

APA-1  
6/93

**TRANSMITTAL SHEET FOR  
NOTICE OF INTENDED ACTION**

Control No. 220 Department or Agency Conservation and Natural Resources  
Rule No. 220-4-.09

**Rule Title: Placement and Configuration of Piers and Other Improvements on State Submerged Lands.**

New  Amend  Repeal (of Existing Rule)  Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? YES

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? YES

Is there another, less restrictive method of regulation available that could adequately protect the public? NO

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? NO

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the rule? N/A

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? YES

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Does the proposed rule have any economic impact? NO  
If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

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Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975 and that it conforms to all applicable filing requirements of the Alabama Administrative Procedure Division of the Legislative Reference Service.

Signature of Certifying Officer Jennifer Welton

Secretary of Administrative Procedure

Date 5-22-17

APA-2  
6/93

Department of Conservation and Natural Resources  
State Lands Division

NOTICE OF INTENDED ACTION

AGENCY NAME: Department of Conservation and Natural Resources

RULE NO. & TITLE: 220-4-.09 Placement and Configuration of Piers and Other Improvements on State Submerged Lands.

INTENDED ACTION: Amendment.

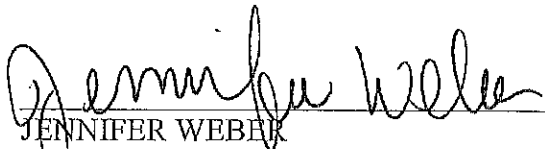
SUBSTANCE OF PROPOSED ACTION: To amend the paragraphs that describe the purpose of the rule, to allow for a waiver from the rule under limited circumstances, to revise the definition of "Avulsion", and to revise the description of a single residential dock.

TIME, PLACE, MANNER OF PRESENTING VIEWS: Interested persons may present their views in writing to the Director of the State Lands Division at any time during the period stated below, or orally if requested in advance by personally appearing at Room 474, Folsom Administrative Building, 64 North Union Street, Montgomery, Alabama, at 10:00 a.m., Wednesday, July 12, 2017.

If ADA accommodations are needed, please contact Daisy Perry at (334) 242-3165 or [daisy.perry@dcnr.alabama.gov](mailto:daisy.perry@dcnr.alabama.gov). Requests should be made as soon as possible but at least seven days prior to the date of a personal appearance to present views regarding the proposed rules.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE:  
July 12, 2017.

CONTACT PERSON AT AGENCY: Patricia J. Powell, Director, State Lands Division, 4th Floor, 64 N. Union Street, Montgomery, Alabama 36130, 334-242-3484.

  
JENNIFER WEBER  
Secretary of Administrative Procedure

N. Gunter Guy, Jr.

220-4-.09      **Placement and Configuration of Piers and Other Improvements on State Submerged Lands**

**(1) Purpose.**

(A) To aid in fulfilling the ~~trust and fiduciary~~ duties and responsibilities of the Commissioner of the Alabama Department of Conservation and Natural Resources for the administration, management and ~~disposition~~ control of state owned submerged lands;

~~(B) To insure maximum benefit and use of state owned submerged lands for all the citizens of Alabama;~~

~~(C) B~~ To manage and ~~enhance~~ state owned submerged lands so that the public may continue to enjoy traditional uses including, but not limited to ,public recreation, navigation, fishing and swimming;

~~(D) C~~ To manage and ~~provide maximum protection for all~~ state owned submerged lands, especially those important to for ~~public recreation,~~ and fish, shellfish and wildlife propagation and ~~management~~ conservation; and,

~~(E) D~~ To insure that all public and private activities on state owned submerged lands which generate revenues, ~~or~~ exclude or preempt traditional public uses and/or which sever materials from state owned submerged lands provide just compensation for such privileges.

**(2) Intent of Rules and Severability.**

(A) These rules are to implement the administrative and management responsibilities of the department regarding state owned submerged lands. Responsibility for environmental permitting of activities and water quality protection on state owned submerged and other lands is vested with the Alabama Department of Environmental Management. These rules are considered cumulative.

(B) These rules shall not affect previous actions of the Commissioner concerning private docks or the issuance of any easement, lease or any disclaimer concerning state owned submerged lands. Fee arrangements in existing leases and easements shall not be subject to the fees of this rule until expiration of the current term unless otherwise specified in the lease or easement.

(C) Any expansion of an existing activity shall be subject to the provisions of this rule.

(D) It is declared to be the intent of the Commissioner that if any section, subsection, sentence, clause, phrase, or provision of this rule is held invalid or unconstitutional, such

invalidation or unconstitutionality shall not be construed as to render invalid or unconstitutional the remaining provisions of this rule.

(E) The Commissioner may grant a waiver from any portion of this rule when the implementation of said portion of the rule may result in an unreasonable infringement upon the Riparian rights of an upland riparian owner or for the proposed activity is determined to have a de minimis impact on natural resources under the jurisdiction of the Alabama Department of Conservation and Natural Resources.

### **(3) Definitions.**

When used in these rules, the following definitions shall apply unless the context clearly indicates otherwise:

(A) "Artificial erosion" means the slow and imperceptible loss or washing away of sand, sediment, or other material from property caused by man-made projects and operations.

(B) "Avulsion" means the sudden ~~or perceptible~~ loss of or addition to land by the action of water or the sudden or perceptible change in the bed of a lake or the course of a stream.

(C) "Consent of use" means a nonpossessory interest in state owned submerged lands created by an approval which allows the applicant the right to erect specific structures or conduct specific activities on said lands.

(D) "Division" means State Lands Division.

(E) "Dock" means a fixed or floating structure, including moorings, used for the purpose of berthing buoyant vessels.

(F) "Easement" means 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.

(G) "Marginal Docks" means a fixed or floating structure placed immediately contiguous and parallel to an established seawall, bulkhead or revetment.

(H) "Marina" means a small craft harbor complex used primarily for recreational boat mooring or storage.

(I) "Multi-slip docking facility" means any marina or dock designed to moor 10 or more boats, as determined by the Alabama Department of Conservation and Natural Resources.

(J) "Ownership oriented facility" means docking facilities where the use of the docking facility requires some real property interest in one or more residential units on the adjacent upland parcel.

(K) "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.

(L) "Riparian rights" means those rights incident to lands bordering upon navigable waters, as recognized by the courts and common law.

(M) "Satisfactory evidence of sufficient upland interest" shall 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.

(N) "State owned submerged lands" means those lands 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.

(O) "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.

#### **(4) Management Policies, Standards and Criteria.**

The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on state owned submerged lands.

(A) General Proprietary.

(1) For approval, all activities on state owned submerged lands must be not contrary to the public interest, except for sales which must be for a public purpose and in the public interest.

(2) All leases, easements, or other forms of approval for state owned submerged land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage state owned submerged lands.

(3) When satisfactory evidence of sufficient upland interest is not fee simple title, the term of the state owned submerged lands authorization will in no case exceed the remaining term of the sufficient upland interest unless the fee simple title holder agrees to become a co-holder of the state owned submerged lands authorization.

(4) Compensation shall be required to 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. State or other governmental agencies may be excepted from this requirement at the discretion of the Commissioner.

(5) Activities on state owned submerged lands shall be limited to water dependent activities only. Public projects which are primarily intended to provide access to and use of the waterfront may be permitted to contain minor uses which are not water dependent if:

a. Located in areas along seawalls or other nonnatural shorelines;

b. The nonwater dependent uses are incidental to the basic purpose of the project, and constitute only minor nearshore encroachments on state owned submerged lands.

(6) Boathouses with living quarters, or other such residential structures shall be prohibited on state owned submerged lands.

(B) Resource Management.

(1) All state owned submerged lands shall be subject to navigation priority and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.

(2) Activities which would result in significant adverse impacts to state owned submerged lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed and accomplished.

(3) The Alabama Department of Conservation and Natural Resources biological, marine safety and navigation assessments and any other assessments or reports by other agencies with related statutory, management, or regulatory authority may be

considered in evaluating specific requests to use state owned submerged lands. Any such reports sent to the Division in a timely manner shall be considered.

(4) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation on state owned submerged lands.

(5) Reclamation activities on state owned submerged lands shall be approved only if avulsion or artificial erosion is affirmatively demonstrated. The placement of fill material below the ordinary low water line of non-tidal streams or the mean high tide line of tidal water not associated with an approved reclamation project or the implementation of a shoreline restoration project compliant with paragraph (7) below shall not be approved.

(6) To the maximum extent possible, shoreline stabilization should be accomplished by the establishment of appropriate native wetland vegetation. Rip-rap materials, pervious interlocking brick systems, filter mats, wave attenuation units and other similar stabilization methods should be utilized in lieu of vertical seawalls wherever feasible.

(7) Shoreline restoration, including the use of "living shorelines" techniques for shoreline stabilization, may be permitted upon such terms and conditions as the Commissioner acting through the State Lands Division may require. Such techniques may include, but are not limited to, the planting of native vegetation, the placement of wave attenuation structures, the placement of fill materials, and/or other techniques. Fill material placed and/or sediments accreted below the ordinary low water line of non-tidal streams or the mean high tide line of tidal water through the implementation of shoreline restoration shall not be construed as reclamation nor cause a change in the title to state owned submerged lands.

(8) Severance of materials from state owned submerged lands shall be approved only if the proposed dredging is the minimum amount necessary to accomplish the stated purpose and is designed to minimize the need for maintenance dredging.

(9) Severance of materials for the primary purpose of providing upland fill shall not be approved unless the activity is determined by the Commissioner to be in the public interest.

(10) Activities on state owned submerged lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat. Special attention and consideration shall be given to endangered and threatened species habitat.

(11) To the maximum extent feasible, all beach compatible dredge materials taken from the tidal coastal system shall be placed on beaches or within the nearshore sand system.

(12) A setback 10 feet from the riparian lines of adjacent property owners shall be required.

(13) Setbacks from other activities, channels or structures shall also be required to ensure safety, facilitate enforcement abilities or ensure resource management.

(14) Any area made the subject of a riparian easement shall not be closer than 100 feet from a marked navigation channel.

(15) The activity shall not be contrary to the public interest or, if within the boundary of a National Estuarine Research Reserve, that the activity must be consistent with Reserve guidelines established by the Commissioner.

(C) Riparian Rights.

(1) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights of upland property owners adjacent to state owned submerged lands.

(2) Satisfactory evidence of sufficient upland interest is required for activities on state owned submerged lands, riparian to uplands, unless otherwise specified in this chapter. Satisfactory evidence of sufficient upland interest is not required for activities on state owned submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

(3) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

(4) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 10 feet inside the applicant's riparian rights lines. Exceptions to the setbacks are: private residential single-family docks or piers where such structures are shared by two adjacent single-family parcels; utility lines; bulkheads, seawalls, riprap or similar shoreline protection structures located along the shoreline; structures and activities previously authorized by the Alabama Department of Conservation and Natural Resources; structures and activities built or occurring prior to any requirement for Alabama Department of Conservation and Natural Resources authorization; when a letter of concurrence is obtained from the affected adjacent upland riparian owner; or when the Alabama Department of Conservation and Natural Resources determines that locating any portion of the structure or activity within the setback area is necessary to avoid or minimize adverse impacts to natural resources.



(D) Standards and Criteria for Docking Facilities.

(1) All Multi-slip Docking facilities and Ownership oriented facilities with 10 or more wetslips shall conform to the following specific guidelines, design standards and criteria:

(a) The area of state owned submerged lands made subject to a riparian easement for the docking facility shall not exceed the square footage amounting to 200 times the riparian waterfront footage along the affected waterbody of the applicant.

(b) Ownership oriented facilities which preempt an area less than or equal to ten square feet for every foot of riparian shoreline on the affected waterbody shall be exempt from the provisions of this regulation.

(c) Docks, mooring pilings or other such structures shall extend no more than 25 percent of the width of the waterbody at that particular location.

(d) Docks, mooring pilings or other such structures shall not extend within 100 feet of a federal navigation project channel.

(e) Within the standards set forth above, the design of piers and other improvements and quantity of wetslips may be further restricted by the Alabama Department of Conservation and Natural Resources in recognition of obstructions to navigation, marine safety considerations, riparian setback constraints, local land use regulations, and natural resource considerations such as potential impacts to endangered species and shellfish resources.

(E) Procedures - Forms of Consent.

(1) Consent of use is granted on the following activities:

a. A single residential dock, pier and/or boathouse serving a single residential parcel or similar structure serving two adjacent residential parcels, which preempts no more than 1,000 square feet of state owned submerged land area for each 100 linear feet of shoreline in the applicant's ownership. Proportional increases in the 1,000 square foot threshold can be added for fractional shoreline increments over 100 linear feet.

b. Marginal docks and mooring pilings along an existing seawall, bulkhead or revetment.

c. Replacement of bulkheads or seawalls at or within two feet waterward of the mean high water line for tidally-influenced waters or at the mean

low water line for non-tidal streams. New construction of bulkheads or seawalls requires the location of the structure at or landward of the mean high tide line for tidal waters and at or landward of the mean low water line for non-tidal streams or water bodies.

d. Placement of riprap at or within ten feet waterward of the mean high tide line in tidally-influenced waters.

(2) Riparian Easement – is required for:

a. Docks or other such activities which are larger than those which are granted a consent of use under these rules.

b. All revenue generating/income related activities.

## **(5) Payments and Fees.**

Fees for Riparian Easements relating to piers, docking facilities and other similar improvements on State-owned submerged lands shall be as follows:

### **(A) Fee Formula**

1. The annual fee for extended term riparian easements shall be either, six percent (6%) of the gross rental value as determined by the State Lands Division appraisal of all wet slips located on state-owned submerged lands encompassed by the easement, the base fee, or the minimum annual fee, whichever is greater.

2. For new leases, the first annual lease fee shall be the base fee or the minimum fee whichever is greater.

3. The easement grantee shall provide upon request by the Division any and all information in a certified form needed to calculate the easement fee specified above, including the total number, length and configuration of wet slips.

### **(B) Base Fees, Minimum Annual Fees and Other Payments**

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

2. There shall be a minimum annual fee of \$500. The minimum annual fee shall be adjusted annually on March 1 as specified in (a) above.

3. There shall be a late payment assessment for easement fees or other charges due under this rule which are not paid within 30 days after the due date. This assessment shall be computed at the rate of 12 percent per annum, calculated on a daily basis for every day the payment is late.

**~~(6) Repeal of Existing Rule~~**

~~Rule 220-4-.09, entitled "Pier Length Restrictions" as previously promulgated, is expressly repealed in its entirety.~~

**Author:** N. Gunter Guy, Jr.

**Statutory Authority:** § 9-2-12, Code of Alabama 1975

**PENALTY:** As provided by law.

**HISTORY:** 9/3/2003; 11/9/2012(ER); 5/20/2014.