



## AlaFile E-Notice

**02-CV-2008-900034.00**

Judge: SARAH HICKS STEWART

To: COURTNEY JOHN P III  
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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA EX REL TROY KING, ATTORNEY GENERA v. ALABAMA DEPARTMENT OF  
TRANSPORTATION ET AL  
~~02-CV-2008-900034.00~~

The following matter was FILED on 10/16/2009 10:10:34 AM

Notice Date: 10/16/2009 10:10:34 AM

**JOJO SCHWARZAUER**  
**CIRCUIT COURT CLERK**  
MOBILE COUNTY, ALABAMA  
205 GOVERNMENT STREET  
MOBILE, AL 36644

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA, ex rel  
 TROY KING, ATTORNEY GENERAL

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Plaintiff,

\*

and

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CV 08-900034

MOBILE BAYKEEPER, INC.,

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Plaintiff-Intervenor,

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v.

\*

ALABAMA DEPARTMENT OF  
 TRANSPORTATION, et al.,

\*

\*

Defendants.

**ORDER ON SETTLEMENT AGREEMENT  
 BETWEEN MOBILE BAYKEEPER AND THE  
 ALABAMA DEPT OF TRANSPORTATION**

This matter is before the Court on a motion filed by the State of Alabama (“the State”), by the authority of the Attorney General Troy King, Plaintiff-Intervenor, Mobile Baykeeper, Inc. (“MBK”) and Defendants, the Alabama Department of Transportation and Duncan Joseph McInnes, in his official capacity as Director of the Alabama Department of Transportation (collectively “ALDOT”) for approval of the Settlement Agreements reached between the State and ALDOT and between MBK and ALDOT, as set forth in the Settlement Agreement previously filed by the State and ALDOT on May 5, 2009 and the Settlement Agreement between MBK and ALDOT filed October 15, 2009.

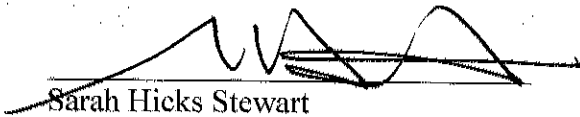
The Court grants the Motion in its entirety. The Order of Approval of the May 5 2009 Settlement Agreement between the State and ALDOT has been entered separately

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 Date: 10/16/09  
 By: PA

but contemporaneously with this Order. Attached to this Order is the Settlement Agreement between MBK and ALDOT that the Court hereby approves.

In connection with the Court's approval of these settlements, the Court orders that the invoices submitted by Mr. Steve Newton, P.E., who was previously appointed by the Court as the independent third party QCP, shall be paid by ALDOT. The Court authorizes Mr. Newton to submit his invoices directly to ALDOT for immediate payment.

Dated: October 16, 2009



Sarah Hicks Stewart  
Circuit Judge  
Thirteenth Judicial Circuit

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA, ex rel.,  
TROY KING, ATTORNEY GENERAL,

Plaintiff,

and

MOBILE BAYKEEPER, INC.,

Plaintiff-Intervenor,

v.

ALABAMA DEPARTMENT OF  
TRANSPORTATION, et al.,

Defendants.

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CIVIL ACTION NO.

CV-2008-900034.00

SETTLEMENT AGREEMENT

I. RECITALS

This Settlement Agreement is entered into by and between Plaintiff-Intervenor-Mobile Baykeeper, Inc. ("MBK"), and Defendants, the Alabama Department of Transportation and Duncan Joseph McInnes, in his official capacity as the Director of ALDOT (collectively "ALDOT") (said Plaintiff-Intervenor and Defendants collectively referred to as "the parties"), for the purpose of resolving MBK's claims in the above styled action, and any and all claims known to MBK which could have been asserted in said action, and any potential claims for which supporting information is known to MBK as of the date of the signing of this Settlement Agreement, on the following acknowledgements and terms:

A. MBK has made claims against ALDOT relating to the relocation and construction of a portion of U.S. Highway 98 in Mobile County, Alabama ("Project").

The parties acknowledge that MBK has also asserted state common law and/or statutory claims in addition to those asserted in this action, and that ALDOT denies any liability as to any and all claims which have been or could be asserted by MBK. In making this Settlement Agreement Defendants do not admit any liability, but rather expressly deny any liability. The parties enter into this Settlement Agreement for the purpose of fully resolving any and all claims which have been or could be asserted by MBK, and any person or entity claiming through MBK concerning the subject Project, and any potential claims for which supporting information is known by MBK at the time of the signing of this Settlement Agreement, as more fully set forth in the separate release attached as Exhibit A, and agree that the Court will retain jurisdiction for the purpose of enforcing this Settlement Agreement until completion of the subject Project which is defined as comprising the approximately 8 mile length of right-of-way from the Mississippi State line to approximately one-quarter mile east of Glenwood Road, and including therein the grade and drain work, two partial base and pave jobs and the bridge extension referred to in paragraph 7 below.

B. MBK's claims are premised on allegations which include, but are not necessarily limited to the following: the Project should be relocated to another alignment; as a result of design deficiencies and/or acts or omissions during construction, sediment escaped from the Project into Big Creek Lake, the Escatawpa River, and the tributary streams thereof, resulting in injury to the lake, river, streams, and/or associated wetlands; the Defendants' acts or omissions in connection with the Project constituted violations of the NPDES permit issued by the Alabama Department of Environmental Management ("ADEM") to ALDOT and the Section 404 wetland fill

permit issued to ALDOT by the U.S. Army Corps of Engineers ("USACOE") for the Project and/or applicable laws and regulations; as a result of design and construction issues water ponded on the north side of the Project causing injury to wetlands; and the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") made in connection with the Project were deficient and a full Environmental Impact Statement should be prepared for the Project and/or the series of projects running from the Mississippi State line to Interstate 65; these allegations are the basis of claims under the federal Clean Water Act and State statutory and common law for declaratory and injunctive relief, civil penalties, damages, and attorney's fees and other litigation costs. MBK agrees that upon entry of this Settlement Agreement all of its claims shall be dismissed with prejudice as set forth in paragraph 11.

C. The parties acknowledge that in October, 2007, ADEM issued a notice asserting violations of the NPDES permit, regulations applicable thereto, and provisions of the Alabama Water Pollution Control Act, which were addressed by a consent order entered into in December, 2007, between ADEM and ALDOT, number 08-095-CMNPS ("ADEM Consent Order") which, inter alia, required ALDOT to bring the project into compliance with the NPDES permit, regulations, and the AWPCA.

D. In or about September, 2007, ALDOT suspended the prosecution of new construction on the Project, engaged a new Qualified Credential Professional ("QCP") to conduct a Best Management Practices ("BMP") and Offsite Impact Assessment on the Project and, in coordination with ADEM and the Board of Water and Sewer Commissioners of the City of Mobile ("MAWSS"), began modifying and implementing BMPs and other actions to bring the Project into compliance with the NPDES permit.

ALDOT resumed prosecution of new work in areas of the Project outside the Big Creek Lake watershed in January 2008.

E. The parties acknowledge that in January, 2008, the State of Alabama, through the State Attorney General, brought this enforcement action pursuant to the Alabama Water Pollution Control Act also based on violations of the NPDES permit and discharges of sediment into Big Creek Lake, the Escatawpa River, and the tributary streams thereof.

F. In or about December, 2007, the parties determined that their interests would be served by pursuing a settlement which would balance and accommodate the following goals of the parties, to-wit: the provision of safe and efficient transportation infrastructure on the part of the ALDOT and the construction thereof, safe provision of drinking water to the City of Mobile and other areas by MAWSS, and the protection of environmental resources. Accordingly, the parties have since that time conducted settlement negotiations including, without limitation, exchanges of documents and other information, frequent meetings and other communications, visits to the Project, discussions of design and construction concepts, and construction activities, and negotiations between representatives of the parties and their counsel.

G. ALDOT resumed the prosecution of new work in the Big Creek Lake watershed in about April, 2008. In connection therewith, ALDOT limited active earthwork to an area of not more than 17.5 acres pursuant to ALDOT's standard specifications. Prior to resuming new work, ALDOT had revised its Construction Best Management Practices Plan and the parties acknowledge that as the work has progressed ALDOT has implemented and maintained BMPs to prevent erosion and

offsite sedimentation. As a result of corrective actions on the part of ALDOT, the discussions and other efforts towards settlement made by the parties, actions have been undertaken, the accomplishment of which has led the parties to be in a position to reach this Settlement Agreement;

NOW THEREFORE, it is hereby agreed as follows:

1. This Settlement Agreement applies to and is binding upon the parties, their officials, officers, directors, employees, agents, servants, successors, and assigns, and all persons, firms, and corporations who assist in the fulfillment of or are obligated pursuant to its terms.

2. Effective on the date of execution and until such time as its terms and conditions are fulfilled or its legal termination, the parties agree to give written notice of this Settlement Agreement to any successors in interest prior to any transfer of ownership, management, operation, or maintenance of any portion of the Project which is the subject of this litigation, and shall provide a copy of this Settlement Agreement to any successor in interest. Any transfer of or change in status of any party hereto shall in no way alter that party's responsibilities pursuant to this Settlement Agreement.

3. The parties agree and that they shall be responsible that any contractors, employees, agents, or other persons or corporations hired to perform any work associated with the Project shall comply with all terms of this Settlement Agreement and any applicable laws.

4. ALDOT has implemented construction methods and/or design changes to address concerns about slope stability and high ground water at certain locations on the Project, including flattening slopes in certain areas, installation of chimney drains, and

installation of a slope tie-back system known as "Platypus". ALDOT also has undertaken other measures to guard against erosion and loss of sediment from the Project such as lining the entire bed of the haul road for the Project with gravel, and on other surfaces not used for construction traffic placing rolled erosion control products and seeding. These remedial measures, or other measures as may become necessary, as determined by ALDOT, shall continue to be taken by ALDOT to address erosion and sediment loss. .

5. From in or about January, 2008, through May, 2008, ALDOT, through its independent QCP, undertook an assessment of offsite sedimentation and potential remediation measures. The evaluation was undertaken on properties for which the owners granted permission for access. ALDOT has been informed that MAWSS does not desire ALDOT to undertake the removal of any sediment which may have left the Project and settled in Big Creek Lake or any tributary streams of Big Creek Lake on property owned by MAWSS due to the possibility of disturbing sediments with latent noxious elements, which could degrade water quality in the reservoir and put the users of the water supply at risk.

6. Escatawpa Mitigation or Causeway Study – It is acknowledged that ALDOT has expended approximately \$125,000 for sediment removal in or near a tributary to Scarboro Creek, which is part of the Escatawpa River Basin, and will take additional remedial measures if so required by ADEM. ALDOT agrees to provide \$50,000 to the Alabama Department of Conservation and Natural Resources ("ADCNR") which may be used by ADCNR, acting in conjunction with Forever Wild, for the acquisition of additional land or an interest therein within the Escatawpa watershed.

If the funds are not used for this purpose within 6 months of the date of this agreement, the funds shall be applied to the study of the efficacy and effects of making alterations to the Causeway in Mobile County. If the funds have not been expended for such purposes within (18) months from the date hereof (subject to extension by mutual agreement), the funds shall be used for a land conservation or water quality enhancement project within Mobile County designated by MBK.

7. Big Creek Mitigation – ALDOT has submitted an "off-site mitigation plan" to ADEM for the Big Creek Watershed. ALDOT agrees to perform such mitigation as required by ADEM and as it may further agree with MAWSS.

8. In order to address concerns about water ponding north of the project on Long Branch and Big Creek, ALDOT performed a directional bore to install an additional drainage pipe to alleviate and prevent ponding on Long Branch and installed two French drains in the temporary haul road/causeway which was constructed on the east side of Big Creek in connection with the construction of the bridge over Big Creek. ALDOT will maintain the directional bore and implement other measures as may become necessary, as determined by ALDOT, to control ponding at Long Branch. The ponding at Big Creek will be further addressed through the bridge extension discussed in paragraph.

9. In order to further address concerns about erosion, potential ponding north of the Project and potential for downstream scour, ALDOT shall extend the bridge over Big Creek originally designed as a 300 foot span, to a span of approximately 1,700 feet. In connection with this construction, the temporary haul road/causeway will be removed with the area restored to its original elevation and vegetated with native plant species.

ALDOT will construct the bridges with level 4, 45 inch high railings. Additionally, the bridge will be constructed with a containment system for stormwater runoff and potential hazardous material spills with the following features: Runoff from the bridge deck will be collected in a piping system suitable for extended service and transported to the west end of the bridge; the piping system and deck will discharge into a containment basin in the roadway median west of the bridge; runoff will be released into the basin in a diffused manner; and the basin will be constructed with a synthetic liner over which top soil and grass will be placed.

10. The interests of the parties have required balancing the need for the traveling public to have reasonably convenient access to the relocated U.S. Highway 98 with the protection of the public drinking water supply, Big Creek Lake reservoir, and the watershed and its feeder streams, which can be damaged by erosion, sedimentation, other construction impacts, hazardous material spills from the highway and bridge, and detrimental runoff resulting from development. The parties agree that these interests are served by limiting the present construction of intersections and/or interchanges on the Project to: (1) Wilmer-Georgetown Road, (2) the intersection of existing U.S. 98 with the Project near the Mississippi State line, and (3) an intersection at Jones Road on the north side of the Project. ALDOT now has no plans for additional interchanges or intersections. Additionally, in the issuance of driveway permits for access directly to the project from adjacent properties, ALDOT will follow, enforce, and continue its existing policy that a permit is personal to the permittee, intended to allow ingress and egress only to the property specified in the permit, and for the purposes specified in the permit. In locations where gopher tortoise fences have been installed along the Project in

accordance with the EA and FONSI, a driveway permit will not be issued without concurrence from the U.S. Fish & Wildlife Service. In areas where the property for which a permit is requested constitutes or includes wetlands, ALDOT will require that the applicant obtain and present with the application an NPDES and/or Section 404 wetland fill permit for the uses of the property for which the driveway permit is requested, or establish to ALDOT's satisfaction that an NPDES and/or Section 404 permit is not required, by written statement from ADEM or the USACOE or otherwise. ALDOT will include the above in the Highway Access Management Plan for Highway 98.

11. MBK may request information regarding access permitting.

12. ALDOT does not object to efforts by MBK or others to have the Project designated as a National Scenic Byway.

13. The parties acknowledge ALDOT has prepared a contingency plan addressing, *inter alia*, the potential spill of hazardous materials on the Project and will work with MAWSS, Mobile County Emergency Agency and others as appropriate to implement the Plan in the event of a spill on the Project.

14. The Project includes wetland treatment ponds, generally at the outfalls in the Big Creek Lake watershed. The ponds are to be used as sediment basins during construction and then converted to final configuration for post-construction treatment of stormwater runoff. The ponds may provide some containment function in the event of a hazardous spill; however, the parties acknowledge and agree that the ponds are not specifically designed for hazardous materials containment, and depending upon the circumstances, may not provide complete containment under certain circumstances.

15. ALDOT will apply what it has learned about sedimentation, slopes, run-off, etc., on the Project to future projects in Alabama to the extent this is reasonable and appropriate. ALDOT is using its experience on the Project to attempt to avoid similar circumstances from occurring with regard to the remaining U.S. 98 work.

16. This Settlement Agreement will be filed with the Court as a part of the Order on Settlement Agreement previously submitted to the Court by the Attorney General and ALDOT. MBK agrees that upon approval of the two agreements by the Court, all claims made in this action, or which could have been made, and potential claims for which it had supporting information at the time of executing this Agreement are dismissed with prejudice and that MBK will execute a release in the form attached hereto as Exhibit A. MBK further agrees that in the action pending in federal court, styled The Board of Water and Sewer Commission of the City of Mobile, et al. v. Alabama Department of Transportation et al, 1:08-718-WS-N, it shall dismiss with prejudice all claims which were or could have been asserted, and any potential claims for which it had supporting information. ALDOT agrees that it will not seek an award of litigation costs in that action.

17. ALDOT agrees to pay MBK \$68,000 for use by MBK on conservation or environmental improvement projects, or as MBK may otherwise determine.

18. Except as stated above or provided in the release, MBK is not waiving or releasing any claim relating to the SR-42 Connector project (i.e. the project immediately east of the subject Project) nor its rights to enforce this Agreement.

19. The parties agree to make a joint statement or release to the media concerning this settlement, and will work together to develop and coordinate the same.

In the event of inquiries by the media after the initial release or statement, the party receiving the inquiry shall respond that the matter was resolved pursuant to the terms of a written settlement agreement and any response to further inquiries shall be non-adversarial in tone and content. In accordance with paragraphs 1 and 3 above, the parties shall take the efforts needed to ensure that all representatives adhere to this provision.


20. Each of the undersigned representatives signing this Settlement Agreement does hereby declare and warrant that said representative has been duly authorized to execute this Settlement Agreement.

21. Each party will bear its own attorney's fees and costs.


DONE and entered this 15<sup>th</sup> day of October 2009.

PLAINTIFF-INTERVENOR MOBILE  
BAYKEEPER, INC.

DATE: 10/9/09

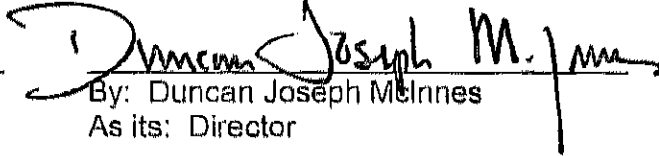
  
By: FRANK H. SUMMERELL  
As its: PRESIDENT

DATE: 10/9/09

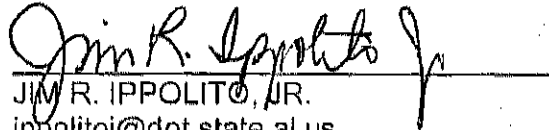
  
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THE ALABAMA DEPARTMENT OF  
TRANSPORTATION

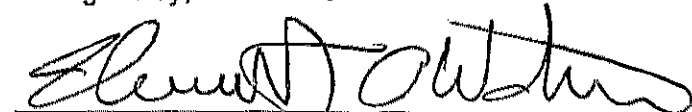
DATE: 10/14/09

  
By: Duncan Joseph McInnes  
As its: Director

DATE: 10/13/09

  
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DATE: 10/15/09

  
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