



*The* **SANDBAR**

---

Volume 12:4 October 2013

Legal Reporter for the National Sea Grant College Program

---

U.S. Supreme Court Issues Opinion in  
**Regulatory Takings Case**

---

*Also,*

Environmental Groups File Residual Designation Authority Petitions for  
EPA Regions 1, 3, and 9

NJ Court's Holding Could Facilitate Shoreline Sand Dune Construction

# Our Staff

**Editor:**

Terra Bowling, J.D.

**Production & Design:**

Barry Barnes

**Contributor:**

Dave Owen, J.D.

**Research Associates:**

Christine Clolinger  
Ryan J.F. Pulkrabek  
Caroline Shepard

*THE SANDBAR* is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: Barry Barnes at [bdbarne1@olemiss.edu](mailto:bdbarne1@olemiss.edu).

Sea Grant Law Center, Kinard Hall, Wing E, Room 258, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: [sealaw@olemiss.edu](mailto:sealaw@olemiss.edu). We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

*THE SANDBAR* is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA090AR4170200, the National Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi School of Law. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the National Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 12:4 *SANDBAR* [Page Number] (2013).

Cover page photograph of a wren on a Florida wetland; courtesy of Kenneth Cole Schneider.

Contents page photograph of the Green Cay Wetlands in Florida; courtesy of Lisa Jacobs.



Now, follow us on Facebook at:  
<http://www.Facebook.com/nsglc>



Now, follow us on Twitter at:  
<http://www.Twitter.com/sglawcenter>



The University of Mississippi complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

ISSN 1947-3966      NSGLC-13-02-04      October 2013  
ISSN 1947-3974



# The **SANDBAR**

## CONTENTS

**U.S. Supreme Court Issues Opinion in  
Regulatory Takings Case** ..... 4

**Environmental Groups File Residual  
Designation Authority Petitions for  
EPA Regions 1, 3, and 9** ..... 7

**NJ Court's Holding Could Facilitate  
Shoreline Sand Dune Construction** ..... 10

**Tightening Regulations on Ballast Water  
Discharge in the Great Lakes**..... 13

**Connecticut Supreme Court Orders  
Removal of Seawall** ..... 14

**Littoral Events** ..... 16

# U.S. SUPREME COURT ISSUES OPINION IN REGULATORY TAKINGS CASE

Ryan J.F. Pulkrabek<sup>1</sup>

Photograph of a road in the wetlands of Orlando, Florida; courtesy of Ricymar Photography.



The U.S. Supreme Court recently sent a Florida case back down to the lower court to determine whether a government agency placed unreasonable demands on a Florida landowner seeking to obtain a land development permit. The opinion expanded two previous Supreme Court opinions, *Nollan* and *Dolan*, to require that certain monetary exactions have a “nexus” and “rough proportionality” to a projected use of a property. Further, the Court held that when an agency denies a land use permit because a property owner did not agree to certain conditions,

the denial is subject to a Fifth Amendment takings claim. While this decision was met with strong dissent, the implications are clear: government agencies imposing exactions or conditions for land development permits may face higher scrutiny.

## **Offset Requirements for Wetlands**

Coy Koontz, Sr. sought to develop the northernmost 3.7-acre section of his 14.9-acre property located east of Orlando. Because this section of his property is a wetland, Florida law required that Koontz obtain a

Wetlands Resource Management permit under the Warren S. Henderson Wetlands Protection Act and a Management and Storage of Surface Water permit under the Water Resources Act to develop it.<sup>2</sup> Pursuant to the Wetlands Protection Act, the St. Johns River Water Management District, the District with jurisdiction over Koontz's proposed development, required that permits could only be obtained by offsetting the resulting environmental damage. To offset the environmental effects of his proposed development on the 3.7-acre section, Koontz offered to deed a conservation easement on the remaining 11.2 acres, about three-quarters of his property, to the District. The District, however, refused Koontz's offer.

The District made a counter-offer asking that Koontz reduce the size of his development to one acre and deed a conservation easement to the District on the remaining 13.9 acres. The District suggested that Koontz could reduce the development area by taking measures that were ultimately more costly, for example replacing the dry-bed pond with a subsurface stormwater management system and installing retainer walls rather than gradually sloping the land.<sup>3</sup>

Alternatively, if Koontz wished to pursue development of the entire 3.7-acre section, the District demanded that he offset the development by hiring contractors to make improvements to District-owned wetlands several miles away or by offering an equivalent mitigation project elsewhere.<sup>4</sup> Both of these alternatives required that Koontz pay a "monetary exaction," a cash payment to develop his property. Koontz believed these demands were too lofty in comparison to the environmental effects of his proposed development and sued under Florida law for money damages alleging that the District's demands constituted a taking of his property without just compensation.<sup>5</sup>

### ***Nollan and Dolan***

The Fifth Amendment bars the government from taking possession of a person's property without just compensation, referred to simply as a "taking." The U.S. Supreme Court set the framework for determining whether an exaction constitutes a taking in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Under *Nollan* and *Dolan*, the government may condition permit approval on the taking of land for public use "so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the

applicant's proposal."<sup>6</sup> The "essential nexus" test from *Nollan* requires that conditions placed on permits by governmental entities must serve "the same governmental purpose as the development ban" or else the condition is a taking. In addition to the "essential nexus" test, the Court in *Dolan* required a "rough proportionality" between the proposed development's impact and the condition. The government need only offer one alternative that satisfies the nexus and rough proportionality standards to meet the *Nollan* and *Dolan* requirements.<sup>7</sup>

---

## **THE DISTRICT MADE A COUNTER-OFFER ASKING THAT KOONTZ REDUCE THE SIZE OF HIS DEVELOPMENT TO ONE ACRE AND DEED A CONSERVATION EASEMENT TO THE DISTRICT ON THE REMAINING 13.9 ACRES.**

---

The case was originally filed in the local circuit court, which held that the District's actions were unlawful because there was not a nexus or rough proportionality between the property that the government demanded and the social costs of the applicant's proposal. The state district court affirmed, but the Florida Supreme Court reversed. Since the District never issued Koontz a permit because he failed to meet their demands, the court reasoned that there could not have been an exaction as there was no actual taking of Koontz's money or property.<sup>8</sup> Further, the court distinguished monetary demands from real property demands, holding that the monetary demands could not give rise to a claim under *Nollan* and *Dolan*. In *Nollan* and *Dolan*, the takings claims were based on the government conditioning building permits on the dedication of land. The U.S. Supreme Court granted the petition for a writ of certiorari, in part, to resolve whether monetary demands are distinguishable from real property demands under *Nollan* and *Dolan*.<sup>9</sup>

### **A Taking for Permit Denial?**

The U.S. Supreme Court first had to determine whether *Nollan* and *Dolan* apply if a permit is never granted because of the owner's refusal to agree to the

proposed conditions.<sup>10</sup> The Court explained that because a gratuitous benefit (the permit) was withheld for failure to meet a condition, the unconstitutional conditions doctrine was triggered. The unconstitutional conditions doctrine prevents the government from impermissibly burdening the right not to have property taken.<sup>11</sup> Although no property was actually taken from Koontz, the Court found that conditioning a permit approval on forfeiture of a constitutional right alone is both a taking and a cognizable injury.<sup>12</sup> As a caveat, the Court noted that were a permit application denied outright with no condition ever imposed, there would be no taking; however, where the government withholds the benefit for failure to give up a constitutional right, a taking has occurred and a valid claim under *Nollan* and *Dolan* can be made, as this triggers the court's policy objective to prevent governmental entities with greater leverage from making extortionate demands.<sup>13</sup>

### Monetary Exactions

The Florida Supreme Court had found, and the dissent agreed, that a monetary exaction could not constitute a basis for a takings claim.<sup>14</sup> However, the majority in *Koontz* disagreed and held that monetary exactions must meet the *Nollan* and *Dolan* nexus and rough proportionality requirement because they are the "functional equivalent" of other land use exactions, i.e. the District could simply demand the same amount of money as the land use easement is worth and arrive at the same result.<sup>15</sup> In other words, *Nollan* and *Dolan* apply when a permit is conditioned on the payment of money by the permit-seeker.<sup>16</sup> Justice Kagan, in her dissent, opined, "[A]n obligation to spend money can never provide the basis for a takings claim."<sup>17</sup> While a monetary exaction is not a classic taking in the sense that no land forfeiture is required, the majority noted that there is a "direct link between the government's demand and a specific parcel of real property."<sup>18</sup> For Koontz to develop his 3.7-acre section of land, he would have to pay the District's monetary exaction, a link that the majority viewed as implicating the key concern of *Nollan* and *Dolan* that the government may use its leverage in land use permitting to extract disproportionate benefits that minimize the value of the owner's property without just compensation.<sup>19</sup> Therefore, the Supreme Court held that monetary exactions as a condition to a land use permit must have an essential nexus and rough proportionality with the harm the development will cause.

### Conclusion

The U.S. Supreme Court expanded the *Nollan* and *Dolan* nexus and rough proportionality tests to encompass government demands for property as a condition to obtaining a land use permit even if the permit is denied. These tests thus apply to permit denials in the same way as they apply to permits that have been granted with conditions. The Supreme Court also expanded *Nollan* and *Dolan* to encompass land use permits that demand a money exaction, as opposed to only those conditions that involve a physical taking or permanent invasion of the land. The Supreme Court sent Koontz's case back to the lower court for further determination as to whether the District's demands meet the *Nollan* and *Dolan* tests. On remand, the parties will present arguments as to whether District's demands had the required essential nexus and rough proportionality to the environmental harm that Koontz's development would cause. ❧

### Endnotes

1. Dec. 2013 J.D. Candidate, University of Mississippi School of Law.
2. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592 (2013).
3. *Id.*
4. *Id.* at 2593.
5. *Id.*, citing FLA. STAT. ANN. § 373.617(2) (2013).
6. *Id.* at 2595.
7. *Id.* at 2598.
8. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011).
9. *Koontz*, 133 S. Ct. at 2594.
10. Tejinder Singh, *Opinion recap: Broadening property owners' rights to sue*, SCOTUSBLOG (July 1, 2013, 2:53 PM), <http://www.scotusblog.com/2013/07/opinion-recap-broadening-property-owners-right-to-sue/>.
11. *Koontz*, 133 S. Ct. at 2594.
12. *Id.* at 2596-97 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836-37 (1987) (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears ... if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."))
13. *Id.* at 2596.
14. *Id.* at 2599.
15. *Id.*
16. Singh, *supra* note 10.
17. *Koontz*, 133 S. Ct. at 2599.
18. *Id.*
19. *Id.*

# ENVIRONMENTAL GROUPS FILE RESIDUAL DESIGNATION AUTHORITY PETITIONS FOR EPA REGIONS 1, 3, AND 9

Dave Owen<sup>1</sup>



Photograph of a stormwater outfall; courtesy of Andy Arthur.

On July 10, 2013, several environmental groups took legal steps that could reverberate throughout the overlapping worlds of water quality protection and stormwater management. The groups filed “residual designation authority” (RDA) petitions, each asking a U.S. Environmental Protection Agency (EPA) regional office to expand the National Pollutant Discharge Elimination System (NPDES) permitting program to cover stormwater discharges from the built environment.<sup>2</sup> In other words, the groups want EPA to require Clean Water Act (CWA) permits for roofs, roads, and parking lots. This article explains the problem to which these petitions respond, the legal and scientific bases for the petitions, and EPA’s potential responses. It also highlights—briefly—a few of the many questions the petitions raise.

## The Challenge of Urban Stormwater

Our nation’s development patterns are not good for water quality. Urban development almost invariably increases the area covered by impervious surfaces—primarily roads, roofs, and pavement—most of which convey stormwater runoff into systems of culverts and storm drains.<sup>3</sup> That runoff reaches surface waterways much more quickly than precipitation in undeveloped landscapes, and it also tends to carry higher pollutant loads. As a consequence, urban waterways are especially prone to flooding, droughts, and pollution.

The resulting water quality problems are pervasive. Many studies have found a nearly universal inverse relationship between development and surface water quality, with degradation often beginning at suburban or rural development levels.<sup>4</sup> For small watersheds, the problem is so common that it has earned the name “urban stream syndrome.”<sup>5</sup> Larger waterways can be somewhat less sensitive, but EPA still identifies urban stormwater runoff as a leading cause of impairment in rivers, lakes, and bays.<sup>6</sup>

The problem also has been difficult for our legal system to address.<sup>7</sup> While the CWA has been quite successful in responding to large, discrete point sources of water pollution, urban stormwater runoff presents a different sort of challenge. Perhaps most importantly, stormwater discharge systems often comingle runoff from many individual properties, most of which contribute multiple pollutants. Simply regulating all of those contributors—let alone assigning responsibility among them—would not be an easy task, and for much of the CWA’s history, EPA was reluctant to even try. A combination of litigation and Congressional action eventually forced the agency to implement a stormwater regulatory program; however, the program contains significant weaknesses and gaps.

One of those gaps, and the focus of the recent petitions, involves runoff from the built environment.<sup>8</sup> Congress’s 1987 amendments to the CWA required EPA to include point source discharges from construction and industrial sites in the NPDES program. Congress also required

medium and large municipalities to obtain permits for their discharges, and those permits in turn establish general requirements for stormwater regulatory programs. But stormwater discharges from non-industrial properties—for example, shopping malls—remain subject only to the municipal permitting program, through which they are often regulated only weakly.<sup>9</sup> If a non-industrial property is outside a municipal permit area, its stormwater discharges trigger no regulation at all.<sup>10</sup>

### The RDA Petitions

While the CWA's system of stormwater regulation contains a major gap, it also contains a mechanism for filling that gap. Section 402(p) requires NPDES permitting for "[a] discharge" that EPA "determines ... contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."<sup>11</sup> EPA's implementing regulations allow "any person" to file a petition demanding that EPA exercise this "residual designation authority."<sup>12</sup>

Despite its potential reach, these provisions remained obscure until quite recently. The Conservation Law Foundation, a regional environmental group, filed the first RDA petitions in the late 2000s. Those petitions focused on a few small watersheds in New England. Within those small areas, the impact was dramatic. In Maine, for example, an RDA petition for the Long Creek watershed helped spur an innovative—and expensive—watershed restoration initiative.<sup>13</sup> But the geographic scope of coverage remained small, and it seemed possible that RDA petitions would remain rare and isolated events.

The July petitions represent a dramatic shift in strategy. Each petition requests "a determination ... that non-*de minimis*, currently non-NPDES permitted stormwater discharges from commercial, industrial, and institutional sites are contributing to violations of water quality standards in certain impaired waters *throughout [the affected EPA Region]*, and therefore require National Pollutant Discharge Elimination System permits."<sup>14</sup> Because so many developed watersheds in each region are impaired, that requirement would extend to literally thousands of sites. The effect, in short, would be to extend the NPDES permitting program to most of the non-residential built environment. Even the regional focus may be a temporary step. In a blog post released the same day the petitions were filed, NRDC attorney Rebecca Hammer wrote: "[S]tormwater pollution is a nationwide problem, and we think that the solutions we're asking to be applied in these regions can and should be replicated everywhere that runoff is causing our water bodies to become degraded."<sup>15</sup>

In addition to expanding the scope of the requests, the July petitions also mark a shift in the groups' evidentiary approach. In its previous RDA petitions, the Conservation Law Foundation relied upon watershed-specific studies of the sources of impairment. That approach makes intuitive sense, but environmental groups could not use it to compel permitting in the many watersheds that have not actually been closely studied. That approach also could dissuade government agencies from conducting watershed-specific studies, for agencies might not want to build evidentiary records that could support an RDA petition. In the recent petitions, the environmental groups instead argued that the weight of scientific evidence was sufficient to show that commercial, industrial, and institutional sites are contributing, as "a category of discharges," to violations of water quality standards, even in the absence of site-specific studies. That change in evidentiary approaches then allowed for the petitions' expanded geographic reach.

### The Questions

From the environmental groups' perspective, the appeal of these petitions is obvious. They would fill a substantial gap in the existing regulatory system, and if permitting leads to successful watershed protection and restoration efforts, they also will improve water quality in areas where large numbers of people live, work, and play. Nevertheless, the petitions also leave several key issues unresolved. All center around a core question: how will EPA respond?

Initially, EPA must decide whether to grant or deny the petitions. Neither course will be simple. To deny the petitions would be to invite litigation, and Vermont's experience with RDA petitions may foretell the likely result: the state denied the Conservation Law Foundation's petitions, and the Conservation Law Foundation then sued and won.<sup>17</sup> But to grant the petitions would mean launching an ambitious expansion of the stormwater regulatory program—and doing so in the face of fierce opposition from the construction industry and, in all likelihood, many state and local governments, which may perceive new permitting requirements as threats to development. The petitioners clearly hope for a different reaction; an expressly stated purpose of the petitions is to transfer some of the regulatory burden from municipalities to private entities. Many municipal officials believe, however, that their cities' interests coincide with the interests of local businesses and developers, and they may be less than thankful for the environmental groups' intervention.

If it grants the petitions, EPA also would need to decide how to go about permitting the newly covered sources. In the past, EPA has used a variety of different permitting approaches, including individual, watershed-based, and general permits, to address water quality problems. Neither the CWA nor EPA's implementing regulations specify which approach should be used here (though most observers would probably agree on the impossibility of individual permitting). The RDA petitions also are silent on the type of permitting scheme to be used, and an NRDC attorney involved in drafting the petitions told me that silence was deliberate. The environmental groups are hoping to initiate a discussion with EPA about appropriate permitting measures rather than to prescribe a specific approach.<sup>18</sup>

Finally, EPA would need to decide what constitutes a “non-*de minimis*” contribution to impairment—another question the petitions invite but (again deliberately) do not answer.<sup>19</sup> Setting that threshold low would be a more inclusive, and perhaps more effective, method of addressing water quality impairment, but it also could increase the cost of and potential regulatory opposition to the permitting program. A higher threshold could focus EPA's regulatory efforts on a smaller subset of properties, but that narrower approach could raise fairness objections—large landowners might wonder why smaller ones were left out—and be less environmentally effective.

## Conclusion

Stormwater management remains our nation's greatest water quality challenge. The impacts of stormwater-related pollution are so pervasive that “healthy urban stream” is almost a contradiction in terms, but addressing the problem would require major changes in the ways our communities are built. The recent RDA petitions may compel steps toward an expanded and more effective regulatory approach, but they are just a start, with many additional steps still to be taken and questions to be resolved. ☹

## Endnotes

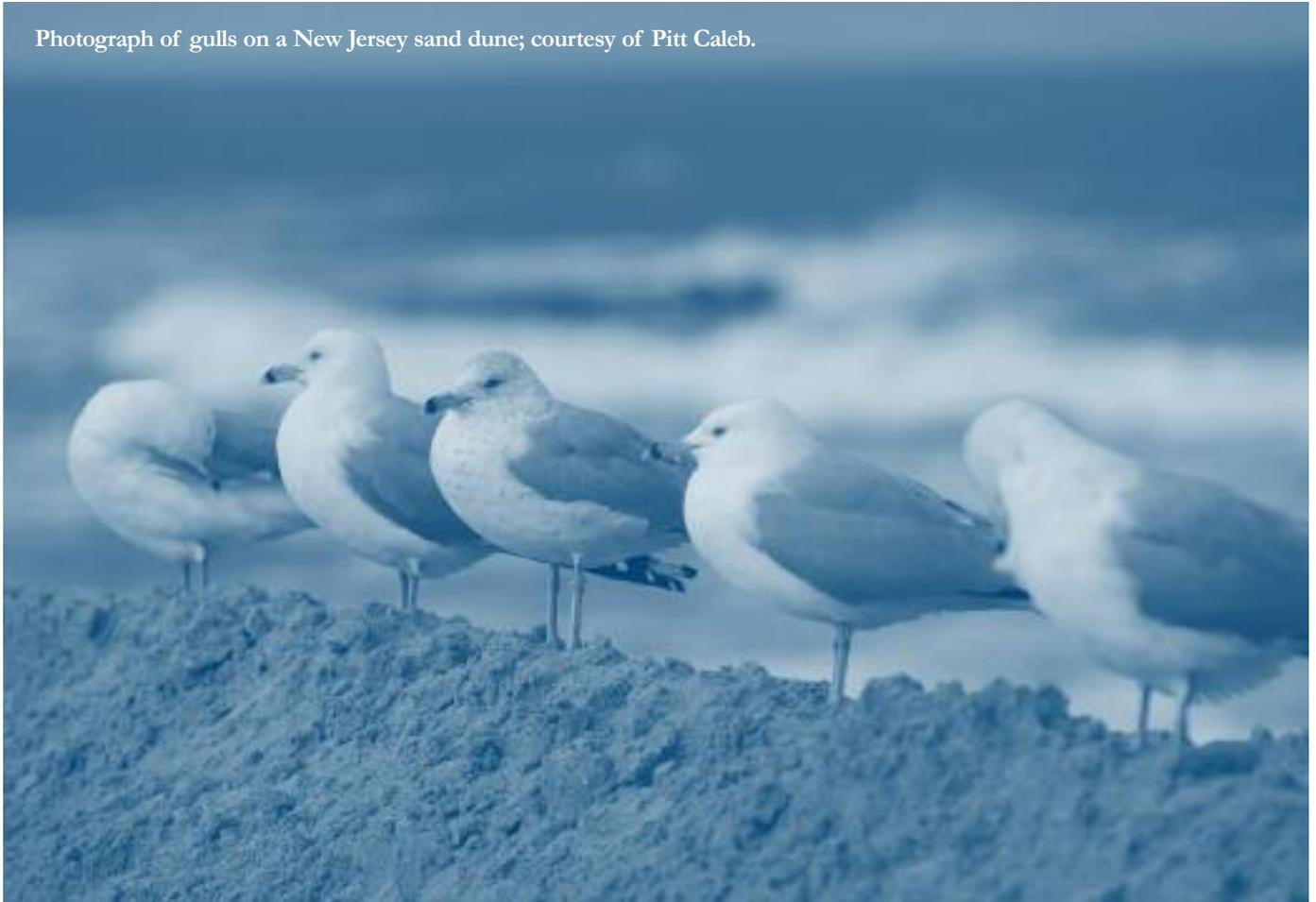
1. Professor of Law and Associate Dean for Research, University of Maine School of Law.
2. American Rivers et al., *Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violations and Require Clean Water Act Permits*, July 10, 2013 (covering EPA Region 1); Anacostia Riverkeeper et al., *Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violations and Require Clean Water Act*

- Permits*, July 10, 2013 (covering EPA Region 3); American Rivers et al., *Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violations and Require Clean Water Act Permits*, July 10, 2013 (covering EPA Region 9).
3. Many people refer to urban stormwater runoff as non-point source pollution. But most urban stormwater runoff reaches surface waterways through some sort of ditch, pipe, or other discrete conveyance, and therefore most stormwater discharge points meet the Clean Water Act's definition of a “point source.” See 33 U.S.C. § 1362(14).
4. See COMMITTEE ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NATIONAL RESEARCH COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES (2009); CENTER FOR WATERSHED PROTECTION, IMPACTS OF IMPERVIOUS COVER ON AQUATIC SYSTEMS (2003).
5. Christopher J. Walsh et al., *The Urban Stream Syndrome: Current Knowledge and the Search for a Cure*, 24 J. N. AM. BENTHOLOGICAL SOC'Y 706 (2005).
6. EPA, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2004 REPORTING CYCLE (2009).
7. For a detailed summary of these challenges and EPA's responses, see Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLORADO L. REV. 431 (2011).
8. 33 U.S.C. § 1342(p)(2).
9. Industrial properties are subject to permitting requirements, but the permits generally focus on runoff that could come into contact with industrial process materials rather than runoff from an industrial facility's parking lots or roofs.
10. See Owen, *supra* note 7.
11. 33 U.S.C. § 1342(p)(2)(E).
12. 40 C.F.R. § 122.26(f)(2).
13. See Owen, *supra* note 7; Dave Owen et al., *Collaboration, Clean Water Act Residual Designation Authority, and Collective Permitting: A Case Study of Long Creek*, 1 WATERSHED SCI. BULLETIN 25 (2010).
14. American Rivers et al., Region 1 Petition, *supra* note 2 (emphasis added).
15. Becky Hammer, NRDC *Petitions EPA to Tackle Water Pollution Sources that Hurt our Economy and our Health*, SWITCHBOARD, July 10, 2013, [http://switchboard.nrdc.org/blogs/rhammer/nrdc\\_petitions\\_epa\\_to\\_tackle\\_w.html](http://switchboard.nrdc.org/blogs/rhammer/nrdc_petitions_epa_to_tackle_w.html).
16. American Rivers et al., Region 1 Petition, *supra* note 2, at 9.
17. *In re* Stormwater NPDES Permit Petition, 910 A.2d 824 (Vt. 2006).
18. Telephone Interview with Becky Hammer, Attorney, Natural Resources Defense Council, August 15, 2013.
19. *Id.*

# NJ COURT'S HOLDING COULD FACILITATE SHORELINE SAND DUNE CONSTRUCTION

Christine Clolinger<sup>1</sup>

Photograph of gulls on a New Jersey sand dune; courtesy of Pitt Caleb.



**T**he unexpected devastation of Hurricane Sandy compelled many New Jersey residents and officials to strengthen protective measures against natural disaster damage. One such measure is the construction of sand dunes along the New Jersey coastline. Such construction, however, can be a source of contention between the government obligated to protect the public and landowners who oppose the alteration of their property. A recent decision by the New Jersey Supreme Court may allow the New Jersey government greater freedom to construct protective sand dunes if a lower court ultimately determines that the financial benefit gained from protective dunes outweighs the financial loss of an ocean view.

## **Sand Dune Protection**

Sand dunes are the “first line of defense” against catastrophic storm damage. Sand dunes can stall flooding and provide protections to inland structures. The presence of sand dunes creates a barrier against the rough force of storm surge and high waves by dissipating wave energy. Although flooding may still occur inland during a storm, destructive currents that batter and wash away inland structures are significantly reduced when sand dunes are present. Larger sand dunes provide greater protection, because the forces of water erosion and storm surge must work longer to weaken the sand dune.

In an effort to provide storm-protection, the U.S. Army Corps of Engineers and the New Jersey Department of Environmental Protection initiated a project that included the construction of dunes along the Long Beach Island shore. The project required easements on properties bordering the ocean, because the dunes would deprive property owners of the use and enjoyment of the land under the dunes. The municipalities in which the dunes were located were required to obtain the easements.

Out of the eighty-two landowners along the coastline, seventeen beachfront owners, including the Karans, refused to consent to the dune construction. The Borough of Harvey Cedars (Borough) subsequently passed an ordinance in July 2008 that authorized it to acquire easements over the remaining properties. The Karans rejected the Borough's compensatory offer of \$300. The Karans' refusal of the compensatory offer prompted the Borough to file suit in November 2008 in order to obtain the easement through eminent domain.

### **A Lost View**

At trial, the Karans claimed they were entitled to greater compensation because the dune construction resulted in the loss of their oceanfront view. Harvey Karan testified that "the wall of sand" prevented him from seeing "one iota of beach" while sitting on his deck. Further, the Karans could no longer enjoy the sight of crashing waves while in their living room during the wintertime, nor could they watch their grandchildren play in the surf from the deck in the summertime. The Karans' real estate appraiser claimed that the loss of the oceanfront view resulted in a \$500,000 reduction of the Karan's property value. The Karans further claimed that since they bought the home in 1973, not "a lick of water" had invaded the home because the home was built on pilings.

### **General or Special Benefit?**

Citizens like the Karans possess a fundamental right dating back to the Magna Carta to "just compensation" when the government takes private property for public use. Such a right is additionally established in the federal and New Jersey constitutions. Benefits a landowner receives from a public project, however, can offset the compensation a government must pay.

When calculating benefits that offset the amount of compensation owed, a court will consider whether the benefits are "special" or "general." Special benefits accrue directly and solely to the landowner. General benefits, or benefits accrued across a community, historically have not been accounted for in New Jersey when formulating

compensation for eminent domain. General benefits are deemed too speculative to serve as reliable evidence. Further, over compensating a landowner would unfairly take away from the public.

The Borough's expert witness, a civil engineer for the U.S. Army Corps of Engineers, testified that both the Karans' property and the property of neighboring homeowners would suffer extreme damage if no improvements were made to the coastline. Furthermore, the Karans' property would likely experience catastrophic storm damage in the next thirty years without the larger dune's protection. In fact, the expert testified that the property would have only a 27% chance of survival within a fifty-year span. With the larger dune, the Karans' property survival increased to only one incident of catastrophic storm damage per 200 years. The dune would also protect the houses near the Karans, making the project economically worthwhile to the entire island.

The trial court judge determined that the entire island would benefit from the sand dune project, resulting in a general rather than a special benefit to the Karans. Because the judge classified the protection provided by the sand dune as general benefit, the jury was barred from considering any financial benefit the Karans would receive from the dune. As a result, the jury could only consider whether the Karans experienced economic loss from the obstruction of the ocean view. The jury instructions were significant in the calculation of damages because the protection from catastrophic storm damage would more than financially compensate for the Karans' lack of ocean view. If the jury were to consider the sand dune's financial benefits, the government likely would not have to pay the Karans' damages as the loss of value due to view obstruction would be offset by storm protection.

After listening to expert testimony and experiencing the blocked view firsthand at the Karans' home, the jury concluded that the government must pay \$375,000 as compensation for the easement to the Karans. The court subsequently denied the Borough's motion for a new trial. In the spring of 2012, the Appellate Division affirmed the trial court's ruling, holding that the dune protection was a "classic example of a general benefit."<sup>3</sup>

### **State Supreme Court's Reversal**

On appeal, the New Jersey Supreme Court reversed the appellate court. The court dismissed the distinction between general and special benefits, finding that society does not "need to pay slavish homage to labels that have outlived their usefulness." The court noted that the nuances of general benefits and special benefits have changed since

their introduction and case law applying the terms has often been inconsistent. Current case law includes benefits that are both distributed across a community or given solely to the landowner in benefits calculation, particularly if those benefits will improve the fair market value of the property. The former method of using general and specific benefits did not truly calculate whether the market value of a property was increased or decreased, and thus did not adequately capture just compensation. For instance, a reasonable property buyer would likely value the presence of a protective barrier to preserve the property as well as an ocean view. Any benefit that is “readily quantified and not shared equally by the entire community” should be included in the calculations for just compensation.

Whether the expert reports quantifying the heightened sand dune created a quantifiable financial benefit against storm damage is a determination that must be made by the jury. The majority found that the trial court erred when it prevented the jury from considering the storm protection afforded by the sand dune in its calculations for just compensation. As such, the lower court’s holding was reversed and the case remanded to the trial court. The trial court judge must instruct the jury that they may consider the financial benefit from the sand dune.

---

## **THE MAJORITY FOUND THAT THE TRIAL COURT ERRED WHEN IT PREVENTED THE JURY FROM CONSIDERING THE STORM PROTECTION AFFORDED BY THE SAND DUNE IN ITS CALCULATIONS FOR JUST COMPENSATION.**

---

### **New Jersey’s Reaction**

The Karans’ case was closely followed in New Jersey due to the current reconstruction of the coastline that was destroyed by Hurricane Sandy.<sup>4</sup> New Jersey officials in particular were vocal about the court’s ruling. Joseph H. Mancini, the mayor of the Long Beach Township, described the case as “huge.” He further commented that landowners fighting for greater compensation should quit “waiting for the good old lottery to come in.”<sup>5</sup> Governor Chris Christie urged New Jersey towns to publicly shame uncooperative landowners<sup>6</sup> and additionally called those landowners “selfish.”<sup>7</sup>

Pete Wegener, the lawyer for the Karans, also noted that it would be hard to find a jury whose opinion will not

be influenced by the hurricane’s destruction.<sup>8</sup> Nearly 365,000 New Jersey homes were destroyed during Hurricane Sandy.<sup>9</sup> The seaside communities were the hardest hit. Long Beach Island, where the Karans reside, suffered between \$750 million and \$1 billion in damage.<sup>10</sup> The storm surge had deposited several feet of sand along its roads.<sup>11</sup>

As this issue went to press, the state announced a settlement with the Karans for \$1. Following the announcement, Governor Christie ordered the state to take legal action against other landowners who refused to sign easements that would permit the government to undertake beach protection projects.

### **Conclusion**

With storm protection no longer viewed as an incalculable, detached benefit, the fight between landowners and officials in New Jersey may be put to rest, at least for now. The government will likely no longer need to bring landowners to court to secure easements for sand dune construction. Many New Jersey citizens who witnessed Hurricane Sandy’s destruction could be relieved that the government has greater facility in strengthening the coastline against natural disaster. 🌪

### **Endnotes**

1. May 2015 J.D. Candidate, Florida State University College of Law.
2. *Borough of Harvey Cedars v. Karan*, 214 N.J. 384 (2013).
3. *Borough of Harvey Cedars v. Karan*, 425 N.J.Super. 155 (App.Div. 2012).
4. Wayne Parry, *NJ court overturns award for view lost to dune*, FINDLAW, <http://news.findlaw.com/apnews-1p/02536cb2074b4cb0b8af799d86953cb9>.
5. *Id.*
6. *Id.*
7. MaryAnn Spoto, *State Supreme Court overturns \$375K award for lost ocean view*, NJ.COM (Jul. 8, 2013), [http://www.nj.com/news/index.ssf/2013/07/oceanfront\\_homeowners\\_dont\\_have\\_to\\_be\\_paid\\_for\\_lost\\_ocean\\_view\\_state\\_supreme\\_court\\_says.html](http://www.nj.com/news/index.ssf/2013/07/oceanfront_homeowners_dont_have_to_be_paid_for_lost_ocean_view_state_supreme_court_says.html).
8. Kate Zernike, *Court Sides With Town on Price of Views Lost to Dune*, THE NEW YORK TIMES (Jul. 8, 2013), <http://www.nytimes.com/2013/07/09/nyregion/court-sides-with-town-on-price-of-views-lost-to-dune.html>.
9. Salvador Risso, *Christie announces first round of post-Sandy home buyouts for Sayreville*, THE STAR LEDGER (Jul. 16, 2013), [http://www.nj.com/news/index.ssf/2013/07/christie\\_announces\\_first\\_round\\_of\\_post-sandy\\_home\\_buyouts\\_in\\_south\\_river\\_sayreville.html#incart\\_river](http://www.nj.com/news/index.ssf/2013/07/christie_announces_first_round_of_post-sandy_home_buyouts_in_south_river_sayreville.html#incart_river).
10. *Long Beach Island Damage Could Reach \$1 Billion*, THE SANDPAPER.NET (Nov. 2, 2012), <http://thesandpaper.villagesoup.com/p/long-beach-island-damage-could-reach-1-billion-mayor-says/919035?cid=3618876>.
11. Ryan Hutchins, *Extensive damage from Sandy litters Long Beach Island*, THE STAR-LEDGER (Oct. 31, 2012), [http://www.nj.com/news/index.ssf/2012/10/extensive\\_damage\\_from\\_sandy\\_li.html](http://www.nj.com/news/index.ssf/2012/10/extensive_damage_from_sandy_li.html).

# TIGHTENING REGULATIONS ON BALLAST WATER DISCHARGE IN THE GREAT LAKES

Terra Bowling and Caroline Shepard<sup>1</sup>

In July, the National Wildlife Federation (NWF) filed suit against the U.S. Environmental Protection Agency (EPA), alleging that the agency's latest permit regulating the discharge of ballast water from overseas ships entering the Great Lakes does not meet Clean Water Act (CWA) requirements.<sup>2</sup> Contaminated ballast water can lead to the introduction of invasive species such as zebra and quagga mussels, the round goby, and spiny water flea. The Great Lakes are currently home to 186 non-native species that cause over \$200 million in damage annually. The NWF claims that the EPA's permit will not adequately protect the Great Lakes from these threats.<sup>3</sup>

Over a decade ago, environmental groups sued the EPA to require it to regulate ballast water discharges under the CWA. The U.S. District Court for the Northern District of California found that the EPA's exclusion of ballast water discharges from National Pollutant Discharge Elimination System (NPDES) permitting was a violation of the CWA.<sup>4</sup> Ultimately, the Ninth Circuit upheld the ruling.<sup>5</sup> In 2008, the EPA issued a NPDES general permit for the discharge of ballast water by commercial vessels, which is set to expire in December 2013.<sup>6</sup>

In March, the EPA issued a final NPDES general permit to replace the expiring permit. The new permit requires commercial vessels over 79 feet long entering the Great Lakes to commit one of 27 different types of discharges of ballast water. In addition, the permit contains numeric ballast water discharge limits for vessels with ballast water tanks. These numeric limits are the maximum concentration of living organisms allowable in ballast water, and, in general, align with the Coast Guard's ballast water rulemaking.

The EPA predicts that "[t]hese limitations will achieve significant reductions in the number of living organisms discharged via ballast water;"<sup>8</sup> however, the NWF now argues that the permit is not stringent enough to prevent the contamination of the Great

Lakes.<sup>9</sup> Marc Smith, Senior Policy Manager for the NWF stated that "We're not about closing down commerce ... We need commerce. The Great Lakes are a valuable asset, not only to us and our quality of life but our economy, and we need shipping to happen. But we just need to do it in a way that doesn't devastate the ecosystem at the same time."<sup>10</sup> Smith stated, "The EPA's permit will not adequately protect the Great Lakes and other U.S. waters from ballast water invaders. This weak permit leaves the door open for future harm to our environment and economy. We can do better—and need to do better—if we are to protect our fish and wildlife and their habitat for future generations."<sup>11</sup> ❏

## Endnotes

1. Terra Bowling is Sr. Research Counsel at the National Sea Grant Law Center. Caroline Shepard is a 2015 J.D. Candidate, University of Mississippi School of Law.
2. Jordan Lubetkin, *National Wildlife Federation Sues EPA to Strengthen Protections against Ballast Water Invaders*, NATIONAL WILDLIFE FEDERATION, (July 10, 2013), <https://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Wildlife/2013/07-10-13-NWF-Sues-EPA-To-Strengthen-Protections-Against-Ballast-Water-Invaders.aspx>.
3. *Id.*
4. *Northwest Environmental Advocates et al. v. EPA*, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006).
5. *Northwest Environmental Advocates et al. v. EPA*, 537 F.3d 1006 (9th Cir. 2008).
6. *See* EPA, Vessel General Permit, <http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm>.
7. *Id.*
8. 78 Fed. Reg. 21942 (Apr. 12, 2013).
9. Lubetkin, *supra* note 2.
10. *Group Sues EPA Over Shipping Ballast Water Discharge*, PUBLIC NEWS SERVICE (July 11, 2013), <http://www.publicnewsservice.org/index.php?/content/article/33423-1>.
11. Lubetkin, *supra* note 2.

# CONNECTICUT SUPREME COURT ORDERS REMOVAL OF SEAWALL

Caroline Shepard<sup>1</sup>

In September 2004, David and Betsy Sams built a 261-foot gabion seawall to mitigate erosion along the coastline of their private property in Old Saybrook, Connecticut.<sup>2</sup> The Samses did not request permits to build the seawall before construction began, and shortly thereafter, the Department of Environmental Protection (DEP) ordered the couple to remove the seawall. The Samses challenged the order, ultimately landing in the Connecticut Supreme Court.

## Background

The Samses' property is located on the Connecticut River. Their shoreline is a steep bank, prone to erosion due to runoff and wave activity. After observing erosion to their property that ultimately would have compromised the stability of their patio and resulted in trees located on the bank breaking away from the property, the couple sought erosion control solutions. The Samses elected to construct a 261-foot long gabion seawall, an erosion control structure that consists of plastic or metal meshing containing rocks that are stacked in layers along the natural slope of the property. The Samses did not request permits to build the seawall before construction began, relying on a licensed engineer's advice that no approval was necessary, as all construction would occur landward of the coast's high tide line.

Activities along the Connecticut coast are regulated by state law. Connecticut General Statute § 22a-361(a)(1) requires a property owner to obtain a permit from the DEP before construction of any structure along the Connecticut coast "water-ward of the [high tide] line." Any violation of the regulation is a "public nuisance" for which a cease and desist order may be administered.<sup>3</sup> In addition, the Connecticut Coastal Management Act (CCMA) requires coastal property owners to apply to a local zoning authority for approval before constructing a flood or erosion control structure with a statutorily defined coastal boundary.<sup>4</sup>

On September 29, 2004, the DEP sent a staff member to assess the construction of the Samses' nearly complete seawall. The staff member identified the seawall as a violation of § 22a-361(a)(1), finding that the seawall was water-ward of the high tide line. On October 1, 2004, the town's zoning office assessed the seawall. The inspector affirmed that it was built in violation of the statute, and issued the Samses a cease and desist order. The town requested the Samses submit a plan for removal and restoration of the coastline. The Samses refused to remove the wall and did not submit a removal plan.

In reaction to these assessments, the Samses hired Gary Sharpe, a land surveyor, to determine whether the seawall was located water-ward of the high tide line. Sharpe submitted a permit application and mitigation plan to the DEP. Sharpe's plan identified the seawall as land-ward of the high tide line and proposed to substitute portions of the current wall with green gabions. Green gabions are an alternative to standard gabion seawalls and are composed of natural fibers, stone, and topsoil allowing for the growth of vegetation. The DEP denied the Samses' permit request and reordered them to remove the seawall.

The Samses challenged the removal order and requested a hearing. In response, the DEP evaluated the seawall and took photos of water levels showing high water lines up to and above the Samses seawall without any storm activity in June and September of 2006. By November 2, 2007, a DEP hearing officer determined that the DEP properly exercised jurisdiction and retained the authority to order the removal of the seawall. The Samses appealed this decision and the trial court affirmed DEP's findings on December 14, 2007. The Connecticut Supreme Court transferred the appeal from the appellate court.

## Protecting High Tide

On appeal, the Samses claimed that: 1) the DEP did not properly assert jurisdiction over the seawall through Connecticut General Statute § 22a-361, as the DEP did not prove the seawall was water-ward of the high tide line; 2) the DEP did not properly assert jurisdiction under the CCMA; 3) there was not substantial evidence that supported the conclusion that the seawall was built on a coastal bluff or escarpment; therefore a coastal site plan was not required; and 4) the DEP's order to remove the seawall was abuse of the DEP hearing officer's authority.<sup>5</sup> The court evaluated each claim individually.

In response to the first claim, the DEP contended that there was substantial evidence that the seawall was located water-ward of the high tide line and that its use of the U.S. Army Corps of Engineers' (Corps) one-year frequency tidal flood data was an appropriate source to determine the high tide line on the Samses' property. The DEP argued that its photographic evidence of the high tide line breaching the seawall proved that the seawall was water-ward of the high tide line. The DEP cited the Connecticut Supreme Court's ruling in

*Shanaban v. Dept. of Environmental Protection* to support its argument.<sup>6</sup> In this case, the court held that if, “absent intense storm activity, the water level at high tide ever reaches a given location, that location is necessarily water-ward of the high tide line.”<sup>7</sup> The court in the present case agreed, holding that “[t]he exact elevation of the high tide line is not needed in these instances.”<sup>8</sup>

The DEP also relied on the Corps’ data plan, which identified the high tide line on the Samses’ property at 4.1 feet in contrast with Sharpe’s observation of 2.8 feet. While the Samses insisted that Sharpe’s high tide line was correct because the Corps’ data plan was influenced by storm events, the court recognized that the Corps’ data plan did not include hurricane storm surges and was therefore the appropriate resource. Finding that the DEP was able to prove the seawall was located water-ward of the high tide line, the court affirmed that the DEP properly asserted jurisdiction over the seawall.

For the Samses’ second claim, the DEP relied on Connecticut General Statute § 22a-108 which states “any activity within the coastal boundary ... which occurs without having received a lawful approval from a municipal board or commission ... shall be deemed a public nuisance .... After notifying the municipality in which the activity is located, the commissioner may order that such a public nuisance be halted, abated, removed or modified.”<sup>9</sup> The court agreed that without acquiring approval from the town, the seawall became a public nuisance, which according to the language of the statute then entitled the DEP to exercise enforcement.

In reaction to the Samses’ third claim that the seawall was not located on a “coastal bluff or escarpment” according to a 1979 DEP coastal resource map and therefore did not require a coastal site plan, the DEP responded that “an activity can affect coastal resources even if the site of the activity is not identified as a coastal resource on the department coastal resource map.”<sup>10</sup> The court agreed with the DEP that although the Samses’ property is not identified as a “coastal bluff or escarpment” on the DEP coastal resource map, the record reflects that prior to construction of the seawall “the river bank was found to have an angle of approximately seventy degrees, and appears on maps to have an elevation between approximately seventeen and nineteen feet above sea level.”<sup>11</sup> Further, the court also claimed that, “even if the seawall were not located on a coastal bluff or escarpment, the plaintiffs would have still been required to submit a coastal site plan to the town prior to commencing construction,”<sup>12</sup> as plan review is required for “proposed building, use, structure, or shoreline flood and erosion control structure”<sup>13</sup> along a coastal boundary according to Connecticut General Statute § 22a-109(a).

In addition, DEP contended that Connecticut General Statute § 22a-361(a)(1) assigned them jurisdiction over a structure located in “tidal, coastal, or navigable waters of the state.”<sup>14</sup> The court found that there was copious evidence, as explained in the first claim, showing that the seawall was located within the tidal waters. The court went so far as to state that the Samses’ own experts, “testified that the water level at the seawall varies and is influenced by the tide.”<sup>15</sup>

Finally, in response to the Samses’ fourth claim, the court stated that its duty was to evaluate the evidence to determine whether the DEP abused its authority in requiring the Samses to remove their seawall. The court found that in light of claims one and two, the DEP properly asserted jurisdiction over the seawall. Accordingly, the court held that the DEP hearing officer did not abuse her authority in requiring the removal of the seawall.

## Conclusion

As the court ruled that the Samses’ seawall was in violation of state law, the court required the Samses to submit a removal and restoration plan to mitigate damage at the seawall site. Following the final decision, Brian Thompson, Director of the Department’s Office of Long Island Sound Programs noted, “At a time when shoreline residents are increasingly concerned about the impacts of shoreline erosion and sea level rise, the Samses decision underscores the importance of following the appropriate legal procedures before considering an erosion control structure.”<sup>16</sup> ❏

## Endnotes

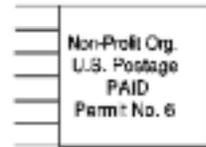
1. May 2015 J.D. Candidate, Univ. of Mississippi School of Law.
2. *Sams v. Dep’t of Env’t. Prot.*, 308 Conn. 359, 369 (2013).
3. CONN. GEN. STAT. ANN. § 22a-362.
4. *Id.* § 22a-109.
5. *Sams*, 308 Conn. at 363.
6. 305 Conn. 681 (2012).
7. *Id.*
8. *Sams*, 308 Conn. at 381.
9. CONN. GEN. STAT. ANN. § 22a-108.
10. *Sams*, 308 Conn. at 381.
11. *Id.* at 407.
12. *Id.* at 407-08.
13. CONN. GEN. STAT. ANN. § 22a-109 (a).
14. *Id.* § 22a-361(a)(1).
15. *Sams*, 308 Conn. at 405.
16. *Connecticut Supreme Court Upholds DEEP Order to Remove Old Saybrook Seawall*, SOUND OUTLOOK, <http://archive.constantcontact.com/fs112/1104335014923/archive/1113242997674.html>.



*The University of Mississippi*

**THE SANDBAR**

Sea Grant Law Center  
Kinard Hall, Wing E, Room 258  
P.O. Box 1848  
University, MS 38677-1848



# Littoral Events

## **Summit 2014: Inspiring Action Creating Resilience** *Washington, D.C. • November. 1 – 5, 2014*

The Coastal Society and Restore America's Estuaries are hosting *Summit 2014: Inspiring Action Creating Resilience*, which will be the 7th National Summit on Coastal and Estuarine Restoration and the 24th Biennial Meeting of The Coastal Society. The meeting, held at the Gaylord National Convention Center just outside of Washington, D.C., will bring together the restoration and coastal management communities for an integrated discussion to explore issues, solutions, and lessons learned.

For more information, visit: [www.estuaries.org/summit](http://www.estuaries.org/summit)

---

## **Aquaculture America 2014** *Seattle, WA • February 9 – 12, 2014*

The U.S. Aquaculture Society (formerly U.S. Chapter of WAS) joins with National Aquaculture Association and the U.S. Aquaculture Suppliers Association to produce the annual Aquaculture America meeting. This year's meeting will be held in Seattle. The program will feature special sessions, contributed papers and workshops on topics such as offshore aquaculture, aquatic invasive species, science and public policy, and federal agency updates.

For more information, visit: [www.was.org/meetings/default.aspx?code=aa2014](http://www.was.org/meetings/default.aspx?code=aa2014)

---

## **ASBPA Coastal Summit** *Washington, D.C. • February 26 – 28, 2014*

The American Shore and Beach Preservation Association will convene the 2013 Coastal Summit in Washington, D.C. to discuss the future management of the nation's beaches and shores. ASBPA encourages policy makers, state and local officials, scientists, and attorneys to attend the conference. Among other topics, the conference will examine Hurricane Sandy's impact and aftermath in repairing the New Jersey and New York shorelines.

For more information, visit: [www.asbpa.org/conferences/sum\\_13.htm](http://www.asbpa.org/conferences/sum_13.htm)