Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

April 9, 2024

The Honorable Michael Watson
Secretary of State
401 Mississippi Street
Jackson, Mississippi 39201

Re: Placement of Breakwater on Tidelands

Dear Secretary Watson:

The Office of the Attorney General has received your request for an official opinion.

Questions Presented

1. Does the law allow the Secretary of State to authorize the placement of breakwaters on tidelands without requiring the upland owner to lease land under the footprint of the breakwater?

2. May the Secretary of State require private resident upland landowners wanting to place living shoreline breakwaters on state-owned tidelands to enter into binding agreements identifying the current mean high-water mark as the boundary of public trust lands and excluding artificial accretions to the uplands from the ownership or title of the upland owner?

3. Is the Secretary of State otherwise limited by law from consenting to such placement of structures on tidelands?

4. Even if the Department of Marine Resources ("DMR") authorizes a living shoreline under a Mississippi General Permit from the Army Corps of Engineers, is the residential property owner allowed to place such structures on tidelands without the consent of the Secretary of State?

Brief Response

1. The Secretary of State's authorization is only necessary when a tidelands lease is needed. Generally, "[p]ermanent structures . . . may not be erected on state[-]owned waterbottoms

550 HIGH STREET • SUITE 1200 • JACKSON, MISSISSIPPI 39201
POST OFFICE BOX 220 • JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3680

unless done so pursuant to a lease with the Secretary of State." MS AG Op., *Nelson* at *1 (Sept. 18, 1998). However, pursuant to Mississippi Code Annotated Section 29-15-5(2), "[r]esidential property owners shall not be required to obtain a tidelands lease for exercising their common law and statutory littoral and riparian rights." If it is determined that a breakwater constitutes an "other structure" as set forth in Section 49-15-9, and is thus a littoral right of property owners, Section 29-15-5(2) authorizes the placement of breakwaters on tidelands without requiring residential upland owners to lease the land under the footprint of the breakwater.

2. There is no statutory provision specifically authorizing the Secretary of State to require agreements with the private landowner establishing the current high-water mark as the boundary of public trust tidelands and excluding artificial accretions from ownership/title. However, Section 29-15-7(2) provides that "natural" accretions increase the land owned by the contiguous upland owner, but it does not afford upland owners the same increase in land as a result of "artificial" accretions.

3. Aside from the provisions mentioned herein, we are aware of no other state law that would limit the Secretary of State from consenting to living shoreline breakwaters on tidelands. However, the Secretary of State's authorization and/or consent is only necessary to the extent a tidelands lease is needed.

4. Mississippi General Permits from the Army Corps of Engineers or Wetlands Permits issued by DMR are wholly separate and distinct from public trust tidelands leases entered with the Secretary of State. Consent from the Secretary of State is not a requirement of DMR's permitting process. Beyond this, see the response to question one.

Applicable Law and Discussion

We first note that the Attorney General is authorized to issue official opinions on prospective matters of state law only; this office cannot opine on matters of federal law. Miss. Code Ann. § 7-5-25; MS AG Op., *Snell* at *2 (Mar. 16, 2018). Likewise, this office may not opine upon any applicable ordinances, zoning codes, or regulations. MS AG Op., *Tullos* at *1 (Aug. 27, 2018); MS AG Op., *Provine* at *1 (July 28, 2006). Accordingly, the scope of this opinion is limited to Mississippi law.

According to the Mississippi Supreme Court, "[i]t is a well-established principle of law that lands covered by tide waters within a state belong to the state in which they are found." *Stewart v. Hoover*, 815 So. 2d 1157, 1159 (Miss. 2002); *see also* Miss. Code Ann. § 29-15-5(1) ("Tidelands and submerged lands are held by the state in trust for use of all the people . . . ."). As set forth in your request, the Secretary of State is the statutorily designated trustee and manager of state-owned public trust tidelands and submerged lands along Mississippi's southern border and has the authority, with the Governor's approval, to rent or lease state public trust tidelands. Miss. Code Ann. § 7-11-11; § 29-1-107(2)(a).

Sections 29-15-1, *et seq*., govern Public Trust Tidelands, and Section 29-15-3(1) sets forth the legislature's public policy in regard to these tidelands:

> It is declared to be the public policy of this state to favor the preservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific public trust tidelands would serve a higher public interest in compliance with the public purposes[1] of the public trust in which such tidelands are held.

As the designated trustee of Mississippi's public trust tidelands, it is the duty of the Secretary of State to accomplish the public policy set forth by the legislature.

You first ask if the law allows the Secretary of State to authorize the placement of breakwaters on tidelands without requiring the upland owner to lease the land under the footprint of the breakwater. To begin, it is the opinion of this office that the Secretary of State's authorization is only necessary to the extent that a tidelands lease is necessary. This said, generally speaking, "[p]ermanent structures . . . may not be erected on state[-]owned waterbottoms unless done so pursuant to a lease with the Secretary of State under his authority to lease such submerged lands under Section 29-1-107 and Section 29-15-9 of the Mississippi Code." *Nelson* at *1 (Sept. 18, 1998). However, there are certain fact-specific exceptions to this general rule. *See, e.g.*, *Bayview Land, Ltd. v. State ex. rel. Clark*, 950 So. 2d 966, 988 (Miss. 2006); *State by and through Watson v. RW Development, LLC*, 357 So. 3d 1028, 1038 (Miss. 2023). Moreover, Section 29-15-5(1) provides that "[l]ittoral and riparian property owners have common law and statutory rights under the Coastal Wetlands Protection Law which extend into the waters and beyond the low tide line," and Section 29-15-5(2) provides that "*[r]esidential* property owners *shall not* be required to obtain a tidelands lease for exercising their common law and statutory littoral and riparian rights."[2] (emphasis added).

The statutory littoral and riparian rights referenced in Section 29-15-5 are set forth in Section 49-15-9, which states:

> The sole right of planting, cultivating in racks *or other structures*, and gathering oysters and erecting bathhouses and *other structures* in front of any land bordering on the Gulf of Mexico or Mississippi Sound or waters tributary thereto belongs to the riparian owner and extends not more than seven hundred fifty (750) yards from the shore, . . . measuring from the average low water mark, but where the distance from shore to shore is less than fifteen hundred (1500) yards, the owners of either shore may plant and gather to a line equidistant between the two (2) shores, but no person shall plant in any natural channel so as to interfere with navigation, and such

[1] The Mississippi Supreme Court has recognized the following as an unexhausted list of public purposes as set forth in Section 29-15-3(1): "navigation and transportation, commerce, fishing, bathing, swimming and other recreational activities, development of mineral resources, environmental protection and preservation, the enhancement of aquatic, avarian [sic] and marine life, [and] sea agriculture." *Columbia Land Dev., LLC v. Sec'y of State*, 868 So. 2d 1006, 1012–13 (Miss. 2004) (citations omitted).

[2] "Littoral rights" are those "concerning properties abutting an ocean, sea or lake." *Watts v. Lawrence*, 703 So. 2d 236, 238 (Miss. 1997) (internal quotations and citation omitted). "Riparian rights" are those concerning a river or stream. *Id*. The Mississippi Supreme Court has applied Section 49-15-9, titled "Riparian rights" as regarding both riparian and littoral rights. *Id*. Your questions concern littoral rights.

> riparian rights shall not include any reef or natural oyster bed and does not extend beyond any channel. A riparian owner shall comply with the Coastal Wetlands Protection Act in exercising the use of these riparian rights. Stakes of such frail materials as will not injure any watercraft may be set up to designate the bounds of the plantation, but navigation shall not be impeded thereby. The riparian owner shall clearly mark such cultivation racks and other structures.

(emphasis added).

Your question is specific to breakwaters. A breakwater is defined as "an offshore structure (such as a wall) protecting a harbor or beach from the force of waves." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/breakwater (last visited April 9, 2024). "Other structure," as set forth in Section 49-15-9, is a broad and open-ended term. If it is determined that the placement of a breakwater constitutes an "other structure" as set forth in Section 49-15-9, and thus is considered a littoral right of property owners, Section 29-15-5(2) authorizes *residential* upland property owners to place breakwaters on tidelands without requiring them to lease the land under the footprint of the breakwater.

Furthermore, while this office may not opine upon rules and regulations, the Secretary of State's own Rules for the Administration, Control and Leasing of Public Trust Tidelands should also be considered in regard to who must obtain a lease. *See* Rules of Secretary of State for the Administration, Control, and Leasing of Public Trust Tidelands, Rule 4(C)(1) ("A public trust tidelands lease shall not be required for structures built in the riparian or littoral area pursuant to General Permits MS-GP-02 or MS-GP-04 provided that the combined area of structures (excluding access piers) and berthing areas does not exceed 1,000 square feet and so long as said structures are not used for, or in association with, commercial purposes."); Rule 4(C)(2) ("Leases are required of commercial and industrial applicants and for commercial and industrial use of littoral and riparian rights.").

You next ask if the Secretary of State may require private resident upland landowners wanting to place living shoreline breakwaters on tidelands to enter into binding agreements identifying the current mean high-water mark as the boundary of ownership or title of the upland owner.[3] There is no statutory authority allowing the Secretary of State to require such agreement. This said, Section 29-15-7(2) provides that "natural" accretions increase the land owned by the contiguous upland owner, but it does not afford upland owners the same increase in land as a result of "artificial" accretions. Put differently, "artificial" accretions derived from an upland owner's construction of a living shoreline will not increase the land owned by the contiguous upland owner from that determined prior to construction of a living shoreline. *See Bayview Land, Ltd.*, 950 So. 2d at 983-84 (indicating same but also noting Mississippi common law provides that "accretions

[3] A living shoreline is "a protected, stabilized coastal edge made of natural material such as plants, sand, or rock." Living shorelines "connect the land and water to stabilize shorelines, reduce erosion, and provide valuable habitat that enhances coastal resilience." National Ocean and Atmospheric Administration Fisheries, *Understanding Living Shorelines* (Dec. 19, 2023) https://www.fisheries.noaa.gov/insight/understanding-living-shorelines#what-is-a-living-shoreline.

caused by third-party strangers to the upland title will vest in the upland owner . . ., at least as to non-state third-party strangers to the upland title.").

Your third question is whether the Secretary of State is otherwise limited by law from consenting to such placement of structures on tidelands. Aside from the provisions mentioned herein, we are aware of no other state law that would limit the Secretary of State from consenting to living shoreline breakwaters on state-owned tidelands. Again, the Secretary of State's authorization and/or consent is only necessary to the extent a tidelands lease is needed. As stated *supra*, it is the duty of the Secretary of State as the designated trustee of Mississippi's tidelands to accomplish the public policy set forth by the legislature in Section 29-15-3(1). Please note that this office may not opine upon any federal law, ordinances, zoning codes, or regulations that may be applicable.

Finally, you ask "[e]ven if the Department of Marine Resources authorizes a living shoreline under a Mississippi General Permit from the Army Corps of Engineers, is the residential property owner allowed to place such structures on tidelands without the consent of the Secretary of State?" The Coastal Wetlands Protection Law, commonly known as the "Wetlands Act," is set forth in Sections 49-27-1, *et. seq*. Like tidelands, the legislature has set forth public policy for preserving wetlands, which can be found in Section 49-27-3. In advancement of this policy, the Wetlands Act mandates that "[n]o regulated activity shall affect any coastal wetlands without a permit unless excluded in Section 49-27-7."[4] Miss. Code Ann. § 49-27-9(1). These permits are issued by DMR, which is vested with the full power "to manage, control, supervise, enforce and direct any matters pertaining to saltwater aquatic life and marine resources under the jurisdiction of the [Mississippi Advisory Commission on Marine Resources]." Miss. Code Ann. § 49-15-11(1). Consent from the Secretary of State is not a requirement of the permitting process. Although both are often necessary, rendering overlap, permits issued by DMR are wholly separate and distinct from public trust tidelands leases entered with the Secretary of State. *See Watts v. Lawrence*, 703 So. 2d at 238 (recognizing DMR's administrative control over littoral rights and noting construction of structure by residential property owner was subject only to regulation by DMR after receiving permit to build); *Stewart*, 815 So. 2d at 1163 (reiterating same). Accordingly, please see the response to question one.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Maggie Kate Bobo*

Maggie Kate Bobo
Special Assistant Attorney General

[4] Regulated activity is defined in Section 49-27-5(c) and includes the erection of certain structures.