obtain ownership of submerged lands by artificially filling those lands.<sup>18</sup> If the upland owner or his predecessor in title caused the accretion, the accretion belongs to the state.<sup>19</sup> An upland owner may claim ownership of the accreted land only if he (or any prior owner of his land) did not cause, consent to, or participate in the making of the artificially accreted lands.<sup>20</sup>

Alabama law includes an exception to this rule: beach renourishment projects. State law establishes that any land accreted as a result of beach projects undertaken by coastal municipalities remains state owned land. Riparian landowners impacted by this law are “entitled to all statutory and common-law riparian or littoral rights of access to the mean high tide line across the state-owned lands filled in the course of a permitted beach project or by subsequent natural or artificial fill process, including, without limitation, access rights for ingress, egress, boating, bathing, and fishing.”<sup>21</sup>

- *Lands lost by artificial erosion*

If an upland owner loses land as a result of artificial erosion, the landowner may seek permission from ADCNR State Lands to reclaim the lost land. The process is the same as reclaiming land

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<sup>16</sup> ALA. ADMIN. CODE r. 220-4-.09(3)(a).

<sup>17</sup> *State v. Gill, Reid v. State.*

<sup>18</sup> *Reid v. State*, 373 So.2d at 1074.

<sup>19</sup> “[A] landowner has a right to land created in front of his or her land by artificial accretion that is superior to the right of the State if neither the landowner nor his or her predecessor in title is responsible for the artificial accretion of the land but has an inferior right to that of the State if the landowner or his or her predecessor in title is responsible for the artificial accretion.” *Spottswood v. Reimer*, 41 So.3d 787, 796 (Ala. Civ. App. 2009), *cert. denied.* (summarizing *State v. Gill* and *Reid v. State*).

<sup>20</sup> *Reid v. State*, 373 So.2d at 1074.

<sup>21</sup> ALA. CODE § 9-15-55(d).

lost by avulsion, discussed above. The upland owner will need a permit for reclamation activities; the upland owner must demonstrate that artificial erosion caused the land loss.

During the May 26th meeting, someone asked if the landowner installing a living shoreline structure would be liable for a neighbor's resulting property loss. This issue has not been expressly resolved in Alabama. In some cases, landowners suffering beach erosion caused by government actions have been able to claim an unlawful taking of their property by the government (a takings claim). For instance, the U.S. Army Corps of Engineers has been held liable for erosion caused by jetties built and maintained by the Corps.<sup>22</sup> In that case, the court determined that the Corps' jetties caused partial erosion to beachfront property on Lake Michigan. The Corps was required to compensate the property owners. However, takings claims can only be brought against the government and not against non-government neighboring property owners.

This type of claim against neighboring property owners often takes the form of trespass or nuisance. Nuisance refers to the interference of someone's use and enjoyment of her property.<sup>23</sup> Trespass involves the physical invasion of one's property. For instance, Alabama recognizes actions for trespass when the actions of one landowner indirectly cause flooding of surface water or debris onto a neighboring landowner.<sup>24</sup> A landowner may be liable to their neighbor for damages caused by indirect trespass if 1) the landowner intentionally installed a structure which caused something (like surface water or mud) to physically invade the neighbor's property, 2) the physical invasion was reasonably foreseeable, and 3) the invasion caused damage to the neighbor's property. Alabama courts have yet to consider whether reef structures like those involved in this project create a trespass or nuisance.

### Property Boundary Disputes

Another question raised was whether a statute of limitations applied to reclamation of lost property. The answer is yes. Under Alabama law, any legal action for the recovery of land must be commenced within ten years.<sup>25</sup> Actions for trespass must be brought within six years.<sup>26</sup> Alabama law also includes a residual injury statute of limitations of two years. The residual injury statute of limitations applies to all actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated" in the law.<sup>27</sup> Some courts have applied this two-year limitation to actions for damages to riparian rights.<sup>28</sup> However, in 1997, the Alabama Civil Court of Appeals clarified that the ten-year statute of limitations applies to actions seeking declaration of riparian rights, damages for violation of those rights, and injunctive relief.<sup>29</sup>

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<sup>22</sup> Banks v. U.S., 78 Fed.Cl. 603 (Fed. Cl. 2007).

<sup>23</sup> ALA. CODE § 6-5-120, 636 So.2d 430.

<sup>24</sup> Easterling v. ABC, 770 So.2d 606 (Ala.Civ.App. 1999); Johnson v. Washington, 474 So.2d 651 (Ala.1985).

<sup>25</sup> ALA. CODE § 6-2-33(2); Cove Properties v. Walter Trent Marina, 702 So.2d 472, 475 (Ala.Civ.App. 1997).

<sup>26</sup> ALA. CODE § 6-2-34(2).

<sup>27</sup> ALA. CODE § 6-2-38(l).

<sup>28</sup> Beaunit Corp. v. Alabama Power Co., 370 F.Supp. 1044 (N.D.Ala. 1973).

<sup>29</sup> Cove Properties v. Walter Trent Marina, 702 So.2d 472, 475 (Ala.Civ.App. 1997).

### Adequate Signage/Markers

As I understand your proposed project, segmented reef structures will be installed offshore below the water line. You asked what constitutes adequate signage of the reef structures to ensure navigational safety. Structures that interfere with navigation require adequate lights and signs. The U.S. Coast Guard regulates the marking of structures that may interfere with navigation.<sup>30</sup> In Alabama state waters, the ADCNR Marine Police Division oversees the installation of navigational markers.<sup>31</sup> When you receive the necessary permits for installing the reef structures, the permit terms will likely address what markers will be needed. If this information is not found in your permit, contact the Alabama Marine Police. You will also need permission from the Alabama Marine Police before installing any signs or markers.

### Liability for Injuries Caused by Living Shoreline Installation

Another concern was whether waterfront property owners would be liable for personal injuries or property damage to watercraft caused by the living shoreline structures. MBNEP will be installing submerged reef structures on state owned water bottoms with the consent of riparian owners. The reef structures will underlie public waterways.<sup>32</sup>

Landowners are generally not responsible for accidents that occur on lands outside their ownership, possession, or control, unless the landowner created or controlled the conditions on the adjoining property. Here, the structures are located on state owned lands but the upland owner is consenting to the installation. Because of the landowner's consent and participation in the project, the upland owner likely has a duty to warn the public of the structures. To fulfill this duty, the upland owner should make sure that the structures remain adequately marked. As long as the structures are properly marked, the landowner should not be responsible for injuries.

Potentially, the location of the structures, though on state lands, may be considered within the upland owner's control because of a riparian easement. This does not substantially change the upland owner's risk of liability however. Property owners are not liable for injuries sustained by non-commercial public recreational users, unless the landowner fails to warn of a known danger.<sup>33</sup> Recreational uses include boating, fishing, and water sports. A landowner is liable if he knows "that a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm" and does not warn against the harm.<sup>34</sup> In other words, property owners have a duty to warn recreational users of known harms. Under either scenario, the upland owner should warn the public of the potential risk by ensuring that the submerged structures are adequately marked.

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<sup>30</sup> 33 C.F.R. 64.01 et seq

<sup>31</sup> ALA. ADMIN. CODE r. 220-6-.19.

<sup>32</sup> Alabama considers all tidal waters public and navigable. Sayre v. Dickerson, 179 So.2d 57 (Ala. 1965).

<sup>33</sup> ALA. CODE § 35-15-1 through 35-15-5; 35-15-20 through 35-15-29 (Alabama's Recreational Use Law).

<sup>34</sup> ALA. CODE § 35-15-24.

### Maintenance & Repair of Living Shoreline Installations

Over time, storm events may damage the structures and strew materials. Property owners asked for clarification about who would be responsible for removal and/or repair of damaged structures (themselves or MBNEP?). To the extent that strewn materials are obstacles of navigation following a storm, the U.S. Army Corps of Engineers may remove those pieces. Other issues of repair and maintenance should be decided by the parties and addressed in the written agreement between MBNEP and the participating property owners. Both parties have an interest in safeguarding the structures. MBNEP will hold the permit for the installation of the structures but property owners also have an interest in making sure the structures are adequately marked so as to prevent against potential liability.

### Waiver of Riparian Rights to Oysters

Alabama recognizes the right of riparian landowners to plant and gather oysters in front of their shoreline (to a distance of 600 yards, but where the distance from shore to shore is less than 1,200 yards, the owners of either shore may plant and gather to a line equidistant between the two shores) so long as the oysters do not interfere with navigation.<sup>35</sup>

Because the living shoreline installation is funded with federal money, MBNEP would like riparian owners to waive their right to harvest oysters only on the reef structures that MBNEP is installing. Riparian owners can accomplish this waiver by entering into a binding covenant. A covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done. The term covenant generally describes promises relating to real property.<sup>36</sup> To be valid, a covenant must be clear and unambiguous. Any covenant by the landowners should be clearly worded. To avoid later confusion, specifically identify which riparian oyster rights are being waived and which riparian oyster rights are being retained. The covenant will be filed with the landowner's deed and will remain in affect as to future owners of the same land.

I hope you find this information helpful. If you have any additional questions, please let me know.

Sincerely,

/s/ Niki L. Pace  
Research Counsel

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<sup>35</sup> ALA. CODE § 9-12-22.

<sup>36</sup> Collins v. Rodgers, 938 So.2d 379 (Ala. 2006).