

LTAMS
Land Title Association of Mississippi

Phase I Environmental Site Assessments

WHY ARE THEY IMPORTANT ?

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Speaker

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Keith W. Turner
Watkins & Eager
Member

LTAMS
Land Title Association of Mississippi

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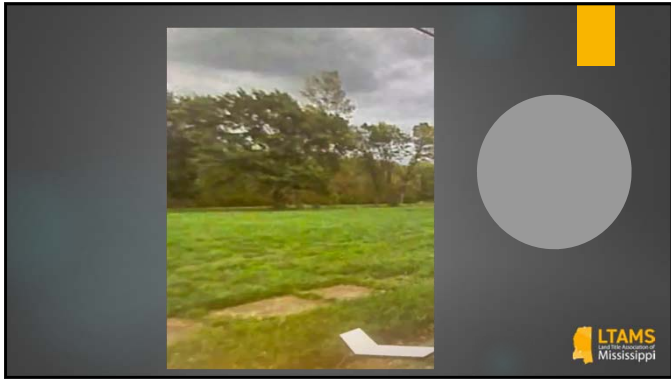
Environmental Risks Are Not Always Obvious

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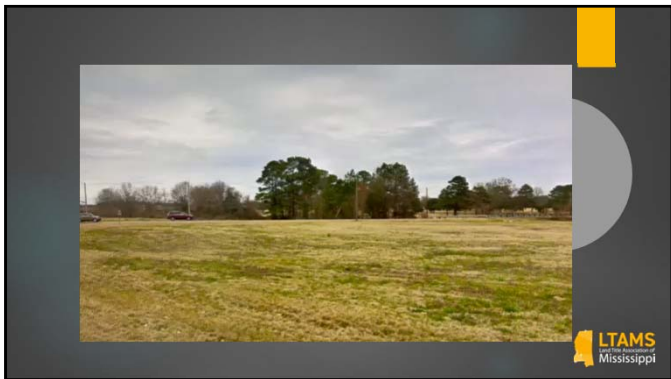
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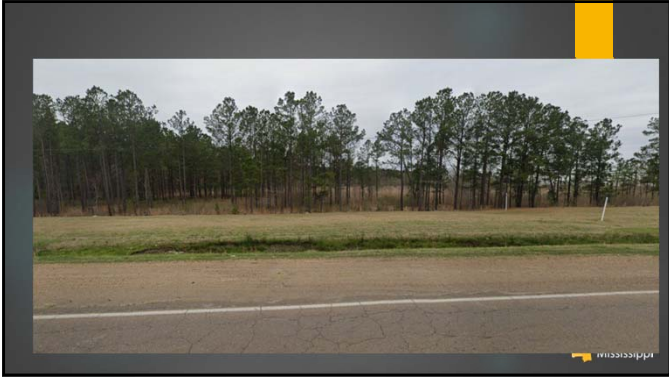
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Why should buyers complete Phase I ESA's ?


- Federal Law - 42 § 9601
- Federal Regulation - 40 CFR 312
- CERCLA provides **liability protections** for certain landowners and potential property owners who did not cause or contribute to contamination at the property and can demonstrate compliance with specific provisions outlined in the statute, including conducting All Appropriate Inquires (AAI) into present and past uses of the project.



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Types of Purchasers (CERCLA)

- **Innocent Landowner**
 - No prior knowledge of contamination
- **Bona Fide Prospective Purchaser**
 - Purchase with knowledge but not responsibility
- **Contiguous Property Owner**
 - Adjacent to contamination
- **Indicia of Ownership**
 - Holds property to protect security interest



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PHASE I ESA – Acceptable Standards


- “Parties purchasing potentially contaminated properties may use the ASTM E1527–21 standard practice to comply with the all appropriate inquiries requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This rule does not require any entity to use this standard.”



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PHASE I ESA – Acceptable Standards

- “Any party who wants to claim protection from liability under one of CERCLA’s landowner liability protections may follow the regulatory requirements of the All Appropriate Inquiries Rule at 40 CFR part 312, use the ASTM E1527–13 “Standard Practice for Phase I Environmental Site Assessments,” use the ASTM E2247–16 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property,” or use the standard recognized in this direct final rule, the ASTM E1527–21 standard, to comply with the all appropriate inquiries provision of CERCLA.”
- “EPA approval of E1527-21 does not disallow the use of the previously recognized standards (ASTM E1527–13 or ASTM E2247–16)”



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Phase I and II Environmental Site Assessments


- ASTM Standards
 - E 1527 Phase I ESA
 - E 1528 Transaction Screening
 - E 1903 Phase II Site Assessment
 - E 2247 Phase I ESA for Forests and Rural Property



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Summary of 1527 updates (2021)

- New definition for Recognized Environmental Condition (REC)
- New definition for Historical REC's
- New REC – Controlled REC
- Per- and Polyfluoroalkyl Substances - PFAS not included
- Expands use of historical sources
- Other misc.

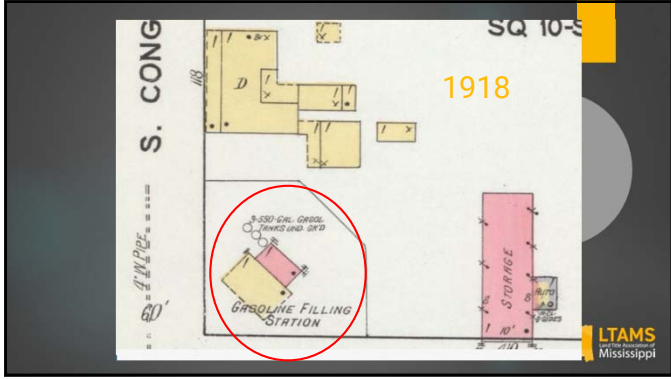


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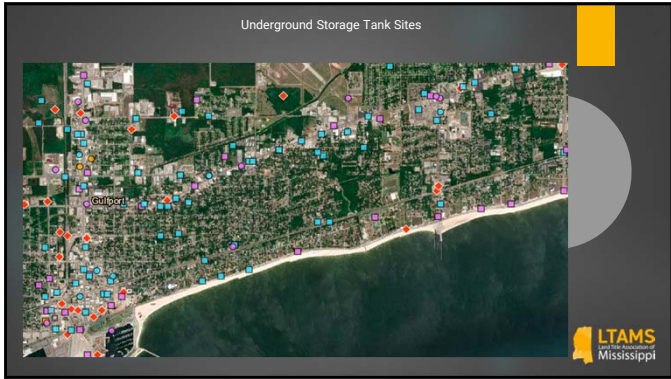
Sanborn Maps



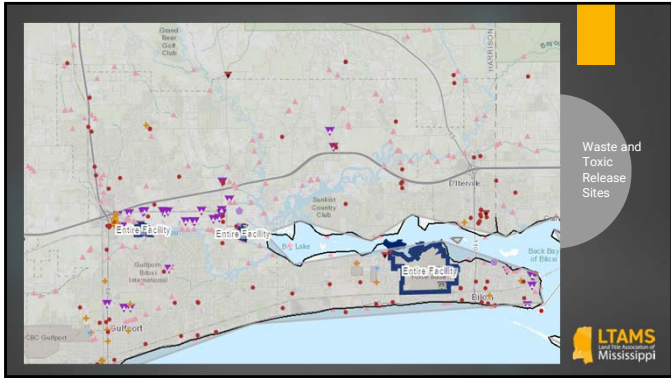
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E1527

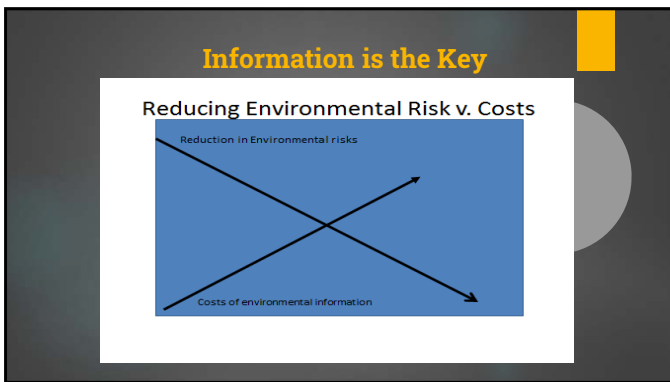
following two methods:

6.2.1 *Method 1: Transactions Related Title Insurance Documentation* Such as Preliminary Title Reports and Title Commitments. The user may rely on title insurance documentation commonly fashioned as preliminary title reports or title commitments, which are prepared in the course of offering title insurance for the subject property transaction to identify environmental liens or AULs filed or recorded against the subject property. Title insurance documentation involves a reliable review of *land title records* or judicial records. See Appendix XI. However, the user (or a title professional engaged by the user) should closely review the title insurance documentation, particularly the areas of the documentation listing *subject property* encumbrances or "restrictions on record," for indications of *AULs* or *environmental liens*.

6.2.2 *Method 2: Title Search Information Reports* Such as Condition of Title, Title Abstracts, and AUL/Environmental Lien Reports - Alternatively, users may rely on title search information reports to identify environmental liens or AULs filed or recorded against the subject property. Title search information reports, commonly fashioned as Condition of Title, Title Abstract, AUL/Environmental Lien or similarly titled reports, provide the results of *land title record* and/or judicial records research (as applicable) for information purposes only, rather than for the purposes of offering title insurance. *Users* may rely on title search information reports as long as the title search information reports meet the following scope.

6.2.2.1 *Scope of Title Search Information Reports* - Title search information reports shall identify environmental covenants, environmental easements, land use covenant and agreements, declaration of environmental land use restrictions, environmental land use controls, environmental use controls, *environmental liens*, or any other recorded instrument that restricts, affects, or encumbers the title to the *property* due to restrictions or encumbrances associated with the presence of *hazardous substances or petroleum products*. Title search information reports shall review *land title records* for documents recorded between 1980 and the present. In the case of jurisdictions that rely on the judicial records for filing of *environmental liens*, the judicial records shall also be reviewed for *environmental liens* filed anytime between 1980 and the present. If judicial records are not reviewed, the title search information report shall include a statement providing that the law or custom in the jurisdiction at issue does not require a search for judicial records in order to identify *environmental liens*.

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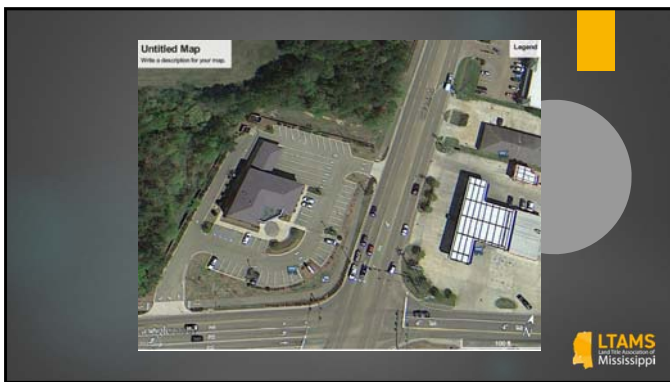
Phase I ESA's may not identify all environmental risks

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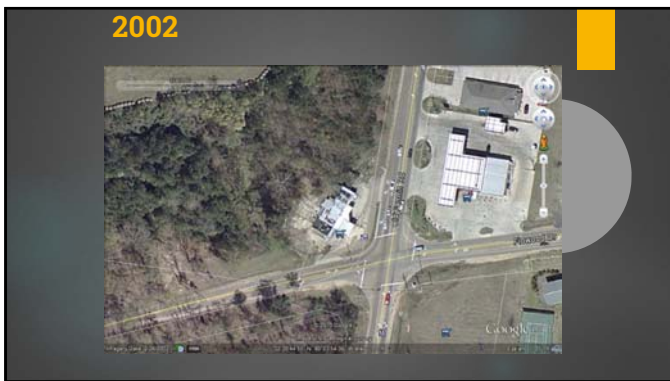
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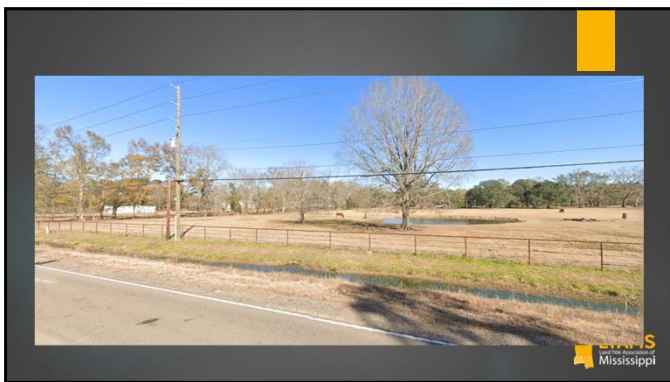


Is there risk of environmental claims against the title policy ?

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**MGD v. First American Title
5th Circuit – nonpublished opinion (2011)**

- Title policy purchased as part of a 326-acre development
- Post closing buyer learned site was a former WW II bombing range
- Local government refused to issue permits
- Among several lawsuits, MGD sued First American under claim of marketability of title
- Lower court held it was not a defect in the title but a condition of the property



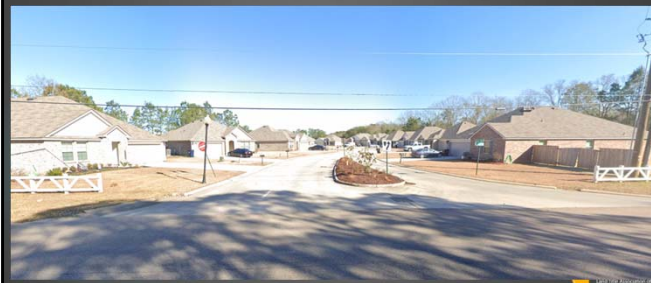
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MGD Decision – Title Insurance Coverage:

- Coverage applies only to those claims resulting from title defects, such as an encumbrance or cloud on the title.
- Does not include problems relating to the use of the property, such as environmental contamination.



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Chicago Title Ins. Co. v Kumar Mass. 1987



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**Chicago Title Ins. Co. v Kumar
Mass. 1987**

- Declaratory action regarding discovery of hazardous waste spill
 - Phase I ESA was performed prior to closing
 - Waste discovered several months later
- Possibility of a future state "super" lien did not create title defect under a 1970 title policy
- ALTA policy only insures against matters affecting the title - defects or liens or encumbrances - not physical conditions



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**Lick Mill Creek Apartments v
Chicago Title Ins. Co Cal. 1991**




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**Lick Mill Creek Apartments v
Chicago Title Ins. Co Cal. 1991**

- Prior property use included UST's, chemical plants and warehouses
- Plaintiff purchased lot in 1986 to construct apartments
- No liens were recorded regarding the contamination
- Court held no need to evaluate impact of policy since provisions provided no coverage regarding hazardous waste



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Pavilion Park LLC v First American Title Kentucky 2011

- Plaintiff negotiated the contractual right to conduct an environmental assessment, it **did not do so** and purchased the Property "as is."
- Plaintiff apparently became aware for the first time of an agreed order and restrictive covenant years after purchase, which documented (it was recorded in the clerk's office) a previously undisclosed and unlawful use of the Property as a solid waste disposal site.
- Neither party mentioned or identified the restrictive covenant – or included in the Policy
- The question is whether the undisclosed restrictive covenant amounts to a "defect in or lien or encumbrance on the title" under the Policy.
- "The Policy does not insure against general unmarketability but only when it arises from a "matter affecting the title." Also see *Grooch* at *3-4. The restrictive covenant does not affect the title or the transfer of it. Finally, the exclusion language is inconsequential where the Policy simply does not provide coverage for a particular matter."



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Old Republic National Title v. RM Kids Georgia (2019)

- Pipeline leak contaminated site
- Environmental limitations place upon the property
 - No use of groundwater
 - Easement for access to monitoring well
 - Right of first refusal to reacquire
 - Riparian buffer easement




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Old Republic National Title v. RM Kids

- 1. Did omission of exhibit C trigger coverage?
 - Held: Restrictions placed upon the property were defects in the title
- 2. Damages – have they been proved and does the exemption apply
 - Expert appraisers - \$6 million v \$1.9 million
 - Evidence supported jury's finding of \$4.2 million in damages



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Key Question – Does the claim affect the marketability of the title?

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Environmental Liens

- Federal "windfall liens" - may not be filed in local records – recorded in federal court records
- No statutory environmental liens in Mississippi
 - MDEQ approach to cost recovery – orders with financial assurances – not recorded in local records
- Restricted Use Covenants



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Mississippi Uniform Environmental Covenants Act

- Chapter 23, Mississippi Uniform Environmental Covenants Act (§§ 89-23-1 – 89-23-27)
- § 89-23-1. Short title.
- § 89-23-3. Definitions.
- § 89-23-5. Holder defined; rights and obligations; subordination of rights.
- § 89-23-7. Contents of environmental covenant.
- § 89-23-9. Validity of environmental covenant; effect on other instruments.
- § 89-23-11. Relation of this chapter to other land-use laws.
- § 89-23-13. Notice requirement; penalty for failure to provide notice.
- § 89-23-15. Recording of environmental covenant, amendment, and termination.
- § 89-23-17. Duration of environmental covenants.
- § 89-23-19. Amendment or termination of environmental covenant; consent.
- § 89-23-21. Violation of environmental covenant; injunctive relief.
- § 89-23-23. Application and construction of chapter.
- § 89-23-25. Relation of chapter to federal law.
- § 89-23-27. Severability.




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Mississippi Uniform Environmental Covenants Act

§ 89-23-15. Recording of environmental covenant, amendment, and termination.



(a) An environmental covenant and any amendment or termination of the covenant must be recorded in every county in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in Section 89-23-17(b), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property including, but not limited to, the requirement of providing indexing instructions and preparer data, as set forth in Section 89-5-33(3); and, the requirement to provide an acknowledgment as set forth in Section 89-3-1.



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Mississippi Brownfield Program Sites Fiscal Year 2021 Annual Report

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Brownfield Sites

- All property owners directly impacted included - adjacent property owners must be included in the covenant if the contamination has migrated off site



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What is considered a "public record" pursuant to a title policy?

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American Land Title Association Endorsement B.1
Environmental Protection Lien


TA B.1 ENVIRONMENTAL PROTECTION LIEN ENDORSEMENT

This endorsement is issued as part of
Policy Number _____
issued by
BLANK TITLE INSURANCE COMPANY

- The insurance afforded by this endorsement is only effective if the Land is used or is to be used primarily for residential purposes.
- The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the Insured's **environmental protection lien** that:
 - is a **public record** established under State statutes at the Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or
 - is an **environmental protection lien** provided by any State statute in effect at the Date of Policy, except environmental protection liens provided by the following State statutes:
[Drafting Instruction: List the relevant State statutes, if any; if none, specify "none"]

This endorsement is issued as part of the policy. Except as expressly stated, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause]
[Date]
BLANK TITLE INSURANCE COMPANY
By: _____
[Authorized Signatory]



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ALTA ENDORSEMENT 8.2-06
Commercial Environmental Protection Lien

COMMITMENT CONDITIONS

1. DEFINITIONS

- (a) "Knowledge" or "Known": Actual or imputed knowledge, but not constructive notice imparted by the Public Records
- (b) "Land": The land described in Schedule A and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is to be insured by the Policy.
- (c) "Mortgage": A mortgage, deed of trust, or other security instrument, including one evidenced by electronic means authorized by law.
- (d) "Policy": Each contract of life insurance, in a form adopted by the American Land Title Association, issued or to be issued by the Company pursuant to this Commitment.
- (e) "Proposed Insured": Each person identified in Schedule A as the Proposed Insured of each Policy to be issued pursuant to this Commitment.
- (f) "Proposed Policy Amount": Each dollar amount specified in Schedule A as the Proposed Policy Amount of each Policy to be issued pursuant to this Commitment.
- (g) "Public Records": Records established under state statutes at the Commitment Date for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.
- (h) "ISE": The estate or interest described in Schedule A.

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EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; (b) proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.
2. Any facts, rights, interests, or claims that are not shown by the Public Records but that could be ascertained by an inspection of the Land or that may be asserted by persons in possession of the Land.
3. Easements, liens or encumbrances, or claims thereon, not shown by the Public Records.
4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records.
5. Any claim to (a) ownership of or rights to minerals and similar substances, including but not limited to ores, metals, coal, lignite, oil, gas, uranium, limestone, clay, rock, sand, and gravel located in, on, or under the Land or produced from the Land, whether such ownership or rights arise by lease, grant, exception, conveyance, reservation, or otherwise, and (b) any rights, privileges, immunities, rights of way, and easements associated therewith or appurtenant thereto, whether or not the interests or rights excepted in (a) or (b) appear in the Public Records are shown in Schedule B.
6. Any dispute as to the boundaries caused by a change in the location of any water body within or adjacent to the Land prior to Date of Policy, and any adverse claim to all or part of the Land that is, at Date of Policy, or was previously, under water.
7. Taxes and assessments for the year and subsequent years and not yet due and payable.
8. The Company does not insure the area, square footage, or acreage of the land.

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Should a federally created restriction or notice qualify as a condition that impacts marketability of the title ?

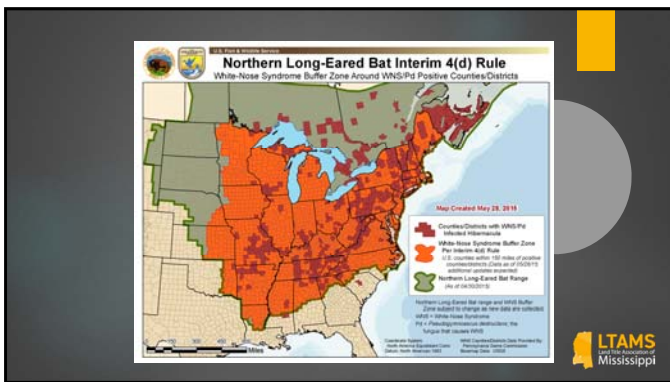
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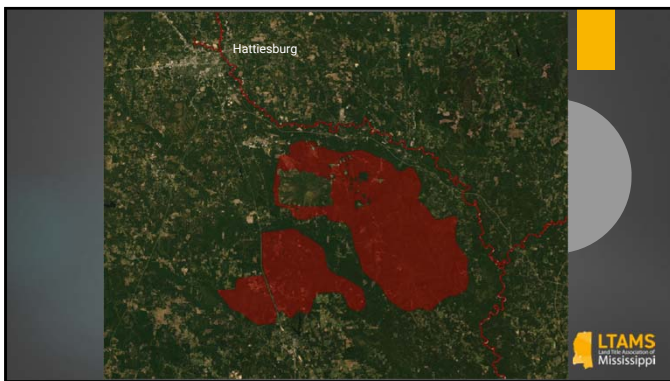
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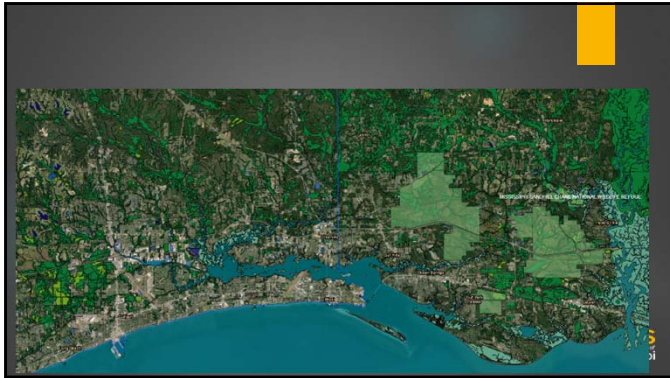
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Questions?

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601-965-1958

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