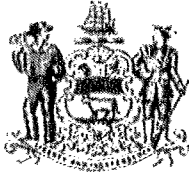


EXHIBIT A
TO APPELLANT'S MOTION *IN LIMINE*



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL

DIVISION OF WATER
RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

WETLANDS &
SUBAQUEOUS LANDS

PHONE
(302) 739-9943

January 30, 2020

Delmarsh, LLC
c/o: Jeffrey Liberto
74 Caddie Court
Magnolia, DE 19962

Wetlands Map Change ID: MC-267/19

RE: State Regulated Wetlands Map Change DNR-183 near the northern terminus of N. Flack Avenue and N. Bayshore Drive, Bowers Beach, Kent County, DE

Tax Parcel #s: 8-01-11513-01-0300-00001 & 8-01-11513-01-0200-00001

Dear Mr. Liberto,

This letter is in response to a request for a mapping change to the State of Delaware Wetland Map DNR-183. The request was submitted to the Wetlands and Subaqueous Lands Section ("WSLS") of the Delaware Natural Resources and Environmental Control ("Department") by Richard L. Abbott, Esquire on July 1, 2019 with subsequent information received on August 12, 2019. The proposed map change is located near the mouth of the Delaware Bay and the Saint Jones River near the terminus of N. Flack Avenue and N. Bayshore Drive, Bowers, Kent County, Delaware. The applicant requested that the property associated with the above referenced tax parcels ("Property") be removed from the wetlands map designation.

State Wetland Regulatory Authority

State wetlands are regulated in accordance with The Wetlands Act, (7 *Del. C.*, ch. 66) and the Department's Wetlands Regulations (7 *Del. Admin. C* § 7502). Pertinent portions of these documents are as follows:

State regulated wetlands are defined in the Act (§6603(h)) and Regulations (§5.0) as:

[T]hose lands above the mean low water elevation including any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State along the Delaware Bay and Delaware River, Indian River Bay, Rehoboth Bay, Little and Big Assawoman Bays, the coastal inland waterways, or along any inlet, estuary or tributary waterway or any portion thereof, including those areas which are now or in this century have been connected to tidal waters, whose surface is at or below an elevation of 2 feet above local mean high water, and upon which may grow or is capable of growing any but not necessarily all of the following plants.

In accordance with State law, the State regulated wetlands have been identified, inventoried, and demarcated on the Delaware Wetlands maps. The Property was designated as wetlands and included on the Delaware Wetlands maps in 1988.

Section 6607(e) of the State Wetlands Act and § 17.1 of the Wetlands Regulations address errors in the adopted State of Delaware Wetlands maps:

If an on-site evaluation by the Department establishes that an error exists in a wetlands map that has been adopted by the Department, in accordance with 7 Del.C. §§6607(b) and (c) the wetlands map containing the error may be corrected by the Department after the Department documents, in writing, the results of the on-site evaluation, and the Department gives public notice of any proposed correction.

This procedure is the only mechanism for removing a wetlands designation.

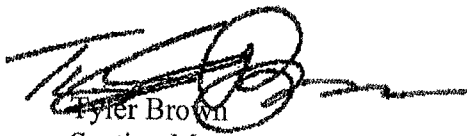
Conclusion

The WSLs evaluated the proposed map change in accordance with the Wetlands Act and the Wetlands Regulations. The WSLs evaluated the site and reviewed the supporting documentation submitted with the map change request.

Upon reviewing the supporting documentation and conducting an on-site evaluation of the properties located at tax parcels 8-01-11513-01-0300-00001 & 8-01-11513-01-0200-00001 it has been determined that no error exists in the State of Delaware Wetland Map DNR-183. This property has been found to meet the definition of a "Wetlands" as defined in 7 Del. C. § 6603(h) and the Wetlands Regulations. Therefore, the area will remain as State-regulated wetlands.

Pursuant to 7 Del. C. § 6610, "Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after the Secretary has announced the decision."

Sincerely,



Tyler Brown
Section Manager
DNREC Wetlands and Subaqueous Lands Section

CC: George Geatz, Environmental Scientist, DNREC Wetlands and Subaqueous Lands Section
Richard L Abbott, Esquire

EXHIBIT B
TO APPELLANT'S MOTION *IN LIMINE*

Delmarsh LLC On-Site Investigation Summary

Two on-site investigations were conducted by DNREC Wetlands and Subaqueous Lands (WSLS) staff members George Geatz and Tyler Brown on 8/13/19 and 9/18/19. These investigations were conducted to characterize the nature of the site with regards to whether the site met the definition of a “Wetlands” as defined in 7 Del. C. § 6603(h) and the Wetlands Regulations.

Upon visually looking over the site it was apparent that anthropogenically-induced changes were present across the entire area. Specifically, herbicide applications and the mowing of vegetation had taken place which made it difficult to discern exact species of vegetation which would be naturally present. However, it was apparent from standing stems at the site that vegetation contained extensive aerenchyma tissue which is an adaptation characteristic of plants which have evolved to exist in wetland environments where water is near, at, or above the soil surface on a frequent basis. Adjacent areas which had not been mowed or sprayed, on the adjacent parcel, and fell in a similar landscape setting appeared to have lush stands of *Spartina alterniflora* which are found in wetland environments and are listed as one of the species which may grow or is capable of growing in wetlands according to the definition found in 7 Del. C. § 6603(h) and the Wetlands Regulations. The standing stems drew a very similar resemblance to *Spartina alterniflora* stems and phragmites.

An elevation survey was provided to WSLS from the applicant which depicted the mean highwater line. According to the survey, there is no area on any of the parcels in question which have elevations 2 feet above local mean high water except for the dune areas. These dune areas are not mapped as state-regulated wetlands, which was confirmed by walking the site using a GPS unit loaded with the wetland maps. These areas were either never mapped as state-regulated wetlands or had already undergone map changes to correct the mapping errors. Thus, the elevation standard set in the definition of a “Wetlands” as defined in 7 Del. C. § 6603(h) and the Wetlands Regulations shows that what is currently mapped falls in line with a Wetlands.

Aerial photography from 1926 shows a clear channel coming from the St. Jones River and running along what is now Flack Avenue into the sites in question. According to a Department of Justice interpretation of the definition of the “Wetlands” definition in 7 Del. C. § 6603(h) and the Wetlands Regulations, we consider the criterion of wetlands which states “...areas which are now or in this century have been connected to tidal waters...” to be satisfied by any land which was connected to tidal waters within the 20th century. Thus, with the St. Jones River being tidal in this area and having a clear tidal connection from the St. Jones River to the sites in question in 1926, WSLS considers this criterion of a wetland to be fulfilled. Additionally, a culvert located on the northern end of the property appears to connect the site with the vast area of tidal *Spartina* marsh found on the opposite end of Flack Avenue.

While no soils-related language is included in the “Wetlands” definition in 7 Del. C. § 6603(h) and the Wetlands Regulations, several soil cores were taken to determine the nature of the substrate at the site. This was done to provide additional information on the condition of the site which could help in the map change determination. The soils in the area are mapped primarily as Transquaking and Mispillion soils by the USDA, and these are the soils which were observed onsite. These represent organic soils with

drainage classes of "very poorly drained" and with official soil series descriptions which note that they are found in geographic settings along "tidally influenced" areas. Organic soils are the hydric soils, which according to the National Technical Committee of Hydric Soils are "a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part." This is the definition used to administer Section 404 of the Clean Water Act by the EPA and the U.S. Army Corps of Engineers.

EXHIBIT C
TO APPELLANT'S MOTION *IN LIMINE*

Richard Abbott

From: Spialter, Kayli (DOJ) <Kayli.Spialter@delaware.gov>
Sent: Friday, July 24, 2020 4:52 PM
To: Richard Abbott
Cc: Jeffrey D. Liberto [LibertoLife.com]
Subject: Re: EAB Appeal 2020-03 Delmarsh, LLC
Attachments: 1926 Photo.PNG

Enclosed is the picture you requested.

Kayli H. Spialter, Esq.
Deputy Attorney General, Environmental Unit
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
(302) 577-8508

 Please consider the environment before printing this message.

Please note that my email address has changed. Please update your address book to reflect my new email address, kayli.spialter@delaware.gov

Confidentiality Notice: This electronic message and any attachment(s) are confidential and may be subject to the attorney/client privilege and/or work product immunity. This e-mail is only for the use of the intended recipient(s). If you have received this e-mail in error, please notify the sender immediately by replying to this e-mail, then delete this message and any attachment(s) from your system. Any unintended transmission expressly shall not waive the attorney/client or any other privilege.

From: Richard Abbott <rich@richabbottlawfirm.com>
Sent: Tuesday, July 21, 2020 7:28 PM
To: Spialter, Kayli (DOJ) <Kayli.Spialter@delaware.gov>
Cc: Jeffrey D. Liberto [LibertoLife.com] <JDL@libertolife.com>
Subject: Re: EAB Appeal 2020-03 Delmarsh, LLC

Kayli,

Please provide the 1926 Map being relied upon by your client.

We should not have to wind our way through apps and maps and guess.

We need to know precisely what image DNREC is relying upon for its decision.

A URL Address does not make it clear.

Thank you.

Rich Abbott

Richard L. Abbott, Esq.
724 Yorklyn Road, Suite 240

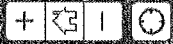
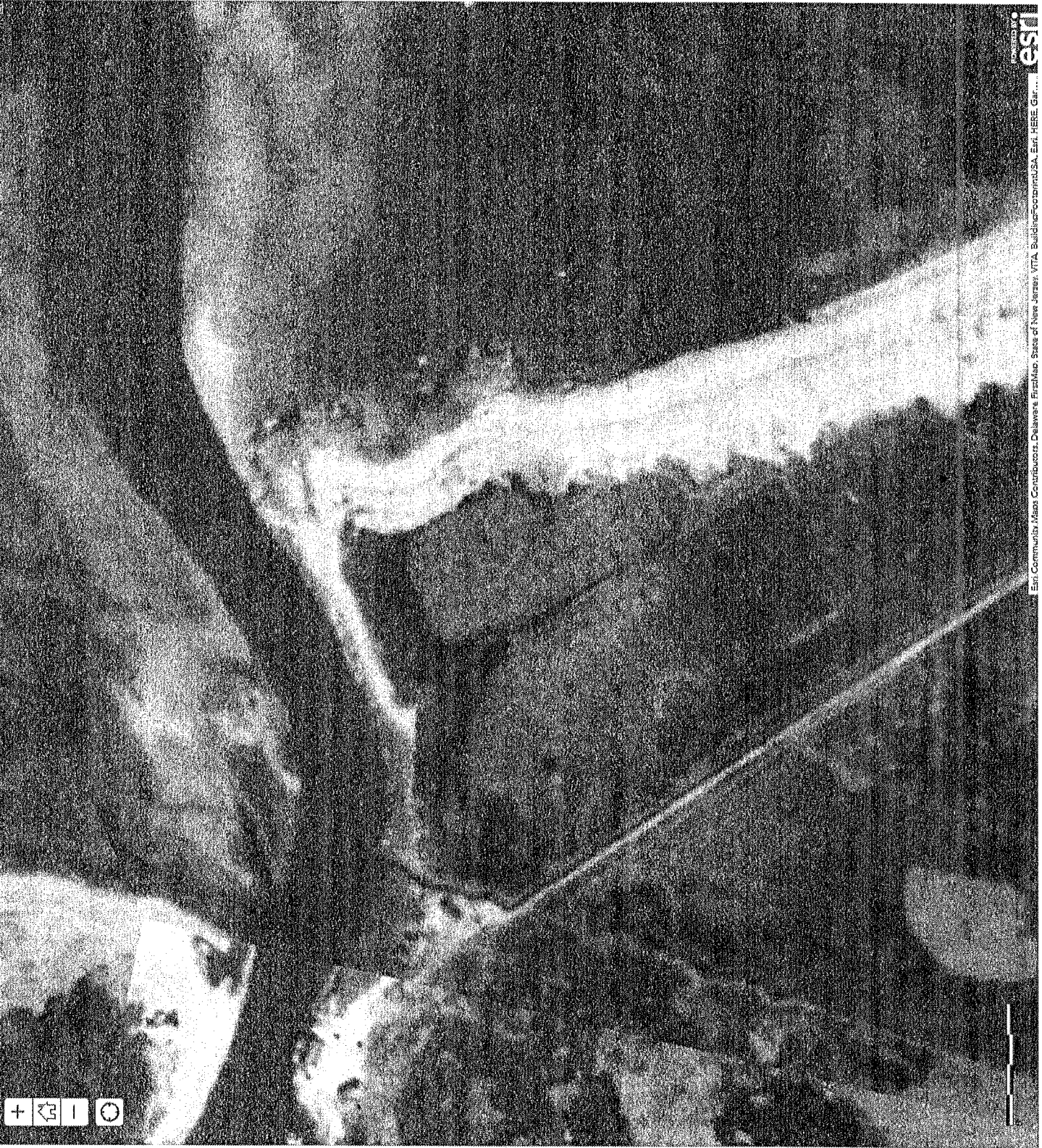


EXHIBIT D
TO APPELLANT'S MOTION *IN LIMINE*

BEFORE THE ENVIRONMENTAL APPEALS BOARD

DELMARSH, LLC,)

Plaintiff,)

v.)

EAB Appeal No. 2020-03

DELAWARE DEPARTMENT OF)

NATURAL RESOURCES AND)

ENVIRONMENTAL CONTROL,)

Defendant.)

**RESPONSE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL TO PLAINTIFF'S SUBPOENA**

Defendant Delaware Department of Natural Resources and Environmental Control ("DNREC") by and through undersigned counsel, hereby submits the following responses to Plaintiff's Subpoena as follows:

- 1) All emails or other written communications from or to DNREC personnel regarding the Subject.

RESPONSE: Pursuant to Rule 45(c)(3), DNREC objects to this request as unduly burdensome and failing to allow reasonable time for compliance. Further objected subject to the provisions of Rule 26(b)(3) and Rule 26(c)(4) limiting the disclosure of trial preparation materials or attorney work product.

- 2) All analyses, reports, studies, evaluations, or recommendations regarding the Subject.

RESPONSE: The only responsive document is the “On-Site Summary” previously provided.

- 3) All documents supporting the inclusion of any part of the Property on the Map as marsh, wetlands, or any other Map designation.

RESPONSE: The only responsive document is the “On-Site Summary” previously provided. By way of further response, pursuant to Rule 45(c)(3), DNREC objects to this request as unduly burdensome and failing to allow reasonable time for compliance. Also objected subject to Rule 26(b)(3) and Rule 26(c)(4) limiting disclosure of trial preparation materials or attorney work product.

- 4) All documents in any electronic or hard copy files regarding the Application, other than those submitted to DNREC by Delmarsh LLC or its agent.

RESPONSE: The only responsive document is the “On-Site Summary” previously provided. By way of further response, pursuant to Rule 45(c)(3), DNREC objects to this request as unduly burdensome and failing to allow reasonable time for compliance. Further objected subject to the provisions of Rule 26(b)(3) and Rule 26(c)(4) limiting the disclosure of trial preparation materials or attorney work product.

- 5) A copy of the DNREC Secretary Order adopting the original State Wetlands Maps after the adoption of the State Wetlands Act in 1978 - Title 7, Chapter 66 of the Delaware Code.

RESPONSE: Enclosed as Exhibit A.

- 6) The State Wetlands Map for area 183, which includes the Town of Bowers, on the original State Wetlands Maps.

RESPONSE: Enclosed as Exhibit B.

- 7) Copies of all State Wetlands Map changes which are contained in the "Map Change See Box File," as handwritten on the "DNREC 16-015 3-22-88" aerial photograph that purports to be a Wetlands Map panel for area 183 of the State Wetlands Maps on the DNREC Website.

RESPONSE: Enclosed as Exhibit C.

- 8) A copy of the State Wetlands Map currently in effect for all parcels of land situate in the Town of Bowers, Kent County, Delaware.

RESPONSE: Enclosed as Exhibit D

- 9) Copies of the "Aerial Photography from 1926 [that] shows a clear channel coming from the St. Jones River and running along what is now Flack Avenue into the sites in question" contained in the document entitled "Delmarsh LLC On-Site Investigation Summary" (undated) which was produced by DNREC counsel to counsel for Delmarsh (the "On-Site Summary").

RESPONSE: These photographs are accessible here: http://firstmap.gis.delaware.gov/arcgis/rest/services/DE_Imagery/DE_Imagery_1926/ImageServer

- 10) A copy of the “Department of Justice interpretation of the definition of ‘Wetlands’ in 7 *Del. C.* § 6603(h) and the Wetlands Regulations” referenced in the On-Site Summary (the “Interpretation”).

RESPONSE: DNREC objects pursuant to the provisions of Rule 26(b)(3) and Rule 26(c)(4) limiting the disclosure of trial preparation materials or attorney work product.

- 11) All documents which support the contention in the On-Site Summary that there is “a culvert located on the northern end of the property [that] appears to connect the site with the vast area of tidal *Spartina* marsh found on the opposite end of Flack Avenue” (the “Alleged Culvert”).

RESPONSE: The only responsive document is the “On-Site Summary” previously provided. By way of further response, pursuant to Rule 45(c)(3), DNREC objects to this request as unduly burdensome and failing to allow reasonable time for compliance.

- 12) Copies of all handwritten notes, memoranda, emails, memos, or other forms of recordation regarding the Interpretation and the Alleged Culvert.

RESPONSE: The only responsive document is the “On-Site Summary” previously provided. By way of further response, pursuant to Rule 45(c)(3), DNREC objects to this request as unduly burdensome and failing to allow reasonable time for compliance. Further objected subject to the provisions of Rule 26(b)(3) and Rule 26(c)(4) limiting the disclosure of trial preparation materials or attorney work product.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

/s/ Kayli H. Spialter

Kayli H. Spialter, I.D. 5955
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302)577-8507
Attorney for DNREC

July 17, 2020

EXHIBIT E
TO APPELLANT'S MOTION *IN LIMINE*

Allow Raster Function: true

Allow Compute TiePoints: false

Supports Statistics: true

Supports Advanced Queries: true

Use StandardizedQueries: true

Raster Type Infos:

Name: Raster Dataset

Description: Supports all ArcGIS Raster Datasets

Help:

Has Raster Attribute Table: false

Edit Fields Info: null

Ownership Based AccessControl For Rasters: null

Child Resources: [Info](#) [Histograms](#) [Key Properties](#) [Legend](#) [MultiDimensionalInfo](#)
[rasterFunctionInfos](#)

Supported Operations: [Export Image](#) [Query](#) [Identify](#) [Compute Histograms](#) [Compute Statistics](#)
[Histograms](#) [Get Samples](#) [Compute Class Statistics](#)

EXHIBIT F
TO APPELLANT'S MOTION *IN LIMINE*

BEFORE THE ENVIRONMENTAL APPEALS BOARD

DELMARSH, LLC,)

Plaintiff,)

v.)

EAB Appeal No. 2020-03

DELAWARE DEPARTMENT OF)

NATURAL RESOURCES AND)

ENVIRONMENTAL CONTROL,)

Defendant.)

**DELAWARE DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL’S WITNESS AND EXHIBIT LIST**

- I. Witnesses – both witnesses are DNREC employees and expect to testify as to their role in evaluating the request and their observations on site.
 - A. Tyler Brown
 - B. George Geatz
- II. Exhibits
 - A. Delmarsh Survey
 - B. Delmarsh Wetlands Map Change Cover Letter and Application
 - C. Watershed Eco Wetlands Waters Delineation Report
 - D. Delmarsh LLC On Site Investigation Summary
 - E. Map Change Denial Letter
 - F. 1926 Aerial Photograph

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

/s/ Kayli H. Spialter

Kayli H. Spialter, I.D. 5955

Deputy Attorney General

820 N. French Street, 6th Floor

Wilmington, DE 19801

(302)577-8507

Attorney for DNREC

July 24, 2020

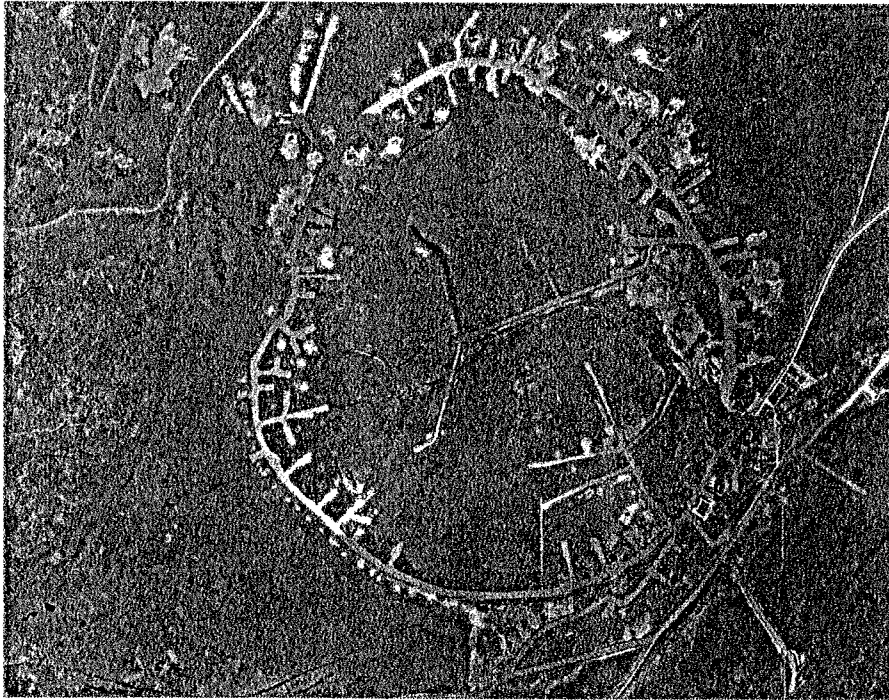
EXHIBIT G
TO APPELLANT'S MOTION *IN LIMINE*

Aero-Data Corporation LLC

*Custom Aerial Photography, Mapping,
Photo Interpretation, and Historical
Research Services*

Expert Witness**Our Experience**

Our aerial photo interpretation experts have provided testimony in both State and Federal Courts in the areas of aerial photo interpretation and photogrammetry. Our testimony often includes the areas of surface water hydrology and agronomy as it relates to the photo interpretation of surface drainage features and vegetation features.



[Click here to view time lapse aerial photographs of Venice Salt Dome.](#)

Our experts have studied over 1000 sites in the United States, Australia, Canada, Jamaica, Puerto Rico, and the U.S. Virgin Islands. These projects have included historical aerial photography based hazardous waste site investigations, surface mine inspections and permitting, environmental audits, accident site investigations, annual site documentation using aerial photography, video, and thermal imagery, contour mapping of plant sites, stock pile volume determinations, geographic information systems and coastal zone erosion studies.

Historical Aerial Photographs

Most industrialized areas in the United States have been photographed from the air at regular intervals since the 1940s. Because these aerial photographs illustrate when, where, and what activities occurred at a site, we can use them to identify or exclude potentially responsible parties at sites where environmental damage has occurred.

When we conduct an aerial photographic study, we research our extensive aerial photo archive as well as the collections of government and private providers for aerial imagery of your site. When available, we obtain the aerial photos in stereoscopic format. We can also obtain historical maps and climatological data if needed.

Stereoscopic Aerial Photos

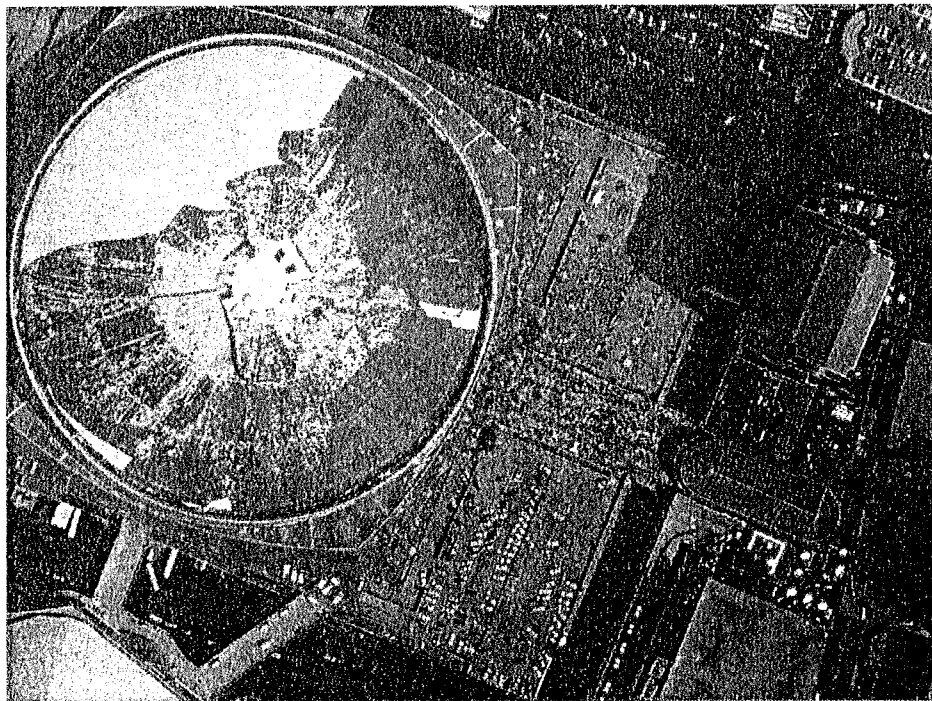
During aerial photo missions, the camera, which is mounted on the bottom of the airplane, shoots one frame after another as the airplane moves across its flight line. Because these consecutive frames overlap, each frame includes an area covered by its neighboring frames. We import these frames into our soft copy workstations. When these aerial photographs of the same area taken at slightly different angles are viewed together, the image appears in stereo (3-D).

Geo-Registration of Aerial Photographs

We electronically geo-register the different frames of aerial photography to a coordinate system. Each stereo model (overlapping frames) shows the features within your site in their true geographic position. This allows us to determine the position of significant historical features relative to the features at the site area today, to generate terrain models, to make height, depth, and distance measurements; and to calculate area and volume. ([View 3-D Model of Our Office Building](#))

Aerial Mapping

As we identify features in the stereo models, we map them on the screen. These features may include buildings, drainage channels, drums, equipment, fill, lagoons, piles, pits, and tanks. As we progress through the different historical dates of photography, we document changes in the condition of vegetation, when contamination is seen, when structures were constructed or dismantled, and what activities occurred upstream or adjacent to the environmentally impacted area.



[New Orleans Superdome after Hurricane Katrina. Click here to view more Hurricane Katrina aerial photos.](#)

Orthophoto Production

We digitally tie the overlapping frames of photography for each date together to produce a seamless photo mosaic. This photo mosaic is called an orthophoto. An orthophoto is equivalent to a map of the same scale. Because each historical date of photography is registered to a coordinate system, each orthophoto produced of a date registers to all the other historical aerial photos acquired. When the orthophotos are viewed in sequence, the orthophotos provide a time lapse perspective of your site.

Importing Orthophotos into a Geographic Information System (GIS)

We import the orthophotos for each date and their corresponding vector data (the points, lines and polygons generated by mapping the features) into ArcGIS, a geographic information system (GIS). The GIS allows us to toggle back and forth between dates, which is useful for change detection analysis. We can also overlay the images with plaintiff location data and parcel data.

Trial Testimony

Our experts use a computer projection system in court. The aerial images can be shown in a time lapse to show the development of the site relevant to significant historical features. We can toggle back and forth between dates, turn vector layers on and off, and zoom in out to different features.

Trial Booklets

Our trial booklets include a series of cropped, scaled and interpreted images for each date of aerial photography. The trial booklet may also include a series of anaglyphs for each date. The anaglyphs, when viewed with special glasses, show the site area in 3-D.

Large Format Plots

We can produce large format plots of your site for courtroom displays.

For Further Information about Our Expert Witness Services

Call us now at 225.767.5725 or email us at contact@aero-data.com to discuss your project.

Aero-Data Corporation LLC

Proudly powered by WordPress.

EXHIBIT H
TO APPELLANT'S MOTION *IN LIMINE*

> Aerial Photograph
Interpretation for Legal
Support

> Visual Enhancement
Technology

> Expert Witness Service

> Our Experience

> Testimonials

> Fees and Expenses

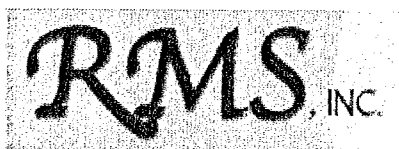
> Aerial Photography
Sources

> Law Firms & Affiliated
Services

> Dispute Resolution Firms

> Archaeology

[Contact](#) [FAQ](#) [Site Map](#)



The highly specialized services provided to attorneys and their clients by our firm include:

- Professional interpretation of aerial photographs
- Search for applicable aerial photographs
- Preparation of supporting graphics
- Expert witnessing

During the past sixteen years we have provided our services to eighteen law firms on more than forty cases.

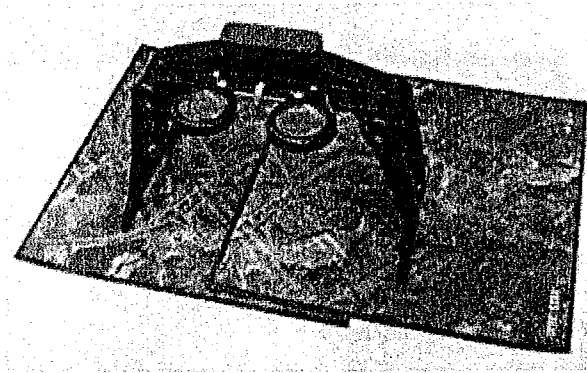
Professional interpretation: An experienced interpreter uses pictorial clues, collectively called image characteristics, to recognize and identify ground features. The interpreter combines feature recognition and logical reasoning to deduce and infer ground activity.

Search for applicable aerial photographs: Millions of aerial photographs have been taken, some as early as the 1930's. Sources include private aerial survey firms, university map and image libraries, engineering firms, local and state government and utilities.

Preparation of supporting graphics: Aerial photograph enlargements and other supporting graphics, such as annotated maps and images, are needed to explain the detail

analyzed on the photographs and conclusions that are reached regarding ground activity. These materials are presented at depositions, hearings and trials.

Expert witnessing: Sworn testimony is given concerning image interpretation results and conclusions.



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Website Design, Hosting and Organic Search Engine Optimization by
Positronic Design, The SEO Company