

**Climate Adaptation Academy Fact Sheet #2**

# Property and Permitting Boundaries at the Shoreline

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The determination of the boundary between public and private areas of the shoreline can be a topic of substantial interest and dispute, especially as the environment changes over time. This document explains the property and regulatory boundaries that apply in Connecticut and how those boundaries change.

Two separate types of boundaries exist at the shoreline: the mean high-water mark, which divides private coastal property from public trust lands, and the coastal jurisdiction line (CJL), which determines if a permit is needed for work within tidal waters. These two boundaries have distinct uses and applications, and changes in one do not affect the other.

## Property Boundary Delimitation

Coastal states, including Connecticut, hold all lands under waters subject to the ebb and flow of the tide in trust for the public.<sup>1</sup> Each state determines the landward boundary of its holdings independently.<sup>2</sup> Connecticut has defined the landward boundary of its trust areas to be the mean high-water mark, as the Connecticut Supreme Court explained in *Mihalcz v. Borough of Woodmont*:

[T]he land between high and low-water marks remains in the state. Thus, Long Island Sound establishes the southern boundary of the plaintiff's property. It has been recognized that a landowner could only have a fee simple title to the area above the mean high-water mark.<sup>3</sup>

Connecticut holds its tidelands in trust for the public for uses such as fishing and recreation<sup>4</sup> and has defined all such lands between high- and low-water as "public beaches."<sup>5</sup>

## DEEP Permitting Boundary Delimitation

Under Connecticut law, any person must obtain a permit from the Department of Energy and Environmental Protection (DEEP) prior to any "dredging, erection of structures and placement of fill in tidal, coastal or navigable waters."<sup>6</sup> An activity is in "tidal, coastal, or navigable waters" if it will be wholly or partially seaward of the CJL.

Connecticut established the CJL in 2012. Prior to that date, a permit was required for any

regulated activities seaward of the “high-tide line.”<sup>7</sup> Determination of the precise location of the high-tide line required interpretation of observations made during field visits and could result in protracted factual disputes about whether a structure was above or below the high-tide line.<sup>8</sup>

To alleviate the difficulty of pinpointing the precise location of the high-tide line, Connecticut amended the law to adopt the CJL. The CJL is based on a “specifically determined elevation as the regulatory limit instead of field evidence of the water surface elevation.”<sup>9</sup> The elevation of the CJL was intended to be consistent with the high-tide line used previously—specifically, it is the elevation of the highest recorded tide between 1983 and 2001.<sup>10</sup>

The CJL applies only to DEEP permitting and other statutes that use the line as a reference. It is independent from other boundary delimitation methods or uses, including the use of the mean high-water mark for property boundary delimitation. In other words, the CJL and the mean high-water mark are separate and distinct boundaries, and changes in the environment may affect one but not the other.

## **Boundaries and Permitting in a Changing Environment**

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Both property and permitting boundaries will shift over time as a result of sea level rise as well as gradual and sudden changes in the shoreline. The shoreline may change through gradual losses or gains (accretion and erosion<sup>11</sup>) or through sudden events known as avulsion.<sup>12</sup> Under common law, erosion and accretion cause shoreline property boundaries to move over time. However, “[w]here a change occurs suddenly and perceptibly by avulsion, . . . boundaries and title to land are not affected.”<sup>13</sup> Property owners are allowed to return their property line to the pre-avulsive state within a reasonable time period.<sup>14</sup> Connecticut, like other states, has adopted these long-standing doctrines of accretion and avulsion for property boundary delimitation.<sup>15</sup>

Beach nourishment, or the addition of sediment to restore a shoreline, is considered a sudden addition and therefore is an avulsive event.<sup>16</sup> Beach nourishment therefore does not change shoreline property boundaries. A newly-created nourished beach is generally the property of the state rather than that of the inland property owner. Where a shoreline is nourished after a storm to return the shoreline to its pre-storm state, however, the nourished area would logically be the property of the shorefront property owner to the extent of the prior property boundary.

The CJL, like a property boundary, may change over time due to changes in the shoreline, but these changes occur through a different mechanism. The CJL is defined based on a fixed elevation; as sea level changes or the shoreline changes, the location of the defined elevation may move inland or seaward. The suddenness of such changes does not affect the movement of the CJL because, unlike the common law governing property boundaries, Connecticut’s statute does not distinguish between accretion and avulsion. Thus, the CJL can shift based on any activity that changes the elevation of the shoreline, including beach nourishment.

Beach nourishment seaward of the CJL is a “placement of fill” in tidal waters that requires a permit from DEEP. If the CJL moves landward, such as after an avulsive event, then a permit logically will be required for nourishment even in areas that previously were landward of the CJL. Thus, a property owner wishing to recover land lost to avulsion will need a permit from DEEP in most cases. DEEP has simplified this process by issuing a “General Permit for Coastal Storm Response” that authorizes landowners to undertake certain activities in preparation for or response to coastal storm events without

an individual permit or certificate.<sup>17</sup> The general permit goes into effect after a declaration by the DEEP Commissioner and authorizes several activities relevant to recovery of land lost to avulsion, including “operation of heavy equipment below the coastal jurisdiction line to replace, regrade or relocate sand on beaches above the mean low water line” and repairs to and rebuilding of existing flood and erosion control structures and living shoreline components.<sup>18</sup> Property owners desiring to conduct activities not listed in the general permit will need to obtain an individual permit or certificate from DEEP before undertaking those activities.

## Summary

The CJL is independent from and does not affect or alter the locations of shoreline property lines, which are based on the mean high-water mark. Beach nourishment is an avulsive event that does not change shoreline property boundaries, but the CJL will shift regardless of the suddenness of changes in the shoreline. A permit from DEEP is required to carry out any nourishment seaward of the CJL, including for fill after a storm event; however, the DEEP general permit for coastal storm response may authorize such activities without the need for an individual permit.

## Questions Answered

In November 2015, Connecticut Sea Grant and CLEAR held a workshop on the legal aspects of climate adaptation. Participants were asked to write down questions or issues they had about the topic. Over fifty questions were asked and a complete list can be found on the Adapt CT website at <http://climate.uconn.edu/caa/>. **This Fact Sheet answers the following questions from the workshop:**

### Property Rights:

6. Does the coastal jurisdiction line have any impact on common law in Connecticut or will the high tide line still apply for common law purposes?
7. Does beach nourishment change property lines?
  - Does it make a difference if it is owner- or government-initiated?
9. Do changing property lines change regulatory jurisdiction? *Mean high water vs. high tide line vs. coastal jurisdiction line.*
13. According to Atty. Shansky, an avulsive event does not result in a change of property line while gradual erosion or accretion does. If a hurricane severely erodes my property, can I fill in the eroded area without getting a permit from DEEP? How does an avulsive event affect the CJL?

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<sup>1</sup> Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988).

<sup>2</sup> *Id.* at 475 (“it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit”), *citing* Shively v. Bowlby, 152 U.S. 1, 26 (1894).

<sup>3</sup> 400 A.2d 270, 271-72 (Conn. 1978) (internal citations omitted).

<sup>4</sup> Conn. Gen. Stat. § 22a-15.

<sup>5</sup> Conn. Gen. Stat. § 22a-93(6).

<sup>6</sup> Conn. Gen. Stat. § 22a-359.

<sup>7</sup> 2012 Conn. Acts 12-101 (deleting prior definition of high tide line as “a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water’s surface at the maximum height reached by a rising tide. The mark may be determined by (1) a line of oil or scum along shore objects, (2) a more or less continuous deposit of fine shell or debris on the foreshore or berm, (3) physical markings or characteristics, vegetation lines, tidal gauge, or (4) by any other suitable means delineating the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.”).

<sup>8</sup> *See* Sams v. Dept. of Env’tl. Prot., 308 Conn. 359 (2013), Shanahan v. Conn. Dep’t of Env’tl. Prot., 47 A.3d 364 (Conn. 2012) (deciding dispute over whether seawall was built landward or seaward of the high-tide line).

<sup>9</sup> 2012 Conn. Acts 12-101, *amending* Conn. Gen. Stat. § 22a-359.

<sup>10</sup> Conn. Gen. Stat. § 22a-359 (defining the “coastal jurisdiction line” as “the location of the topographical elevation of the highest predicted tide for the period beginning in 1983 and ending in 2001, referenced to the most recent National Tidal Datum Epoch as published by the National Oceanic and Atmospheric Administration and described in terms of feet of elevation above the North American Vertical Datum of 1988.”).

<sup>11</sup> Accretion is defined as “[t]he gradual accumulation of land by natural forces, esp. as alluvium is added to land situated...on the seashore.” Black’s Law Dictionary (2d Pocket) 9. Conversely, “erosion” is “[t]he wearing away of something by action of the elements; esp., the gradual eating away of soil by the operation of currents or tides.” *Id.* at 243.

<sup>12</sup> “Avulsion” is defined as “[a] sudden removal of land caused by change in a river’s course or by flood.” *Id.* at 55.

<sup>13</sup> Roche v. Town of Fairfield, 442 A.2d 911 (Conn. 1986), *citing* 78 Am.Jur.2d, Waters § 411.

<sup>14</sup> James G. Titus, ROLLING EASEMENTS: A PRIMER FOR COASTAL MANAGERS § 2.2.2 (2011), *available at* <http://papers.risingsea.net/rolling-easements-2-2-2.html>.

<sup>15</sup> *Id.*; *see also* Stop the Beach Renourishment v. Fla. Dep’t of Env’tl. Prot., 560 U.S. 702, 707 (2010) (explaining common law principles regarding property ownership after erosion, accretion, and avulsive events).

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<sup>16</sup> Stop the Beach Renourishment, 560 U.S. at 707.

<sup>17</sup> Conn. Dep't of Energy & Envtl. Prot., *General Permit for Coastal Storm Response*, DEEP\_OLISP-GP-2015-03 (2015), available at [http://www.ct.gov/deep/lib/deep/Permits\\_and\\_Licenses/LandUse\\_General\\_Permits/Long\\_Island\\_Sound\\_General\\_Permits/Coastal\\_Storm\\_Response\\_gp.pdf](http://www.ct.gov/deep/lib/deep/Permits_and_Licenses/LandUse_General_Permits/Long_Island_Sound_General_Permits/Coastal_Storm_Response_gp.pdf).

<sup>18</sup> *Id.* at § 3(a).

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