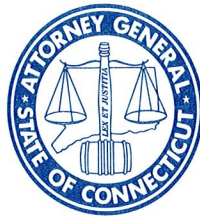


GEORGE JEPSEN
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

(860) 808-5319

Office of the Attorney General
State of Connecticut

May 8, 2017

The Honorable Robert J. Klee
Commissioner
State of Connecticut
Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106

Dear Commissioner Klee:

You have asked my office for an opinion identifying the owner of a structure commonly known as the Stonington Harbor Breakwater, which is located in the Stonington Harbor adjacent to Stonington, Connecticut (the "Breakwater"). You also seek an opinion to identify the owner of the lands upon which the Breakwater rests. Determining the answers to these questions will facilitate the preservation and maintenance of the Breakwater.

We conclude that the State of Connecticut is the owner of the Breakwater and the lands on which it rests. We further conclude that the Department of Energy and Environmental Protection ("DEEP") is responsible for regulating the maintenance of the Breakwater.

I. Background.

A letter and accompanying report from the Secretary of War to the U.S. House of Representatives dated February 28, 1828 (attached to this opinion as Exhibit A) indicates that the Breakwater was constructed by the federal government for the protection of the Stonington Harbor, and vessels traveling or moored within the harbor, from potential damage caused by ocean currents. The construction of the Breakwater was originally authorized by the Act of May 23, 1828 (4 Stat. 288, chapter 73). See Section 1313 of the Federal Water Infrastructure Improvements for the Nation Act, Public Law No. 114-322 (attached to this opinion as Exhibit B).

A letter dated October 21, 2014 from the Department of the Army (the "Department") to United States Senator Richard Blumenthal (attached to this opinion as Exhibit C), states that the Breakwater was constructed by the U.S. Army Corps of Engineers during the time period from 1828 to 1832. The letter further states that the Breakwater was subsequently abandoned pursuant to the Rivers and Harbors Act of 1950. Despite this, the Department believed it prudent that the Breakwater be specifically deauthorized by the U.S. Congress. It was the Department's opinion that once the Breakwater was so deauthorized, it would be up to the State of Connecticut (the "State") to determine the ownership of the Breakwater based on the application of appropriate state law.

Section 1313 of the Federal Water Infrastructure Improvements for the Nation Act deauthorized the Breakwater as a Federal project as of December 16, 2016, the effective date of the Act. See Exhibit B. Because the Breakwater has been deauthorized by the federal government, the question of its subsequent ownership has arisen and prompted this opinion.

II. Discussion.

Before turning to the ownership of the Breakwater itself, it is helpful first to address the ownership of the land on which the Breakwater rests. Federal law provides that it is "in the public interest that . . . title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and . . . the right and power to manage, administer, lease, develop, and use [those] lands," be vested in the respective states. See 43 U.S.C. § 1311(a). The federal government further releases to the states "all right, title and interest" it has in and to those lands. See 43 U.S.C. § 1311(b). Thus, under federal law, the general rule is that if land is within the navigable waters of a State's boundaries, it is owned by the State.¹

The "public trust doctrine," which has its roots in both statutory and common law, provides further guidance on the issue of land ownership. In Connecticut (and elsewhere), the term "public trust doctrine" traditionally has been used to refer to the body of common law under which the State holds in trust for public use title to waters and submerged lands waterward of the mean high tide line. See *Leydon v. Town of Greenwich*, 257 Conn. 318, 332 n.17, 777 A.2d

¹ Pursuant to 43 U.S.C. § 1312, the seaward boundary of a state's jurisdiction extends three geographical miles from its coast.

552 (2001). Under Connecticut statutory law, as set forth in Conn. Gen. Stat. § 22a-15, there is a public trust in the air, water, and other natural resources of the State. Connecticut statutes also establish a "coastal boundary," which is defined in Conn. Gen. Stat. § 22a-94(b) as "a continuous line delineated . . . on the seaward side by the seaward extent of the jurisdiction of the state." This shows an assumption by the legislature that the State has jurisdiction over this area (thus mirroring federal law). Further, Connecticut statutes define a "public beach" as "that portion of the shoreline held in public fee ownership by the state *or that portion of the shoreline below the mean high tide elevation that is held in public trust by the state.*" Conn. Gen. Stat. § 22a-93(6) (emphasis added).

Thus, the Connecticut legislature intended to place the waters of the State in public trust, to establish a boundary with regard to the coastal waters that are subject to the jurisdiction of the State, and for the State to hold in public trust the portion of the shoreline below the mean high tide line. Further, Connecticut common law provides that the State holds in trust for public use title in waters and submerged lands waterward of the mean high tide line. *See Leydon, supra*. Finally, federal law indicates that it is in the public interest for the states to own such lands and that the federal government has released such lands to the states. Accordingly, we conclude that the lands within the jurisdiction of the State that are located seaward of the mean high tide line are held in public trust by the State. DEEP has informed us that the land upon which the Breakwater rests is located entirely below the mean high tide line and within the State's jurisdictional boundary. Therefore, we conclude that the State holds such land in trust for public use.

Turning to the issue of the ownership of the Breakwater, while federal law addresses the concept of deauthorization of no longer viable federal navigable waterway construction projects (*see, e.g.* 33 U.S.C. § 579a, et seq.), the statutes provide no direct guidance regarding the practical impact of such a deauthorization. However, based upon the October 21, 2014 letter from the Department to Senator Blumenthal, it seems clear that the Department takes the position that a deauthorization means the U.S. Government no longer holds any interest in the project in question. Given the federal government's deauthorization of the Breakwater, it is necessary to determine the Breakwater's current owner.

As noted above, the federal government has released to the states all right, title and interest it has in and to lands beneath the navigable waters within the states' boundaries. *See* 43 U.S.C. § 1311(b). Notwithstanding the foregoing, the

United States specifically reserves for itself, subject to its constitutional authority, the use, development, improvement, and control of such lands and waters for the purposes of navigation and to regulate and improve navigation (among other things). See 43 U.S.C. § 1311(d).

In addition to the reservation contained in 43 U.S.C. § 1311(d), the federal government specifically excepts from state control under 43 U.S.C. § 1311 "all structures and improvements constructed by the United States in the exercise of its navigational servitude." See 43 U.S.C. §1313(c). The doctrine of navigational servitude (or navigable servitude) gives the federal government the right to regulate navigable waterways as an extension of the Commerce Clause of the United States Constitution. See Gibbons v. Ogden, 22 U.S. 1, 197 (1824). We believe the Breakwater was constructed by the federal government in furtherance of its navigational servitude because the Breakwater's express purpose was to protect Stonington Harbor and the vessels that traveled to and from the harbor. See Exhibit A. Thus, until its deauthorization, the Breakwater was the property of the United States.

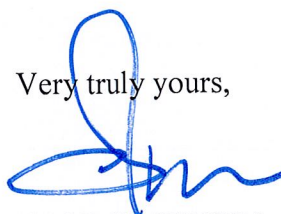
Because the federal government has abdicated its interest in the Breakwater, it is our opinion that ownership now goes to the State. As discussed above, DEEP has informed us that the Breakwater sits entirely upon lands located below the mean high tide line, which are lands held by the State in trust for the public. See Leydon, supra. Given this, and the relevant statutory and common law discussed above, the State becomes the next logical owner of the Breakwater. Further, we are aware of no statutory or other legal authority by which a municipality, other political entity or subdivision, or private party could lay claim to an ownership interest in it. No part of it rests on the land of any such entities or individuals, and no such entity or individual has ever held any ownership interest in it.

Regarding the state agency responsible for managing the Breakwater, Connecticut statutes provide that DEEP shall regulate, among other things, the erection and maintenance of structures and work incidental thereto in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line (i.e. the mean high tide line). See Conn. Gen. Stat. § 22a-359, *et seq.* Thus, it is our opinion that DEEP is responsible for the regulation of the maintenance of the Breakwater.

III. Conclusion.

Based upon our review of the relevant federal and state statutes, common law, and the specific facts of this matter, it is the opinion of this office that the State of Connecticut is now the owner of the Breakwater, along with the lands upon which it rests.² DEEP is the state agency charged with regulating the maintenance of the Breakwater.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL

² We have been informed that the United States Coast Guard owns and operates an aid to navigation (specifically a navigation light or beacon) installed on the waterward end of the Breakwater. We do not know whether the Coast Guard is aware that the Breakwater has been deauthorized by the federal government. We think it would be prudent for the State to contact the Coast Guard to discuss this situation.

26th Congress,
2d Session.

[Doc. No. 153.]

Ho. of Reps.
War Dept.

HARBOR OF STONINGTON.

LETTER

FROM

THE SECRETARY OF WAR,

Transmitting, in compliance with a resolution of the House of Representatives of
the 27th December last,

A REPORT OF A SURVEY

OF

THE HARBOR OF STONINGTON.

WITH A VIEW TO

THE ERECTION OF A SEA-WALL,

FOR THE

PROTECTION OF SAID HARBOR.

FEBRUARY 23, 1828.

Referred to the Committee on Commerce.

WASHINGTON :

PRINTED BY GALES & SEATCH.

1828.

WAR DEPARTMENT,

February 20, 1828.

SIR: In compliance with the resolution of the House of Representatives, of the 27th of December, 1827, directing the Secretary of War to transmit to the House the report of the officers employed for making a survey of the harbor of Stonington, in Connecticut, for the purpose of ascertaining the expediency of erecting a s a-wall, for the protection of that harbor, I have the honor to transmit, herewith, a letter from the Chief Engineer, accompanied with the report called for by the resolution of the House.

I have the honor to be,

Very respectfully,

Your most obedient servant,

JAMES BARBOUR.

To the Hon. ANDREW STEVENSON,

Speaker of the House of Representatives.

ENGINEER DEPARTMENT,

Washington, February 20, 1828.

SIR: In obedience to your directions, I have the honor of presenting, herewith, a copy of the report of the officer employed, by this Department, for making a survey of the harbor of Stonington, for the purpose of ascertaining the expediency of erecting a sea-wall, for the protection of that harbor; and am, very respectfully,

Sir, your most obedient servant.

ALEX. MACOMB,
Maj. Gen. Chief Eng.

To the Hon. JAMES BARBOUR,
Secretary of War.

WEYMOUTH, (Mass.) December 1, 1827.

To Lieut. Col. JOHN ANDERSON,
United States' Topographical Engineer.

SIR: I now have the honor to make the following report, on "the examination and survey of the harbor of Stonington, Conn. for the purpose of ascertaining the expediency and expense of erecting a pier for the improvement of the same;" which examination and survey have been performed under your orders of 23d September last.

A map of the harbor and village, together with the plan and profiles of the proposed pier, accompany this report.

Stonington Harbor is situated at the eastern entrance to Fisher's Island Sound, on its northern shore; and runs, in length, nearly north and south, having its entrance from the south.

The eastern extremity of Fisher's Island is nearly south from the harbor; and this island stretching westward, prevents any sea being thrown into it from this quarter, excepting such as may be raised in the sound, and this is effectually destroyed by the shoal which puts out from Wamphassuck Point, the west chop of the harbor. The harbor is, therefore, secure in this direction.

Wickapisset is a small island, or, rather, collection of rocks at the eastern end of Fisher's Island.

Between Wickapisset and Watch Hill Point, to the east, there is nothing which prevents the direct advance of the ocean waves into the harbor. It is from this quarter the petitioners wish to be protected; and, in fact, the harbor can never be very useful without this protection.

Reference to the maps will suggest, and experience has amply proved, that strong south-southeast winds are accompanied by danger to vessels lying in this harbor. The sea, coming in from this direction almost unbroken, produces a heavy ground swell, to resist which

the strongest ground tackling is necessary, otherwise, vessels will be driven ashore.

In proof of the effects of south-southeast winds, I will refer you to the tide table on the map, by which you will perceive that the south-southeast storm, of the 19th and 20th of September, raised the tides nearly two feet above their ordinary level. The height and magnitude of the waves were increased in proportion. There were but two or three vessels lying in the harbor at this time, and one of these, a sloop, was driven ashore; she was damaged, and the re-floating of her was attended by considerable expense and difficulty.

This harbor is, therefore, unsafe at certain times; and, in regard to the *expediency* of erecting a pier to render it safe, I submit the following considerations:

1st. The local advantages to be derived, by rendering this harbor secure, are unquestionable; but it is believed that these local advantages will be followed by public benefit.

The population of Stonington borough is between 900 and 1000, and its inhabitants are very enterprising. They have employed, during the last season, three vessels in the sealing trade, six in the Labrador fisheries, four on the banks of Newfoundland, six or eight in the coasting trade, and others in the Gulf of Mexico, South America, and in the West Indies. Two ships have been fitted from this place for the Pacific Ocean, on whaling voyages, but the insecurity of the harbor alone has prevented the citizens from making further use of vessels of this class.

It is believed, from the spirit and enterprise of the inhabitants, that, if their harbor were rendered safe, many more vessels would be employed in different commercial pursuits; thereby adding to our revenue, and, ultimately, to such a degree as to more than compensate for the expense of the pier.

2d. This harbor, being the only one between New London, on the west, and Newport, on the east, is advantageously situated for the benefit of the coasting trade, but is now, in a great degree, nugatory, on account of its want of safety.

Vessels, from the east, bound westward, are often prevented, by contrary winds, darkness, state of tide, and other circumstances, from attempting the passage through the Race between Fisher's and Gull Islands, when they could easily make this harbor, and be perfectly secure, were it defended from the ocean swell. In fact, vessels, under the above circumstances, often put into it, as it now is; but the liability of being caught here by winds from the southeast to south, renders our coasters very shy of it.

By reference to the map, you will see that the position of the harbor is such as to make it impossible for vessels to get out of it during the prevalence of the above winds. You will also perceive, that there are no inlets or coves in either shore, bounding that part where vessels of burthen can lie, which can afford shelter.

Vessels, from the west, bound eastward, are often met by north-east storms, after having passed through the Race, and when off this

part of the coast. These storms either compel them to put back, stand out to sea, or to make this harbor. Many vessels make the harbour, it being secure against northeast winds; but northeast storms often wear round by the south, and when they arrive S. S. E., having a fair sweep over the Atlantic, they throw its angry waves directly into the harbor. Vessels which have sought shelter here suddenly become exposed to imminent danger, and nothing can save them but an extraordinary strength of ground tackling. Other vessels off this place, as before stated, during northeasters, which do not make this harbor, incur risks, or meet delays, which might be avoided by rendering this harbor secure. There is no difficulty of access to this harbor; and our coasters are now, many of them, ignorant of its channel of entrance, from the exterior of Fisher's Island, merely because they know it does not warrant their security, if they get into it.

From what has been said, it may easily be imagined to what perils our navigation is exposed, for the want of a pier in this harbor. Many vessels, and what is far more valuable, lives, have been lost, which might, in all probability, have been saved. Inform our coasters that it is a safe harbor, and they will soon experience and testify to its advantages.

Sd. The maritime advantages to be derived from this harbor, in time of war, may be very considerable.

In proof of this, it is only necessary to adduce the experience of the late war, during that period of it in which the enemy blockaded New-London, and, of course, had possession of the eastern entrance to Long Island Sound. There was not, during this period, a harbor, between New York and Boston, so important to our coasting trade as this; (notwithstanding its exposure to the assaults of the ocean) its position being admirable for refuge from the enemy. Here our watchful coasters remained comparatively secure, until opportunity offered for them to set sail and elude the foe. It thus gave annoyance to the enemy, and brought upon the place the vengeance of Commodore Hardy. The result of the Commodore's attack is well known; he being beaten off by the bravery and exertions of about twenty Americans, with one eighteen pound gun. This place was also attacked, during the revolution, by Captain Wallace of the Royal navy. How much its importance and security would have been increased, by protection from the ocean, it is unnecessary to mention.

It may be said, that rendering this harbor secure from the ocean would increase its importance to such an extent, in time of war, as to make it an object of attack to the enemy; and that, consequently, to reap all its advantages, we must give it military as well as nautical security. But it has military defence sufficient in the arms and bravery of its citizens. To use an expression of one of its defenders in the late war: "Let Government protect us from the ocean, and our citizens will keep off other invaders."

Against the above considerations, in favor of the expediency of erecting a pier for the improvement of this harbor, I know of no objections.

As to *expense*, it is evident, from what has been said and by inspection of the map, that a pier of great strength is necessary to resist violent storms, and give permanent security to the harbor. Such a one as is projected on the map, will be strong and *durable*, and will form a harbor, affording protection during south-southeast storms, for from fifteen to eighteen vessels, drawing fifteen feet of water, besides many others, drawing from six to twelve feet of water. The line H L, shows the exterior limit of protection.

The form of the pier is so given, as to have it answer the purpose of a *wharf*, piles, or mooring posts being placed in it, and its internal slope being small. It is thought this construction will be advantageous, and that wharfage may be charged to such vessels as lie at it, until the additional expense is refunded. By additional expense, I mean that which is incurred by making the pier sufficiently wide at top for a *wharf*, when a less width would serve merely as a *breakwater*. There will certainly be advantages in giving the construction proposed but whether they will be sufficient to warrant the increased expense, in the judgment of others, I know not.

The solid contents of the pier thus proposed, will be 44,426 perches, at 25 cubic feet per perch.

At the points A A. on the shore of the upper part of Lambert's Cove, there are numerous large ledges of rocks, which can be easily blasted to any size, and put directly into scows, and thence carried to the pier. These rocks are of a fine grained, compact gneiss, mingled with coarse granite here and there. Owing to their stratification, they can be obtained in such shapes as will make them lay to advantage, and imbed themselves firmly in the bottom of the piers, without any extra expense.

The nature of the stone is such as to render it very durable, not being liable to disintegration by the alternate actions of air and water. Thus the nature and shape of the stones will combine, in the pier, to an eminent degree, strength with durability.

It is calculated that these stones can be obtained, and laid in the pier, for 95 cents per perch. This will give \$42,204 40. for the expense of materials and labor, to which add six per cent. for contingencies, and it makes the total expense \$44,737 00. I have considered the expense of the piles beforementioned, as coming within the contingencies.

If this expense should be thought too great, I would propose one of the following three modes of reduction.

1st. By reducing the *width* of the pier, so as to have it only twelve feet wide at the top, its total expense will be \$39,517 00. estimated as above. But it must be considered that this reduction will destroy its utility as a *wharf*, and convert it into a *breakwater* merely. This, considered in relation to the present state of things, is not so very important, but, in regard to the future, it may be considered very important to have it combine the advantages of a breakwater and *wharf*.

I would here observe, that no reduction in the *height* proposed can be made.

2d. It may be reduced fifty feet in length, in addition to the above reduction, and still answer a very useful purpose for the *present*. If so reduced, its total expense will be \$ 34,418 00.

3d. It may retain its proposed width of twenty feet at the top, and be reduced seventy-five feet in length : its total expense would then be \$ 37,145 00.

Of these three methods of reduction, I should prefer the last. It could then be used as a *wharf*; and, as the increase of the commerce of this place should extend, it could, if found necessary, be easily added to in length.

But, whichever of the proposed plans is adopted, it cannot fail to be highly useful ; yet I would be understood to think the most enlarged one will *ultimately* be the most *economical*.

Very respectfully, your obd't serv't.

J. PRESCOT,

Lieut. 1st Regt. of Artillery, on Topographical service.

(L) South 49° 44' 51" East, a distance of 149.00 feet to an angle point of the tract herein described.

(M) South 44° 47' 21" East, a distance of 353.77 feet to a point for the beginning of a non-tangent curve to the left.

(N) Easterly along said non-tangent curve to the left having a radius of 253.99 feet, a central angle of 98° 53' 23", a chord of South 83° 28' 51" East - 385.96 feet, and an arc length of 438.38 feet to an angle point of the tract herein described.

(O) South 75° 49' 13" East, a distance of 321.52 feet to the point of beginning and containing 393.53 acres (17,142,111 square feet) of land.

SEC. 1313. STONINGTON HARBOUR, CONNECTICUT.

The portion of the project for navigation, Stonington Harbour, Connecticut, authorized by the Act of May 23, 1828 (4 Stat. 288, chapter 73), that consists of the inner stone breakwater that begins at coordinates N. 682,146.42, E. 1231,378.69, running north 83.587 degrees west 166.79' to a point N. 682,165.05, E. 1,231,212.94, running north 69.209 degrees west 380.89' to a point N. 682,300.25, E. 1,230,856.86, is no longer authorized as a Federal project beginning on the date of enactment of this Act.

SEC. 1314. RED RIVER BELOW DENISON DAM, TEXAS, OKLAHOMA, ARKANSAS, AND LOUISIANA.

The portion of the project for flood control with respect to the Red River below Denison Dam, Texas, Oklahoma, Arkansas, and Louisiana, authorized by section 10 of the Flood Control Act of 1946 (60 Stat. 647, chapter 596), consisting of the portion of the West Agurs Levee that begins at lat. 32° 32' 50.86" N., by long. 93° 46' 16.82" W., and ends at lat. 32° 31' 22.79" N., by long. 93° 45' 2.47" W., is no longer authorized beginning on the date of enactment of this Act.

SEC. 1315. GREEN RIVER AND BARREN RIVER, KENTUCKY.

(a) **IN GENERAL.**—Beginning on the date of enactment of this Act, commercial navigation at the locks and dams identified in the report of the Chief of Engineers entitled "Green River Locks and Dams 3, 4, 5, and 6 and Barren River Lock and Dam 1, Kentucky" and dated April 30, 2015, shall no longer be authorized, and the land and improvements associated with the locks and dams shall be disposed of—

(1) consistent with this section; and

(2) subject to such terms and conditions as the Secretary determines to be necessary and appropriate in the public interest.

(b) **DISPOSITION.**—

(1) **GREEN RIVER LOCK AND DAM 3.**—The Secretary shall convey to the Rochester Dam Regional Water Commission all right, title, and interest of the United States in and to the land associated with Green River Lock and Dam 3, located in Ohio County and Muhlenberg County, Kentucky, together with any improvements on the land.

(2) **GREEN RIVER LOCK AND DAM 4.**—The Secretary shall convey to Butler County, Kentucky, all right, title, and interest of the United States in and to the land associated with Green



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

OCT 21 2014

North Atlantic Division
Regional Integration Team

The Honorable Richard Blumenthal
United States Senate
724 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Blumenthal:

This is a final response to an inquiry from Connecticut State Senator Andrew M. Maynard, dated July 16, 2014, regarding the ownership of the Old Stonington Wharf/Breakwater in the Town of Stonington, Connecticut. The Old Stonington Wharf/Breakwater was originally constructed by the U.S. Army Corps of Engineers during the period from 1828 to 1832. In the following years, various other features became part of the Stonington Harbor, Connecticut Federal Navigation Project through modifications. The Old Stonington Wharf/Breakwater was abandoned pursuant to the Rivers and Harbors Act of 1950.

We have completed our review of the available information and believe that the prudent path forward is to have the breakwater specifically deauthorized by Congress. At its request, we can assist Congress with development of the appropriate language. Once the breakwater is deauthorized, the state of Connecticut would need to make a determination as to ownership through the application of appropriate state law.

Thank you for your interest in the Corps Civil Works program. If you have additional questions, please do not hesitate to contact me or your staff may contact Ms. Catherine Shuman, Deputy Chief, North Atlantic Division Regional Integration Team, at (202) 761-1379.

Sincerely,

Steven L. Stockton, P.E.
Director of Civil Works