

Marine Resources Committee Newsletter

Vol. 16, No. 2

August 2013

MESSAGE FROM THE CHAIR

Eric Andreas

I'm very excited to present our second newsletter for this year. We begin with ocean acidification—the evil twin of climate change. When people ask me what I think the next big issue is going to be, I tell them to pay attention to this one. Its impact on the environment should not be underestimated. We also have for you an excellent article that summarizes the highlights of the President's plan to implement the Administration's National Ocean Policy. It's an understatement when I say that everyone in the maritime community is potentially impacted by this. Next is a piece that looks at the effect of sea level rise on takings issues: Should the benefit to the landowner from a protective dune be subtracted from an award of just compensation? Read and find out. Finally, we're pleased to have a piece that outlines the results of the first ever auction for offshore wind leases. This sale was for blocks off Rhode Island and Massachusetts, but more auctions are planned for offshore Virginia, Maryland, and New Jersey.

By the way, did you know that companies are actively fracking right offshore? Yep, right off the coast of California. I think this is a hot topic. And to make sure our committee can better share this information, we plan to update our webpage to add a hot topics box. Keep an eye out for it in the months to come.

Thanks to everyone who contributed to the newsletter, and a very special thanks to Niki Pace, our newsletter vice chair, for making the newsletter happen.

OCEAN ACIDIFICATION: A CLOSER LOOK AT CLEAN WATER

Joyce R. Lombardi

“Climate change's evil twin.” “Osteoporosis of the sea.” “The other CO₂ problem.”

No matter how it is tagged, the fact that our oceans are acidifying at a geologically unprecedented rate has captured the attention of scientists, fishermen, and recently, a few regulators. “What frightens me the most,” Stanford oceanographer Dr. Robert Dunbar told the audience at his state-of-the-ocean TEDTalk in September 2010, “is ocean acidification.” What scares those who study the issue is this: acidifying oceans disrupt the ability of critical organisms like corals, plankton, and oysters to grow, which in turn can impair creatures throughout the entire food chain, including millions of humans at the top. *See NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMIES OF SCIENCE, OCEAN ACIDIFICATION: A NATIONAL STRATEGY TO MEET THE CHALLENGES OF A CHANGING OCEAN (2010).*

The basic science behind acidification is “well understood” and “not controversial.” *See* Dr. Jane Lubchenco, former Administrator of the National Oceanic and Atmospheric Administration (NOAA), testimony before the Select Committee on Energy Independence and Global Warming, hearing on the State of Climate Science, chaired by Edward J. Markey (D-MA, December 2, 2009). The ocean

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Niki L. Pace, Editor

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AMERICAN BAR ASSOCIATION
**SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

September 24, 2013
The State of Our State and Beyond: Local and National Perspectives on Grid Modernization, Infrastructure Resiliency, and Carbon Emissions Reduction Initiatives
New Jersey Law Center
New Brunswick, NJ
Primary Sponsor: New Jersey State Bar Association

October 9-12, 2013
21st Fall Conference
Hilton Baltimore
Baltimore, MD

January 24-26, 2014
Winter Council
The Sanctuary
Scottsdale, AZ

March 20-22, 2014
43rd Spring Conference
The Grand America Hotel
Salt Lake City, UT

April 10-11, 2014
ABA Petroleum Marketing Attorneys' Meeting
The Ritz-Carlton Hotel
Washington, DC

May 2-4, 2014
Spring Council
The Hutton Hotel
Nashville, TN

June 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas, NV

**For full details, please visit
www.ambar.org/EnvironCalendar**

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absorbs about a third of our atmospheric carbon dioxide, forming carbonic acid as it does so. NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, OCEAN ACIDIFICATION: STARTING WITH THE SCIENCE (2011). Over the past decade the ocean simply has not been able to keep pace with the increased carbon dioxide from human activity. NATIONAL RESEARCH COUNCIL (2010); T. Freidrich et al., *Detecting Regional Anthropogenic Trends in Ocean Acidification Against Natural Variability*, 2 NATURE CLIMATE CHANGE 1–5 (2012). The world’s naturally alkaline oceans (think baking soda) have acidified by 30 percent, on average, since the start of the Industrial Revolution 250 years ago. NATIONAL RESEARCH COUNCIL (2010). Although the seas’ chemistry has fluctuated over time, the current spike in the ocean’s pH level is geologically unprecedented. Bärbel Hönisch et al., *The Geological Record of Ocean Acidification*, 335 SCI. 1551 (2012). Given the geologic lag time of the ocean-to-atmosphere cycle, the current level of acidification is effectively irreversible.

Less well understood are the full implications of acidification. So far, the phenomenon has impacted creatures built from calcium carbonate, a list that includes the economically useful (clams, mussels, and oysters); the photogenic (starfish); and the foundational (coral, krill, and plankton). NATIONAL RESEARCH COUNCIL (2010). Take, for example, the pteropod, an animal so popular with fish and birds it has been dubbed the “potato chip of the sea.” Pteropod shells dissolve in high-acid environments in labs, and more recently, the wild. N. Bednarsek et al., *Extensive Dissolution of Live Pteropods in the Southern Ocean*, 5 NATURE GEOSCIENCE 881–85 (Nov. 2012). Tropical coral reefs, and the spectacular array of life they support, are particularly vulnerable to acidification. NATIONAL RESEARCH COUNCIL (2010), at 62. Years of disastrous die-off of young oysters in Washington State’s hatcheries, part of that state’s \$270 million/year shellfish industry, have prompted a blue ribbon report, state-funded research, and the creation of an acidification council in the Governor’s office.

With the Federal Ocean Acidification Research and Monitoring Act, Congress put NOAA in charge of data gathering and coordinating an interagency working group. 33 U.S.C. §§ 3701–08 (2009). It also defined ocean acidification as “the decrease in pH of the Earth’s oceans and changes in ocean chemistry caused by chemical inputs from the atmosphere, including carbon dioxide.” 33 U.S.C.A. § 3702.

Regulation falls to the Environmental Protection Agency (EPA), which has two primary tools to “understand and mitigate” acidification: the Clean Air Act, 42 U.S.C. § 7401 et seq., which regulates emissions of carbon dioxide and other greenhouse gases, and the Clean Water Act, 33 U.S.C. § 1251 et seq., “which charges EPA, States, Tribes and Territories to maintain and restore the chemical, physical, and biological integrity of the Nation’s waters.” Of the two, EPA stated it finds the Clean Air Act the “most promising” in addressing serious climate change issues, but conceded that the Clean Water Act “can complement” those efforts, in at least understanding the issue. EPA, *Questions and Answers on Ocean Acidification and the Clean Water Act 303(d) Program*, November 2010.

The Center for Biological Diversity (CBD), a California-based environmental nonprofit, has been pushing EPA for years to beef up its guidance on the Clean Water Act’s role against acidification. “The Clean Water Act creates a guidepost for where we should be aiming to protect shellfish and other aquatic organisms, before it’s too late,” said Miyoko Sakashita, CBD’s senior counsel for oceans, in an interview with the author. Through legal actions beginning in 2009, CBD’s main focus has been to urge EPA to guide states to place certain impaired waters on their “303(d) lists” under the Clean Water Act. *See CBD v. EPA*, No. 2:09-cv-00670-JCC (W.D. Wash. 2009). These lists are required when a state’s pollution controls are insufficient to meet designated water quality standards. 33 U.S.C. § 1313(d)(1). Since EPA has approval power over 303(d) lists, § 33 U.S.C. 1331(d)(2), the CBD wants the EPA to reject the 303(d) lists of states with documented aquatic life impacts, like Washington or Oregon, that do not list their waters as being impaired by acidification.

The 303(d) list triggers state action to develop total maximum daily loads (TMDLs) for an impaired water body. 33 U.S.C. § 1313(d)(1). The TMDLs, in turn, can allow states to regulate point sources (“discernible,” “confined” sources of pollutants like pipes) and nonpoint sources (aggregate sources like stormwater and urban runoff). *See* 33 U.S.C. § 1362(14); 33 U.S.C. § 1329. With acidification, this power could theoretically be leveraged to regulate atmospheric emissions as well as local discharges. While there are valid pragmatic concerns related to mitigating acidification under the Clean Air Act (*see* Robin Kundis Craig, *The Clean Water Act on the Cutting Edge: Climate Change and Water-Quality Regulation*, NAT. RESOURCES & ENV’T 14, 16 (2009)), general protests like “we can’t regulate China’s emissions” and “the science is uncertain” have already been rejected in the clean air context for CO₂ emissions. *Massachusetts v. E.P.A.*, 549 U.S. 497, 524 (2007).

Using TMDLs against acidification is an academic debate at this point. The first hurdle is getting a state to cite ocean acidification as a cause of impairment on its 303(d) list in the first place. To date, no state has done so, according to EPA representatives interviewed for this article. Puerto Rico listed 65 miles of coastal waters as impaired by pH on its recent lists, but has not attributed the impairment to ocean acidification, nor developed a TMDL for its probable sources, runoff, and stormwater. Washington’s recent 303(d) list identified some waters impaired by pH, but declined to cite acidification as the cause, in part because regulators lacked “critical data” to attribute the pH change to a “human-caused variation,” as required by Washington law. In 2012, Washington’s blue ribbon panel recommended updated EPA guidance on the issue. Other coastal states, however, seem not to have addressed acidification of marine waters on their 303(d) lists at all.

This tepid response is not surprising. Current guidance comes from a 2010 memo that EPA issued in settling CBD’s 2009 lawsuit. Noting that state data was “largely absent or limited,” EPA declined to list acidification as a Clean Water Act priority or alter current guidelines. *Id.* Nonetheless, EPA declared that

states “should” voluntarily list waters as impaired by acidification on their 303(d) lists if they could muster the data. The net effect is that the only federally recommended measure to identify a water body as impaired by acidification is through changes of more than 0.2 pH to its normal pH range (generally 6.5 to 8.5). EPA, Memorandum: Integrated Reporting and Listing Decisions Related to Ocean Acidification, November 15, 2010.

According to the CBD and others, this narrow criterion is inadequate to measure acidification. *See* NATIONAL RESEARCH COUNCIL (2010). “When federal criteria are outdated, water quality throughout the nation suffers,” wrote the CBD in a petition filed in April 2013. Center for Biological Diversity, *Petition to the EPA for Additional Water Quality Criteria and Guidance Under Section 304 of the Clean Water Act, 33 U.S.C. § 1314, to Address Ocean Acidification*, at 31, April 17, 2013. Citing EPA’s duty under 33 U.S.C. § 1314(a)(1) to incorporate “the latest scientific knowledge,” the CBD petitioned EPA to publish guidance on water quality criteria on acidification pursuant to 33 U.S.C. § 1314(a)(2) and to promulgate additional acidification criteria under § 1314(a)(1). The petition asked EPA to include saturation rates of aragonite and calcite, minerals used by many marine animals to build their shells and skeletons. Unlike pH, CBD says, these two measures do not require historical data, sophisticated equipment, or fine-scale monitoring. *Id.* at 32.

In response, EPA agreed that pH alone is insufficient as an acidification indicator, and pledged to launch a work group within the next few months to study the issue. Letter from EPA (Nancy Stoner) to CBD (Miyoko Sakashita) (May 17, 2013), on file with author. EPA stated it would examine other factors like dissolved oxygen and alkalinity, as well as biological indicators. *Id.* This is promising news. EPA’s thoughtful guidance under the Clean Water Act is but one small step in helping state actors grapple with their “other CO₂ problem.”

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THE OBAMA ADMINISTRATION RELEASES ITS OCEAN POLICY IMPLEMENTATION PLAN— SOME HIGHLIGHTS

Joan M. Bondareff

On April 16, 2013, Nancy Sutley, Chair of the Council on Environmental Quality, and John Holdren, Director of the White House Office of Science and Technology Policy, and Co-Chairs of the President's National Ocean Council, released the National Ocean Policy Implementation Plan (Plan) for implementing the National Ocean Policy established under Executive Order 13,547. A copy of the plan can be found at: <http://www.whitehouse.gov/administration/eop/oceans/implementationplan>.

The Executive Order was issued in 2010, and the Administration has taken the past two or more years to develop a plan taking into account the views of multiple stakeholders. The final Plan does include responses to some of the major criticisms of the draft plan, *e.g.*, who will regulate fishing? Does marine spatial planning entail any new regulations of ocean uses? Whether the responses satisfy the critics remains to be seen.

The Plan is very wide-ranging and addresses the interests of the following maritime sectors: commercial fishing; recreational fishing and boating; the ports and shipping community; coastal communities; aquaculture development; offshore oil and gas; offshore renewable energy; regional marine planning; and research and development of the Arctic. Most of the Plan addresses how the 27 interested federal agencies will work better together, and collect and disseminate a lot more oceanographic data. But, there are also a number of action items that are worth paying attention to.

Sector Highlights

Following are some of the important Plan highlights that the maritime community should be aware of:

In the commercial fishing sector, the Plan makes clear that regulation of commercial fishing will continue to be managed exclusively by the state and federal fisheries managers and the Regional Fishery Management

Councils. (This had been a bone of contention in the draft implementation plan and the final Plan attempts to clarify this situation.) On specific action items, federal agencies have committed in the Plan to protect, restore, or enhance 100,000 acres of wetlands, and conduct research on stressors on the coast such as climate change. (The Plan acknowledges the existence of climate change and its potential serious impact on coastal communities.)

In the aquaculture sector, federal agencies have committed to streamline and reduce duplication of permitting efforts, establish an interagency aquaculture initiative to support jobs and innovation, and develop pilot projects through the National Shellfish Initiative to maximize the commercial value of shellfish aquaculture.

For the offshore oil and gas sector, the Plan focuses on providing more accurate charts for safe and efficient navigation, collecting data and information to identify suitable sites for development, and conducting further port access route studies (PARS). The Plan also addresses steps the Administration will take in the Arctic, described below.

In the offshore renewable energy sector, the Administration commits to improving access to data on climate, water, wind, and weather; providing models of seasonal and extreme weather conditions; and developing analyses of how new ocean uses can contribute to the economies of the local communities and regions. Unfortunately, the Plan makes no mention of streamlining the rather cumbersome process for leasing offshore wind farms.

For the shipping and ports sector, the Plan also intends to provide more accurate charts for navigation; undertake more PARS studies; improve predictions about sea level rise; and provide better weather forecasting for the Arctic.

For coastal communities, such as those hard hit by Hurricane Sandy, the Administration commits to sharing more and better data about severe storms and sea level rise; working on improving flood insurance maps; and providing guidance to waterfront property owners on responsible management options for

shoreline erosion. In this area, the National Oceanic and Atmospheric Administration seems up to the task of providing better and more timely information to coastal communities, recognizing that Sandy may not be the last of these mega-storms to hit our coasts.

Another area of contention in the National Ocean Policy and draft Plan was the concept of marine spatial planning. Many conservative critics objected to the term and decreed that it would only add layers of new regulations to existing regulations affecting the maritime industry. As a result, the final Plan softens the term to “marine planning,” while announcing that the entire planning process is voluntary and only those regions that choose to participate will have to do so. The Plan also states definitively that “[n]either the National Ocean Policy nor marine planning creates or changes [existing] regulations or authorities.” At the same time, the Plan cites several examples where marine planning has been effective, *e.g.*, Rhode Island has identified key resources and uses, such as fishing and military needs, so that offshore wind energy can be sited in the best places with the least conflict.

Another important area of focus in the Plan that is addressed in several sections is the Arctic. Several federal interests and objectives are identified for the Arctic, including establishing and strengthening partnerships with industry (*e.g.*, oil companies and ship operators), other governments, and Alaska Native organizations to develop new Arctic communications capabilities; improving oil spill prevention, containment, and response plans and technology for use in ice-covered Arctic areas; completing an integrated dataset to populate an Arctic oil spill planning, coordination, and response tool; and identifying options to minimize and/or mitigate the risks associated with vessel use and carriage of heavy-grade fuel in the Arctic.

From a policy perspective, the Plan also proposes the development of materials to support a U.S. submission on the extended continental shelf delimitation in Arctic waters. The Plan does not address how the United States will manage this submission when it only has an observer seat on the Commission on the Limits of the Continental Shelf established under Article 76 of the

United Nations Convention on the Law of the Sea, to which the U.S. is not a party.

A crosscutting objective in the Plan is to share data and information among federal agencies and with users on its ocean data portal: <http://www.data.gov/ocean/community/ocean>. Another stated objective is to improve the federal permitting process to save time and money for ocean-based industries and taxpayers. Improved permitting for aquaculture is specifically highlighted, but it is not discussed in other uses of the ocean and coastal waters, such as the energy sectors.

Summary

In sum, the Plan is quite comprehensive in that it touches upon all sectors that occupy a place in our maritime world. It is also accompanied by an appendix with a calendar of all the action items, and a list of the various federal agencies that will implement the Plan between now and 2017. A budget line item for implementing the recommendations has not been submitted by the Administration in its FY2014 budget request, so it remains to be seen how successfully the coordinated action items can be carried out and whether Congress will provide the necessary funding in this time of budget constraint.

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BOROUGH OF HARVEY CEDARS V. KARAN— BREAKING THE COST BARRIER OF SEA RISE PROTECTION

Ryan J. F. Pulkrabek

As sea levels rise, communities have begun protecting themselves by building dunes and taking other measures to lessen or prevent the damage caused by storm surges. The New Jersey Supreme Court may have eased the financial burden in protecting these communities by holding that just compensation to beachfront property owners for the taking of property owners' view of the ocean may be mitigated by considering how the portion of the property that was taken for the general public enhanced the value of the remaining property, not just how it lessened it. In *Borough of Harvey Cedars v. Karan*, the court held that the value of the dunes in protecting the Karans' property from storm surges, though a general benefit for the public, can be used to mitigate the just compensation due to the Karans for taking their view, likely easing the financial burden on the governmental entities in implementing this safety measure.

Inevitability of Sea Rise and Natural Barriers to Protect Against Harm

According to the National Oceanic and Atmospheric Administration, sea levels have begun steadily rising at a rate of 1 to 2.5 millimeters per year since 1990, and may be rising by as much as 3 millimeters per year since 1992. *Sea Level Is Rising at an Increasing Rate*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (July 24, 2013, 3:14 PM). The rate of increase is particularly alarming when compared to the previous 19 centuries, which saw little change in sea level. Given the apparent inevitability of the continuation of rising sea levels, several coastal states are beefing up their infrastructure to combat against the harm rising sea levels can cause.

Researchers at the Stanford Woods Institute for the Environment released a study showcasing how natural ecosystems, such as coral reefs, sand dunes, sea grasses, and mangroves, can protect vulnerable coastal

communities from harm altogether or at least by lessening the magnitude of the damage. Elizabeth Rauer, *The Best Defense Against Catastrophic Storms: Mother Nature, Say Stanford Researchers*, STANFORDiNEWS (July 16, 2013). The lead author of the Stanford study, Katie Arkema, highlights that if these natural ecosystems are lost, new barriers must be engineered or else coastal communities will face a heightened risk of greater damages to people and property, resulting in billions of dollars of damage.

In June, President Obama's administration released the Climate Action Plan promoting support for climate-resilient investments, which presumably promotes projects to secure coastal communities where natural barriers do not exist. Chief among efforts to support climate-resilient investments is removing policy barriers at the local level. While this provision is aimed at policymakers, the New Jersey judiciary helped facilitate this effort in *Borough of Harvey Cedars v. Karan*. With a stroke of judicial activism, the New Jersey Supreme Court has helped remove one key barrier in promoting climate-resilient investments in New Jersey: cost.

***Borough of Harvey Cedars v. Karan* Procedural History**

A few years ago, the Borough of Harvey Cedars of Ocean County, New Jersey, began a large-scale public works project to protect homes and business from storm-surge destruction by creating a barrier wall connecting with other dunes to run the entire length of Long Beach Island. *Borough of Harvey Cedars v. Karan*, 2013 WL 3368225, *1 (N.J. July 8, 2013). To complete this project, the Borough exercised eminent domain to take a portion of Harvey and Phyllis Karan's beachfront property to construct a dune, a step necessitated by the Karans' refusal to voluntarily consent. The Karans were one of 16 residents to refuse consent despite 66 others voluntarily giving the Borough an easement for the project. The portion of the land taken by the Borough was replaced by a 22-foot-high dune, which blocked the Karans' oceanfront vista, lessening the value of the home in that regard. Because the Borough took the Karans' land and blocked their oceanfront view, the Karans are

indisputably entitled to just compensation under state and federal constitutional law. At dispute, however, is not whether they are entitled to just compensation but rather how to calculate the amount of just compensation the Borough owes the Karans since the public project lessens the Karans' property in part and enhances it in part as well.

At the condemnation trial, the Karans were permitted to present evidence of the loss in value caused by the dune's obstruction of their oceanfront vista; however, the Borough was not allowed to present evidence on how the dune enhances the Karans' property by protecting it from powerful storms and storm surges. The Borough was disallowed to present evidence of benefits from the dunes because they were deemed general benefits to the public rather than specific benefits to the Karans, which, as the lower court determined based on state law, could not be factored into the just compensation determination. The court deemed it a general benefit because it protected and enhanced the value of the entire community's homes, not just the Karans' home in particular. Irrespective of the enhancement to the value of the Karans' home, the jury determined that the Karans were entitled to \$375,000 in damages, mostly for the loss of their oceanfront vista.

The New Jersey Supreme Court, however, reversed the lower court's judgment and sent the case back down for the jury to calculate just compensation for public projects by considering all "relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property." *Id.* Since this is a partial takings case, the jury is to consider the fair market value of the Karans' property before the partial taking and the fair market value after the taking with full consideration given to the quantifiable benefits of the public project. The court stated that true loss must be calculated and the result must be just to both the landowner and the public.

Bringing Just Compensation Calculation into Focus

The integral components of determining just compensation lie in determining how the public project

enhances the value, whether that enhancement is specific to the Karans, and how the enhancement may factor into determining just compensation, if it does so at all. In *Sullivan*, a case in which an easement was granted to a railroad bringing no specific benefit to the landowner, the New Jersey Supreme Court stated that general benefits were "those which affect the whole community or neighborhood" and are not subtracted from just compensation in a partial taking because they would be "enjoyed by the entire neighborhood." *Sullivan v. N. Hudson Cnty. R.R. Co.*, 18 A. 689 (N.J. 1889). The court differentiated special from general benefits by stating that specific benefits were "those which directly increase the value of the particular tract crossed," which could be deducted from damages. *Id.*

Sullivan was refined and clarified in *Mangles*, in which the same Justice from *Sullivan* held that "the benefit immediately accruing to the remainder property from a public project may offset both the 'value of the land taken' and 'the damage' caused to the remainder." *Mangles v. Hudson Cnty. Bd. of Chosen Freeholders*, 25 A. 322 (N.J. 1892). This holding created the necessity to consider non-speculative benefits that are reasonably calculated at the time of the taking in the calculus of just compensation determination. The U.S. Supreme Court supported the language in *Mangles* in *Bauman v. Ross*, holding that the government can use any special and direct benefit that is presently and reasonably calculable from public improvement projects to offset the value of the property that is partially taken. 167 U.S. 548, 584, 578-79 (1897). This ensured that the property owner whose property is subject to a partial taking is compensated for the value of what he or she has lost without granting the owner a windfall. This holding was supported by the Court about 20 years later in *McCoy v. Union Elevated R.R. Co.* 247 U.S. 354 (1917).

While the lower courts struggled with distinguishing between special and general benefits, the New Jersey Supreme Court instead looked to the fair market value approach from the California Supreme Court in *Continental*. (See *L.A. Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp.*, 941 P. 2d 809, 823-24 (Cal. 1997). The *Karan* court deemed *Continental* a

modern-day *Mangles* and held that its approach should be applied to *Karan* on remand by basing just compensation on “non-conjectural and quantifiable benefits . . . that are capable of reasonable calculation at the time of the taking.” *Karan*, 2013 WL 3368225, at *15-16.

Applying the Fair Market Value Approach

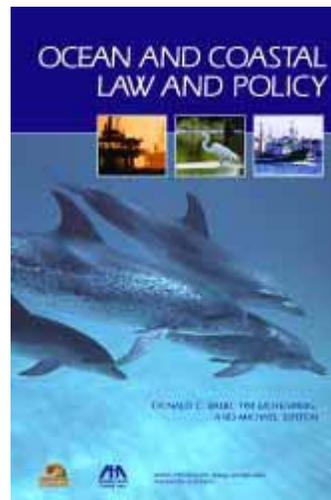
In applying the fair market value approach, the New Jersey Supreme Court reasoned that a purchaser of beachfront property would likely place value in the ocean view and proximity to the ocean as well as the protection a barrier may provide. *Id.* at *16. Following this reasoning, the court stated that while the jury should hear about how the dunes block the oceanfront view, it should also hear about the added benefit of the protective dunes. The court ordered a new trial allowing the Borough to present any evidence of “non-speculative, reasonably calculable benefits that inured to the advantage of the Karans’ property at the time of the taking,” and stated that “the quantifiable decrease in the value of their property—loss of view—should have been [offset] by any quantifiable increase in its value—storm-protection benefits” regardless of whether they were enjoyed by the entire community. *Id.* at *19. To do so, the court advanced this formula for the new trial: “[v]alue of entire parcel before taking [minus the] value of remainder area after taking [equals] just compensation.” *Id.* at *18 (quoting 2–5 *Nichols on Eminent Domain*, § 14.23 (Matthew Bender, 3d ed. 1975)). The court thus “reverse[d] the judgment of the Appellate Division, vacate[d] the [\$375,000] condemnation award, and remand[ed] to the trial court for proceedings consistent with this opinion.” *Id.*

Conclusion

Ultimately, sea levels are rising and storm surges are becoming more inevitable. Dunes can be used to protect against this prospect, but only if they are not cost prohibitive. Of the 82 beachfront property owners, 16 refused to voluntarily permit the government an easement to build the dunes, prompting the government to take their property. Were a \$375,000 award given to all 16, the award would be \$6 million, or \$30.75 billion if all 82 held out. This

holding will likely lessen the amount of holdouts and expedite the process for communities to build storm surge protection against rising sea levels.

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Ocean and Coastal Law and Policy

Editors: Donald C. Baur, Tim Eichenberg, Michael Sutton

The country’s ocean and coastal laws and policies in many ways mirror the very resources they were created to

manage, restore, and protect: they are complex, intertwined, and fluid. **Ocean and Coastal Law and Policy** provides an authoritative yet practical resource for practitioners, government officials, and scholars to understand and build upon the current legal framework of our ocean and coastal policies.

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DOI COMPLETES FIRST OFFSHORE ENERGY AREA AUCTION, PREPARES FOR SECOND IN THE FALL

Jennifer Simon Lento

On July 31, 2013, the Bureau of Ocean Energy Management, an office within the U.S. Department of the Interior, held the first ever subsea land auction for the purpose of developing an offshore wind farm on the outer continental shelf. The land area, which was previously designated as a wind energy area as part of BOEM's Smart from the Start program, consists of two lease areas located approximately 9.2 nautical miles off the coast of Rhode Island and Massachusetts. Deepwater Wind, the developer of a demonstration scale 30 megawatt offshore wind project near Block Island, Rhode Island, is the provisional winner for both lease areas.

The 257-square mile wind energy areas consist of a north lease area (Lease OCS-A0486) and a south lease area (Lease OCS-A0487). The north lease area consists of about 97,500 acres and the south lease area covers about 67,250 acres. The combined lease areas have potential to support 3,395 megawatts of wind generation—more than seven times the rate expectancy for the Cape Wind Farm in Nantucket Sound—enough to power more than one million homes, according to the Department of Energy's National Renewable Energy Laboratory. Deepwater Wind has stated that it plans to build an offshore wind farm of up to 1,000 megawatts with more than 100 turbines in the two lease areas. Maps for these areas are available on BOEM's website.

Now that the auction is complete, the Attorney General, in consultation with the Federal Trade Commission, has 30 days to complete an antitrust review of the winning bids. Following that review, BOEM must send unsigned copies of the lease form to Deepwater Wind, which has ten days in which to execute and return the lease, file financial assurance materials, and pay the balance on its winning bid.

Deepwater Wind's leases have a preliminary term of six months. During this preliminary term, Deepwater

Wind must submit a site assessment plan (SAP) to BOEM for approval. The SAP, among other things, must include a detailed explanation of the activities Deepwater Wind plans to undertake to assess wind, ocean, and metocean conditions. Following BOEM's approval of the SAP, Deepwater Wind will have four-and-a-half years in which to submit a construction and operations plan (COP) for approval. After the COP is approved, BOEM will grant Deepwater Wind a 25-year operations term lease.

Although nine bidders were prequalified to participate in the auction, only three bidders actually participated in the auction: Providence, Rhode Island-based Deepwater Wind, Philadelphia-based Sea Breeze Energy, and U.S. Wind, a company with ties to an Italian energy conglomerate. None of the bidders were aware of which companies were bidding against them during the course of the auction.

BOEM set opening-round prices for each lease and then raised the prices in subsequent rounds of the auction. Bidding for the north section started at \$2 an acre, or \$194,996. Bidding for the south section opened at \$1 an acre, or \$67,252. The sale of the north lease went on for 11 rounds before ending with Deepwater Wind's \$3,744,135 bid. The sale of the south lease went on for only two rounds before Deepwater Wind won with its bid of \$94,000.

BOEM will hold its next competitive lease sale for Virginia's 112,800-acre wind energy area on September 4, 2013. BOEM has stated that it expects to announce additional auctions for wind energy areas offshore Massachusetts, Maryland, and New Jersey later this year and in 2014.

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