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KEY FINDINGS

- The Public Trust Doctrine provides access along the shore below mean high water, but it does not include the right to cross private property to reach the shore. Therefore, access to the shore varies greatly, depending on the availability of roads and public paths to the shore.

- Rising sea level alone does not have a significant impact on either access to the shore or access along the shore; however, responses to sea-level rise can decrease or increase access.

- Shoreline armoring generally eliminates access along estuarine shores, by eliminating the intertidal zone along which the public has access. New Jersey has regulatory provisions requiring shorefront property owners in some urban areas to provide alternative access inland of new shore protection structures. Other mid-Atlantic states lack similar provisions to preserve public access.

- Beach nourishment has minimal impact in areas with ample access; however, it can increase access in areas where public access is restricted. Federal and state policies generally require public access to and along a shore before providing subsidized beach nourishment. In several communities, property owners have assigned public access easements in return for beach nourishment.

- Responses based on allowing shores to retreat have minimal impact on public access.
8.1 INTRODUCTION

Rising sea level does not inherently increase or decrease public access to the shore, but the response to sea-level rise can. Beach nourishment tends to increase public access along the shore because federal (and some state) laws preclude beach nourishment funding unless the public has access to the beach that is being restored. Shoreline armoring, by contrast, can decrease public access along the shore, because the intertidal zone along which the public has access is eliminated.

This Chapter examines the impacts of sea-level rise on public access to the shore. The following sections describe existing public access to the shore (Section 8.2), the likely impacts of shoreline changes (Section 8.3), and how responses to sea-level rise might change public access (Section 8.4). The focus of this Chapter is on the public’s legal right to access the shore, not on the transportation and other infrastructure that facilitates such access.

8.2 EXISTING PUBLIC ACCESS AND THE PUBLIC TRUST DOCTRINE

The right to access tidal waters and shores is well established. Both access to and ownership of tidal wetlands and beaches is defined by the “Public Trust Doctrine”, which is part of the common law of all the mid-Atlantic states. According to the Public Trust Doctrine, navigable waters and the underlying lands were publicly owned at the time of statehood and remain so today.

The Public Trust Doctrine is so well established that it often overrides specific governmental actions that seem to transfer ownership to private parties (Lazarus, 1986; Rose, 1986). Many courts have invalidated state actions that extinguished public ownership or access to the shore (Illinois Central R.R. v. Illinois; Arnold v. Mundy; see also Slade, 1990). Even if a land deed states that someone’s property extends into the water, the Public Trust Doctrine usually overrides that language and the public still owns the shore. In those cases when government agencies do transfer ownership of coastal land to private owners, the public still has the right to access along the shore for fishing, hunting, and navigation, unless the state explicitly indicates an intent to extinguish the public trust (Lazarus, 1986; Slade, 1990).

Figure 8.1 illustrates some key terminology used in this Chapter. Along sandy shores with few waves, the wet beach lies between mean high water and mean low water. Along shores with substantial waves, the beach at high tide is wet inland from the mean high water mark, as waves run up the beach. The dry beach extends from approximately mean high water inland to the seaward edge of the dune grass or other terrestrial plant life, sometimes called the vegetation line (Slade, 1990). The dune grass generally extends inland from the point where a storm in the previous year struck with sufficient force to erode the vegetation (Pilkey, 1984), which is well above mean high water. Along

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1. Chapter 7 discusses impacts on transportation infrastructure.

2. The “mean low water states” (i.e., Virginia, Delaware, and Pennsylvania), are an exception. See Figure 8.2.
marshy shores, mudflats are found between mean low water and mean sea level, low marsh is found between mean sea level and mean high water, and high marsh extends from mean high water to spring high water. Collectively, the lands between mean high water and mean low water (mudflats, low marsh, and wet beaches) are commonly known as tidelands.

The Public Trust Doctrine includes these wetlands and beaches because of the needs associated with hunting, fishing, transportation along the shore, and landing boats for rest or repairs (Figure 8.2). In most states, the public owns all land below the high water mark (Slade, 1990), which is generally construed as mean high water. The precise boundary varies in subtle ways from state to state. The portion of the wet beach inland of mean high water resulting from wave runup has also been part of the public trust lands in some cases (see e.g., State v. Ibbison and Freedman and Higgins, undated). Thus, in general, the public trust includes mudflats, low marsh, and wet beach, while private parties own the high marsh and dry beach (Figure 8.3).

Nevertheless, Figure 8.4 shows that there are some exceptions. In Pennsylvania, Delaware, and Virginia, the publicly owned land extends only up to the low water mark (Slade, 1990). In New York, by contrast, the inland extent of the public trust varies; in some areas the public owns the dry beach as well. The public has also obtained ownership to some beaches through government purchase, land dedication by a developer, or other means (see Slade 1990; Figure 8.5).

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3 e.g. Dolphin Lane Assocs. v. Town of Southampton, 333 N.E.2d 358, 360 (N.Y. 1975).
Ownership, however, is only part of the picture. In Pennsylvania, Delaware, and Virginia, the Public Trust Doctrine provides an easement along the tidelands for hunting, fishing, and navigation. In New Jersey, the Public Trust Doctrine includes access along the dry part of the beach for recreation, as well as the traditional public trust purposes (Matthews v. Bay Head). Other states have gradually obtained easements for access along some dry beaches either through purchases or voluntary assignment by the property owners in return for proposed beach nourishment. Federal policy precludes funding for beach nourishment unless the public has access (USACE, 1996). Some state laws specify that any land created with beach nourishment belongs to the state (e.g., Md. Code Ann., Nat. Res. II 8-1103 [1990]).

The right to access along the shore does not mean that the public has a right to cross private land to get to the shore. Unless there is a public road or path to the shore, access along the shore is thus only useful to those who either reach the shore from the water or have permission to cross private land. Although the public has easy access to most ocean beaches and large embayments like Long Island Sound and Delaware Bay, the access points to the shores along most small estuaries are widely dispersed (e.g., Titus, 1998). However, New Jersey is an exception: its Public Trust Doctrine recognizes access to the shore in some cases (Matthews v. Bay Head); and state regulations require new developments with more than three units along all tidal waters to include public access to the shore (NJAC 7:7E-8.11 [d-f]). Given the federal policy promoting access, the lack of access to the shore has delayed several beach nourishment projects. To secure the funding, many communities have improved public access to the shore, not only with more access ways to the beach, but also by upgrading availability of parking, restrooms, and other amenities (e.g., New Jersey, 2006).

When riparian landowners caused the shorelines to advance seaward, the common law did not vest owners with title to land reclaimed from the sea, although legislatures sometimes have (ALR, 1941). If beach nourishment or a federal navigation jetty artificially creates new land, a majority of states (e.g., Md. Code Ann., Envir. 16-201) award the new land to the riparian owner if he or she is not responsible for creating the land (Slade, 1990); a minority of states (e.g., Garrett v. State of New Jersey; N.C. Gen Stat §146-6[f]) vest the state public trust with the new land. Although these two approaches were established before sea-level rise was widely recognized, legal scholars have evaluated the existing rules in the analogous context of shore erosion (e.g., Slade, 1990). Awarding artificially created land to the riparian owner has two practical advantages over awarding it to the state. First, determining what portion of a shoreline change resulted from some artificial causes, (e.g., sedimentation from a jetty or a river diversion) is much more difficult than determining how much the shoreline changed when the owner filled some wetlands. Second, this approach prevents the state from depriving shorefront owners of their riparian access by pumping sand onto the beach and creating new land (e.g., Board

**Figure 8.5** Public beach owned by local government. Beaches that are owned by local governments sometimes have access restrictions for nonresidents. Atlantic Beach, New York (September, 2006).
of Public Works v. Larmar Corp). A key disadvantage is that federal and state laws generally prevent the use of public funds to create land that accrues to private parties. Therefore, part of the administrative requirements of a beach nourishment project is to obtain easements or title to the newly created land. Obtaining those rights can take time, and significantly delayed a beach nourishment project at Ocean City, Maryland (Titus, 1998).

Sea-level rise causes shores to retreat both through inundation and erosion. Although the case law generally assumes that the shore is moving as a result of sediment being transported, inundation and shore erosion are legally indistinguishable. Among the causes of natural shoreline change, the major legal distinction has been between gradual and imperceptible shifts, and sudden shifts that leave land intact but on the other side of a body of water, often known as “avulsion”. Shoreline erosion changes ownership; avulsion does not. If an inlet formed 200 meters (m) west of one’s home during a storm after which an existing inlet 200 m east of the home closed, an owner would still own her home because this shoreline change is considered to be avulsion. But if the inlet gradually migrated 400 m west, entirely eroding the property but later creating land in the same location, all of the newly created land will belong to the owner to the east (see Figure 8.6). The public trust has the same rights of access to beaches created through avulsion as to beaches migrating by gradual erosion in New York (People v. Steeplechase Park Co.) and North Carolina (Kalo, 2005). In other states, the law is less clear (Slade, 1990).

Because the public has access to the intertidal zone as long as it exists, the direct effect of sea-level rise on public access depends on how the intertidal zone changes. Along an undeveloped or lightly developed ocean beach, public access is essentially unchanged as the beach migrates inland (except perhaps where a beach is in front of a rocky cliff, which is rare in the Mid-Atlantic). If privately owned high marsh becomes low marsh, then the public will have additional lands on which they may be allowed to walk (provided that environmental regulations to protect the marsh do not prohibit it). Conversely, if sea-level rise reduces the area of low marsh, then pedestrian access may be less, although areas that convert to open water remain in the public trust.

8.4 IMPACT OF RESPONSES TO SEA-LEVEL RISE ON PUBLIC ACCESS

Although sea-level rise appears to have a small direct effect on public access to the shore, responses to sea-level rise can have a significant impact, especially in developed areas. Along developed bay beaches, public access along the shore can be eliminated if the shorefront property owner erects a bulkhead, because the beach is eventually eliminated. A number of options are available for state governments that wish to preserve public access along armored shores, such as public purchases of the shorefront (Figure 8.7) and protecting public access in permits for shore protection structures. New Jersey requires a public path between the development and the shore-protection structure for all new developments (or new shore protection structures for existing developments) with more than three units along urban tidal rivers (NJAC 7.7E-8.11[e]; see also Section A1.D.2 in Appendix 1) and some other areas, and has a more general requirement to preserve public access elsewhere (NJAC 7.7E-8.11 [d] [1]). However, single-family homes are generally exempt (NJAC 7.7E-8.11[f] [7])—and other mid-Atlantic states have no such
requirements. Therefore, sea-level rise has reduced public access along many estuarine shores and is likely to do so in the future as well.

Government policies related to beach nourishment, by contrast, set a minimum standard for public access (USACE, 1996), which often increases public access along the shore. Along the ocean shore from New York to North Carolina, the public does not have access along the dry beach under the Public Trust Doctrine (except in New Jersey). However, once a federal beach nourishment project takes place, the public gains access. Beach nourishment projects have increased public access along the shore in Ocean City, Maryland and Sandbridge (Virginia Beach), Virginia, where property owners had to provide easements to the newly created beach before the projects began (Titus, 1998; Virginia Marine Resources Commission, 1988).

Areas where public access to the beach is currently limited by a small number of access points include the area along the Outer Banks from Southern Shores to Corolla, North Carolina (NC DENR, 2008); northern Long Beach Township, New Jersey (USACE, 1999); and portions of East Hampton, South Hampton, Brookhaven, and Islip along the South Shore of Long Island, New York (Section A1.A.2 in Appendix 1). In West Hampton, landowners had to provide six easements for perpendicular access from the street to the beach in order to meet the New York state requirement of public access every one-half mile (see Section A1.A.2 in Appendix 1). A planned $71 million beach restoration project for Long Beach Island has stalled (Urgo, 2006), pending compliance with the New Jersey state requirement of perpendicular access every one-quarter mile (USACE, 1999). An additional 200 parking spaces for beachgoers must also be created in Northern Long Beach Township (USACE, 1999). Private communities along Delaware Bay have granted public access to the beaches in return for state assistance for beach protection (Beaches 2000 Planning Group, 1988).

If other communities with limited access seek federal beach nourishment in the future, public access would similarly increase. Improved access to the beach for the disabled may also become a requirement for future beach nourishment activities (e.g., Rhode Island CRMC, 2007). This is not to say that all coastal communities would provide public access in return for federal funds. But aside from the portion of North Carolina southwest of Cape Lookout, the Mid-Atlantic has no privately owned gated barrier islands, unlike the Southeast, where several communities have chosen to expend their own funds on beach nourishment rather than give up their exclusivity.

Ultimately, the impact of sea-level rise on public access will depend on the policies and preferences that prevail over the coming decades. Sometimes the desire to protect property as shores erode will come at the expense of public access. Sometimes it will promote an entire re-engineering of the coast, which under today’s policies generally favors public access. It is possible that rising sea level is already starting to cause people to rethink the best way to protect property along estuarine shores (NRC, 2007) to protect the environmental benefits of natural shores. If access along estuarine shores becomes a policy goal, techniques are available for preserving public access as sea level rises.
CHAPTER 8 REFERENCES


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