



NOVEMBER 2012

Coastal Permitting in Connecticut Following Hurricane Sandy

Given the severity of the damage caused by Hurricane Sandy to homes, commercial buildings, docks, seawalls, and other coastal structures in Connecticut, many property owners along the shore will have questions about what they need to do to obtain the proper permits to repair or rebuild, from whom they need permits (federal, state, or local officials), and whether permits are even necessary. The answers to these questions depend on many factors, including the type of structure, the age of the structure, where the structure is located on the property, whether a permit was previously issued, the amount of damage suffered, and how any damage is to be valued.

FEDERAL PERMITS

The United States Army Corps of Engineers (Corps) has issued a notice regarding post-hurricane permitting, which you can find at [Corps Provides Details on Exemptions, Permit Procedures for Storm Damage Repairs in New England](#). Pursuant to federal regulations that exempt maintenance of authorized structures in its jurisdiction from further regulation, the Corps anticipates that most post-hurricane repair activities will not require a new permit or authorization. "Maintenance" is defined in the regulation to include emergency reconstruction if undertaken within a reasonable period of time after the damage has occurred but may not include any modifications that change the character, scope, or size of the original design. To determine if a repair is covered by the exemption, property owners may wish to contact the Corps. If the activity is not exempt, it may be eligible for approval under the Corps' General Permit for Connecticut, but to ensure compliance property owners may wish to be certain that any structures are already properly permitted and carefully check the terms and conditions of the General Permit before conducting any work.

STATE PERMITS

Temporary and Emergency Authorizations

The Connecticut Department of Energy and Environmental Protection (DEEP) has issued three temporary authorizations and an emergency authorization for post-storm repairs for activities or structures within its jurisdiction. Links to the documents can be found at the [DEEP's website](#). These authorizations relate to the following:

- Temporary Authorization #TA-10-2012-1 allows for the temporary shoring of damaged shoreline structures (such as the placement of sandbags, scaffolding, steel or wooden plates or sheeting, and/or bracing) and the temporary use of certain equipment in regulated areas to remove storm debris. This authorization expires on January 24, 2013, and all temporary shoring must be removed by that date.
- Temporary Authorization No. TA-Sandy-10-2012-2 allows for the use of equipment to return sand displaced by the storm back on to a beach. Only sand displaced by the storm may be placed on a beach, no other fill or contaminated debris is allowed. This authorization expires on January 28, 2013.
- Temporary Authorization No. TA-Sandy-10-2012-4 allows, for those repairs that are eligible under the [DEEP's General Permit for Minor Seawall Repair](#), the use of equipment to reset fallen stones displaced from any seawall, bulkhead, retaining wall, or riprap revetment. This authorization expires on January 28, 2013.
- Emergency Authorization No. EA-Sandy-10-2012-3 allows for the placement of riprap on slopes behind (that is, landward) existing, damaged seawalls. It also allows the repair or rebuilding to the preexisting condition of seawalls, bulkheads, and riprap revetments that have been previously authorized, have been in place since January 1, 1995, or that protect public infrastructure or a residence that has existed since before January 1, 1995. This authorization does not allow any work in tidal wetlands and expires on April 30, 2013.

Each of these authorizations is subject to several requirements and conditions and should be reviewed carefully. For example, Temporary Authorizations 2 and 4 require that property owners, within 14 days of the completion of work, provide the DEEP with their contact information, the site location, a description of the work, and *before* and *after* photographs of the work.

Repairs to Seawalls

The [DEEP's General Permit for Minor Seawall Repair](#), which applies to Temporary Authorization 4, only allows minor repairs to existing authorized or legally installed seawalls. Permitted repairs include patching concrete, repointing mortar between stone, resetting fallen stones, and applying a skim coat to the face of the seawall. Seawall repairs outside the scope of the [General Permit](#) are allowed under Emergency Authorization 3, but only for seawalls that have a permit, were installed prior to January 1, 1995, or protect public infrastructure or a residence in existence before January 1, 1995. Property owners must submit, within 30 days of April 30, 2013, an application for a Certificate of Permission (COP) with the DEEP to retain or continue the repair work. The COP process is a simplified permitting procedure taking no more than 90 days, and perhaps as little as 45 days. Full individual permit applications are subject to greater scrutiny and must comply with all current permitting guidelines. An application to retain any seawall installed after June 24, 1939, the start of coastal permitting regulation in Connecticut, that does not already have a permit from the DEEP must be accompanied by a justification as to why it should be allowed to remain.

Repairs to Docks

Repairs to docks already permitted by the DEEP are allowed under the [General Permit for Dock Reconstruction](#). This general permit applies to the repair or replacement of previously existing and authorized commercial or residential docks, which must be reconstructed in compliance with its prior authorization from the DEEP within one year of the day of the damage. Dock owners must register with the DEEP and file a start-work notification prior to construction and a compliance certification upon completion of the construction.

Emergency and Other Repairs to Pre-1939 and Authorized Structures

Although the authorizations and general permits discussed above will cover the great majority of necessary repairs, it is possible that certain repairs or structures may require other administrative actions. In such cases, the DEEP can issue an individual emergency authorization to allow work to begin immediately to prevent "immediate, unforeseen and unacceptable hazards to life, health or welfare, or significant loss of property." After the issuance of the emergency authorization, the property owner then has to apply for a COP or individual permit within 30 days of the expiration of the emergency authorization to retain the work undertaken. The damage to be repaired under the emergency authorization cannot have been caused by a failure to continuously maintain the structure.

If the situation does not call for an emergency authorization, the property owner will first have to apply for a COP to make repairs to significantly damaged structures that have been in place and "continuously maintained and serviceable" since before June 24, 1939, or to structures that already have a permit from the DEEP. Permitted structures that have minimal damage (that is, damage to fixed out-of-water elements only, such as decking or pier surfaces, and damage to no more than 25 percent of the piles supporting the structure) are exempt from the COP requirement.

Repairs to Unauthorized Structures

For structures that do not have a permit from the DEEP or do not predate 1939, there is no right to rebuild or replace what has been damaged or destroyed without first obtaining permission from the DEEP. Emergency Authorization 3 allows emergency repairs to unauthorized seawalls in place since before January 1, 1995, but raises the question as to what will happen if the DEEP does not accept the property owner's justification for retaining the seawall. The requirement to submit an application to retain the repairs becomes particularly complex when dealing with structures that did not need a DEEP permit at the time they were built, such as retaining walls, waterfront houses, or commercial buildings, but now, because of changes in topography due to erosion or sea-level rise, are within the jurisdiction of the DEEP. The Connecticut Supreme Court has recently ruled that such structures cannot be subject to a removal order, but this holding has not yet been tested. If the structure has been in place and "continuously maintained and serviceable" since before June 24, 1939, it arguably should be eligible for a COP. Similarly, structures and activities completed without a permit before January 1, 1995, may also be eligible for a COP but only if they comply with the DEEP's "applicable standards and criteria." For all activities ineligible for a COP, property owners must apply for a full individual permit.

The proper use of any authorizations or general permits for your particular repair or replacement project should be confirmed with the DEEP or your legal counsel.

LOCAL PERMITS

Repairs to Buildings

Local zoning officials have authority over the implementation of FEMA flood hazard regulations for homes and commercial structures in flood hazard areas. All coastal towns in Connecticut have flood hazard regulations as part of their zoning regulations. In post-hurricane situations, the issue most homeowners face when they need to perform repairs is whether, due to the extent of the damage, any rebuilding will trigger the requirement that the house be "floodproofed" so as to comply with FEMA construction requirements. In general (but it may vary from town to town), if the repair or replacement cost is 50 percent or greater than the value of the *building*, the owner must comply with the floodproofing requirements, such as raising the house so the lowest habitable floor is above the "base flood elevation" and installing utility equipment and connections resistant to flood damage. Determining the cost of

repairs and establishing the value of the building often raise issues of fact and law. The rules for rebuilding structures that are otherwise also nonconforming should be of concern as well.

Coastal Area Management Requirements

Local zoning officials also have coastal area management (CAM) review authority for structures outside the permitting jurisdiction of the DEEP but within the coastal boundary (approximately 1,000 feet from mean high water or tidal wetlands). While many repair activities may be exempt from CAM review, seawalls and other "shoreline flood and erosion control structures" are not exempt. As such, any modification to an existing seawall will likely trigger local zoning review, which requires a mandatory referral to the DEEP for comment. As a general rule, seawalls are disfavored under Connecticut's Coastal Management Act, and applications for new seawalls or after-the-fact approvals for existing seawalls without a permit are typically denied by state and local authorities unless they are necessary to protect infrastructure facilities, water-dependent uses, or inhabited structures that predate 1995.

[New amendments to the Coastal Management Act](#), including consideration of the rights of private property owners, the potential impact of sea level rise, and the feasibility of less environmentally damaging alternatives to the proposed development, also must be weighed by local commissions when evaluating proposals in the coastal boundary. The application of these new policies may affect whether homes or businesses will be allowed to rebuild in the same location.

CONTACT US

Coastal permitting is a complex field, with multiple overlapping regulatory requirements. After a storm, the complexity of the permitting requirements is magnified, especially for property owners whose land has been slowly eroding over the years, for those who have suddenly lost a significant amount of land due to the storm, or for those who learn for the first time that their dock or seawall does not have a permit and does not comply with the current permitting requirements. The requirements and processes outlined above are only a general summary of the permitting requirements, and it is important to keep in mind that each coastal property has its own unique characteristics and history that influence the types of permits it requires. If you have any questions or wish to discuss coastal permitting issues further, please contact [John P. Casey](#).

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