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Recommended Citation

Kim Diana Connolly, *Coastal Regulation in South Carolina: Will the Rising Sea Change the Nature of Governing Law*, S.C. Law., Sept. 2007, at 20.

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Coastal Regulation in South Carolina

Will the Rising Sea Change the Nature of Governing Law?

By Kim Diana Connolly

South Carolina's coastal region means different things to different people. Many view it as a fun place to play or a beautiful place to visit. Some view it as a shared natural treasure, held in trust for all citizens, present and future. Others view it as an assemblage of contiguous private property that should be afforded great respect in terms of owners' wishes. Regardless of your views on the coast and its role in your life, the same set of laws applies to all coastal areas. This article will explore some of those laws and reflect on whether and how projected sea level rise may affect those laws.

An enormous and complex web of federal, state and local laws governs the South Carolina coast. Accordingly, those involved in coastal resource management, conservation measures and economic development activity in South Carolina must comply with myriad laws, regulations and requirements. Sorting through the existing laws, how they apply and how they interact is a task that often overwhelms coastal zone planners, resource

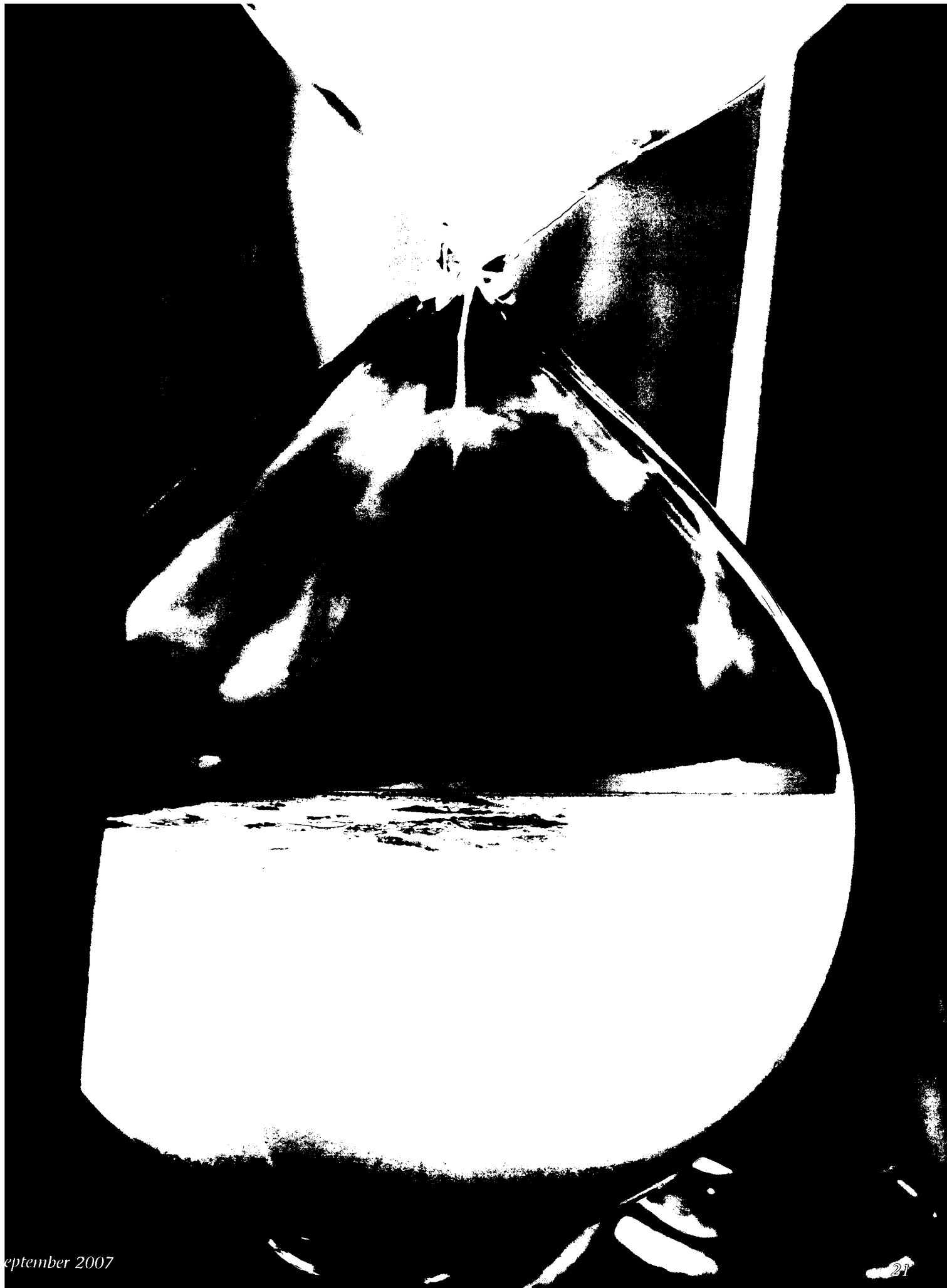
managers, developers, conservationists and those involved in commerce, industry, recreation, tourism and preservation. Understanding and applying the various coastal laws will inevitably become even more complex with the added impact of a rising sea level and climate change.

As is true of similar areas around the globe, South Carolina's coastline is experiencing increased stress, making compliance with laws designed to protect the coast more critical than ever. The National Oceanic and Atmospheric Administration (NOAA) has concluded that "coastal ecosystems are pressured by population growth, leaving them vulnerable to pollution, habitat degradation and loss, overfishing, invasive species, and increased coastal hazards such as sea-level rise." These pressures have been continually escalating as ever larger numbers of people choose to settle in coastal regions. This national trend of migration to coastal regions appears likely to intensify in the future, with a corresponding increased impact on South Carolina.

Here in South Carolina, the U.S. Census Bureau estimates that the population of South Carolina grew from 3,486,703 persons in 1990 to 4,321,249 persons in 2006. This represents an almost 20 percent increase. More importantly, a significant percentage of this increase occurred within South Carolina's eight coastal counties. That region is booming, which should not surprise anyone given the attraction of the state's beautiful coastline.

This increase in coastal growth is a national phenomenon. NOAA estimated that, in 2003, about 153 million people (53 percent of the country's population) lived in the nation's coastal counties. More than 60 percent of our nation's citizens live within 50 miles of what we think of as "the coast" (the Atlantic and Pacific Oceans, the Gulf of Mexico and the five Great Lakes). This means that coastal population density is, on average, four times the national average. Moreover, coastal population is expected to grow by another 15 percent during the next two decades.

PHOTOILLUSTRATION BY ANDREW CELMONS



A large and expanding population in coastal areas such as South Carolina's will place tremendous strains on valuable, and often fragile, coastal land and resources. These strains will make careful and sustainable planning for land use and economic development essential if our natural resources are to be protected and the attributes that entice people to live in these areas are to be maintained. Economic development must be calculated to occur in a sustainable manner, and the regulatory support system that protects the coast should be vigorously implemented and enforced. Yet even that may not be enough. Anticipated sea level rise presents new and disquieting issues in terms of laws and coastal activities. Projections of sea level rising along the South Carolina coast over the next century vary from one to three meters. According to scientists, it is not a question of if it will rise, but how much. Recent reports by the U.S. Environmental Protection Agency conclude that the State of South Carolina has approximately

4,734 km² of land that is only 3.5 meters above sea level. Dealing with potentially catastrophic inundation under existing laws and regulations will be difficult if not impossible. The anticipated continued growth in coastal population will make the situation even thornier to manage, unless lawmakers and policy advocates plan ahead as to how to deal with the problem.

On a federal level, the leaders of this nation have long recognized the importance of our coastal environment by enacting many laws intended to both protect the coast while allowing many varied activities to take place. Among the federal laws that govern coastal activities are: The Federal Water Pollution Control Act (Clean Water Act); The Safe Drinking Water Act; The Rivers and Harbors Act; The Magnuson-Stevens Fishery Conservation and Management Act; The Endangered Species Act of 1973; The Marine Mammal Protection Act of 1972; The Coastal Zone Management Act of 1972; The Emergency Planning and Community Right to Know Act of

1986; The National Environmental Policy Act of 1969; The Fish and Wildlife Coordination Act of 1934; The Shore Protection Act of 1988; The Coastal Wetlands Planning, Protection and Restoration Act; The Migratory Bird Treaty Act of 1918; The Oil Pollution Act of 1990; and The Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990. Understanding and implementing these laws requires expertise and a considerable investment of time on the part of those who seek to undertake coastal activities and those responsible for overseeing these activities.

On the state level, South Carolina has a number of environmental statutes that regulate activities on the coast, including: The Pollution Control Act; The State Safe Drinking Water Act; The State Recreational Waters Act; The South Carolina Water Quality Revolving Fund Authority Act; The Stormwater Management and Sediment Reduction Act; The Erosion and Sediment Reduction Act of 1983; The Coastal Tidelands and Wetlands Act; The Waters, Water

Resources and Drainage Act; The Water Resources Planning and Coordination Act; The Aquatic Plant Management Act; The Beachfront Management Act; and The Coastal Zone Management Act. As is true of the web of federal laws, both time and expertise are essential to comply with these additional, state-level legislative directives when undertaking activities in the coastal area.

Moreover, the lists above do not include the regulations that actually implement these laws (usually orders of magnitude longer) and the various guidance documents that are associated with coastal activities. Furthermore, local ordinances often add to the layers of complexity. It is no wonder that individuals, businesses and governments trying to comply with the law in coastal areas often become frustrated and overwhelmed.

The University of South Carolina School of Law has been working on a project to help those needing to understand and apply the laws impacting activities on the coast. With the support of a grant from the S.C. Sea Grant Consortium, the law school is in the final stages of producing a "Regulatory Pathfinder" to provide a starting point for those seeking to understand coastal laws. This Web-based pathfinder will have links to relevant laws along with brief explanations of those laws, including, in some cases, questions that will help the user determine whether one or more of the laws might apply. The Pathfinder will be available to the public through the S.C. Sea Grant Consortium (www.scseagrants.org) and the USC School of Law (www.law.sc.edu) Web sites.

While useful, the Pathfinder only focuses on current law. One must also consider the future of coastal regulation in light of climate change. Most scientists agree that climate change is occurring. S.C. Gov. Mark Sanford issued an executive order creating a Climate, Energy and Commerce Advisory Committee, a group made up of various stakeholders who collectively are tasked with reviewing possible climate change impacts in South Carolina and formulating strategies that will address those

changes. More information about that committee can be found on its Web site at www.scclimatchange.us. The committee's report is due in the near future.

In considering the enormous task this committee is undertaking, it might help to understand what is involved in climate change. Fossil fuels contribute to greenhouse gas emissions, which in turn trap heat that would otherwise disperse into space. Increased levels of greenhouse gases have been scientifically demonstrated over the past century. Most scientists attribute this rate increase to human activities. Such greenhouse gases have led to higher average surface temperatures on the Earth and to associated changes in rainfall patterns, snow and ice cover and sea level. Models demonstrate that ongoing increases in greenhouse gas levels will continue to change the planet's climate. There is debate, however, about the rate, effects and other specifics of climate change consequences. Nevertheless, the United States has undertaken certain steps to slow the growth of emissions, increase scientific work to explore and address the matter and increase international cooperation. Many wonder, however, if this will be enough, particularly when it comes to our coastal areas. Furthermore, a number of lawyers are uneasy about whether existing regulatory law is equipped to deal with the potential situation presented by the changing climate.

Take, for example, the portion of the federal Clean Water Act that requires permits for certain activities in wetlands and other waters of the United States (commonly referred to as "Section 404"). A significant portion of such regulated waters are along the coast. There has been enormous debate in recent years, however, as to the proper geographic jurisdiction of this act. Changing geography along the nation's coastlines due to sea level rise and other climate change impacts may influence such a debate. An argument can be made that the existing federal Clean Water Act structure could support regulatory amendments to counter climate change effect. Even

if this is not the case, there is pending legislation to amend the Clean Water Act (the Clean Water Restoration Act) that may lead to legislative consideration of the act's scope. One might ask whether this debate about the future of Section 404 regulation should also include an explicit discussion of regulation to address climate change impacts.

Likewise, the federal Coastal Zone Management Act (CZMA) governs certain coastal activities. After determining the "increasing and competing demands upon the lands and waters of our coastal zone ... have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion," Congress adopted the CZMA in 1972. Under this act, the federal government provided grants to states (including South Carolina) to develop and administer coastal management programs. Approved state programs trigger a "federal consistency" requirement, requiring analysis to ensure that programs and activities along the coast are consistent with the approved coastal regulatory system. Unlike the Clean Water Act, this law explicitly recognizes global warming and likely resulting sea level rise in its findings and directs coastal states like South Carolina to "anticipate and plan for such an occurrence." Nevertheless, some proposed amendments to the CZMA would set forth explicit requirements with respect to activities aimed at climate change challenges facing coastal states.

These are but two of the federal laws that govern coastal activities. They both offer options for climate change-related regulation but present some challenges for such in their present form. Likewise, on a state level, the S.C. Pollution Control Act (PCA) is a law worthy of attention. The PCA was originally enacted in 1950 to combat a growing threat of pollution to South Carolina's air and water and amended in 1965 and again in 1970. The act's breadth and depth (the legisla-

Balancing Private and Public Rights in the Coastal Zone in the Era of Climate Change

The Fifteenth Anniversary of *Lucas v. South Carolina Coastal Council*

The conference, scheduled for September 20-21 in Columbia, is being coordinated in conjunction with the Georgetown Environmental Law & Policy Institute at Georgetown University Law Center. Lawyers from around the state and region will have an opportunity to join scholars from around the nation to examine the legal and policy challenges posed by coastal development pressures in this period of climate change. It will also focus on constraints with respect to coastal management created by the landmark *Lucas* takings case, which arose from a pioneering effort in South Carolina to restrict coastal development pursuant to the Beachfront Management Act as discussed in the article. Conference participants will include the major players in the *Lucas* case, other prominent takings scholars and practitioners, and leading policy makers, scientists and academics who are addressing the challenge of coastal management in the era of climate change. In addition to a full set of CLE materials provided to all conference participants, follow-up articles based on the conference will be published in the *Southeastern Environmental Law Journal*. More information can be found at www.law.sc.edu/elj/2007symposium.

ture set forth its purpose as “to maintain reasonable standards of purity of the air and water resources of the state, consistent with the public health, safety and welfare of its citizens ... the protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources”) differs from federal pollution statutes, which historically have been media-specific. Thus, unlike the federal laws discussed above, the PCA’s breadth seemingly provides authority to the S.C. Department of Health and Environmental Control to enact regulations to counter some consequences of climate change.

Also on a state level, the S.C. General Assembly enacted the S.C. Coastal Zone Management Act of 1977 to specifically protect South Carolina’s coastal resources in the face of exploding development. As originally enacted, the state CZMA allowed seawalls, bulkheads and other erosion control methods, which were later determined to actually exacerbate coastal erosion. Accordingly, in 1988 the South Carolina legislature amended the Coastal Zone Management Act with the Beachfront Management Act. The amendments provided further protection to the coastal areas by identifying specific coastal areas where development could occur

while creating baseline and setback areas as part of a plan of eventual retreat from the coast deemed vital to anticipated coastline changes expected due to sea level rise. The PCA and state-level CZMA are interpreted by South Carolina regulators and courts in concert with the Public Trust Doctrine (PTD). Recently cited by the S.C. Supreme Court in *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 580 S.E.2d 116 (2003), the PTD provides broad protections for traditionally navigable waters along the state’s coast. Discourse with respect to the interesting challenges presented by the application of PTD along South Carolina’s coastline, particularly in light of recent debates about bridges to marsh islands on South Carolina’s coasts, was the focal topic of a symposium at the USC School of Law in the fall of 2006 (information about that symposium, including streaming video of the proceedings, is available at www.law.sc.edu/elj/2006symposium). The breadth of PTD protections will likely increase as sea level rises, making this doctrine an important part of the analytical mix as well.

Various local governments have also implemented ordinances that regulate coastal activities, such as critical line buffer ordinances. Those that have such ordinances (includ-

ing Charleston, Mount Pleasant and Beaufort County) have put them in place to provide additional protections to the areas between development and wetlands/tidal waters. Whether such ordinances and resulting buffer areas are sufficient, or will simply be inundated over the next century by sea level rise and increased coastal flooding from storms, remains to be seen. Nevertheless, these counties have taken a first step to assist in the protection of their local areas. Of course, such protections are viewed by some as another “hoop” to jump through in the process of seeking to undertake economically beneficial activities on the coast, and efforts to streamline and coordinate processes would be wise for all concerned. The debate about coastal regulation and climate change is lively and opinionated. This subject will be expanded in a presentation during a conference at the University of South Carolina School of Law entitled *Balancing Private and Public Rights in the Coastal Zone in the Era of Climate Change: The Fifteenth Anniversary of Lucas v. South Carolina Coastal Council* (see sidebar).

Many South Carolinians have a strong affinity for the coast, and every effort should be made to ensure that citizens continue to have access to the beauty and tranquility of the coast. Likewise, activities that boost the economy of the state and increase tourism should be supported to the extent possible without harming the underlying resources. Expanding populations and increasing development pressures leave all coastal regions with decreased amounts of available land. The S.C. Legislature and/or administrative branch should not wait for anticipated shifts associated with climate change to occur before undertaking the necessary steps to ensure adequate regulatory protections are in place for the coast. That delay could have disastrous consequences for some of South Carolina’s greatest natural resources.

Kim Connolly is an associate professor at the University of South Carolina School of Law.

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