

What Now?

Considerations for Post-Storm Rebuilding

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- Legal implications
- Examples
 - Case-case, incremental adaptation
 - Emergencies
 - Long-term planning

Legal implications

- Land → sea
- Private → public
- Management to date has been based on expectations arising from past experience of conditions

1951 Aerial Photography



1985 Aerial Photography



1997 Orthophotography



2008 Aerial Photography



0 100 200 300 400
Feet

RIGS

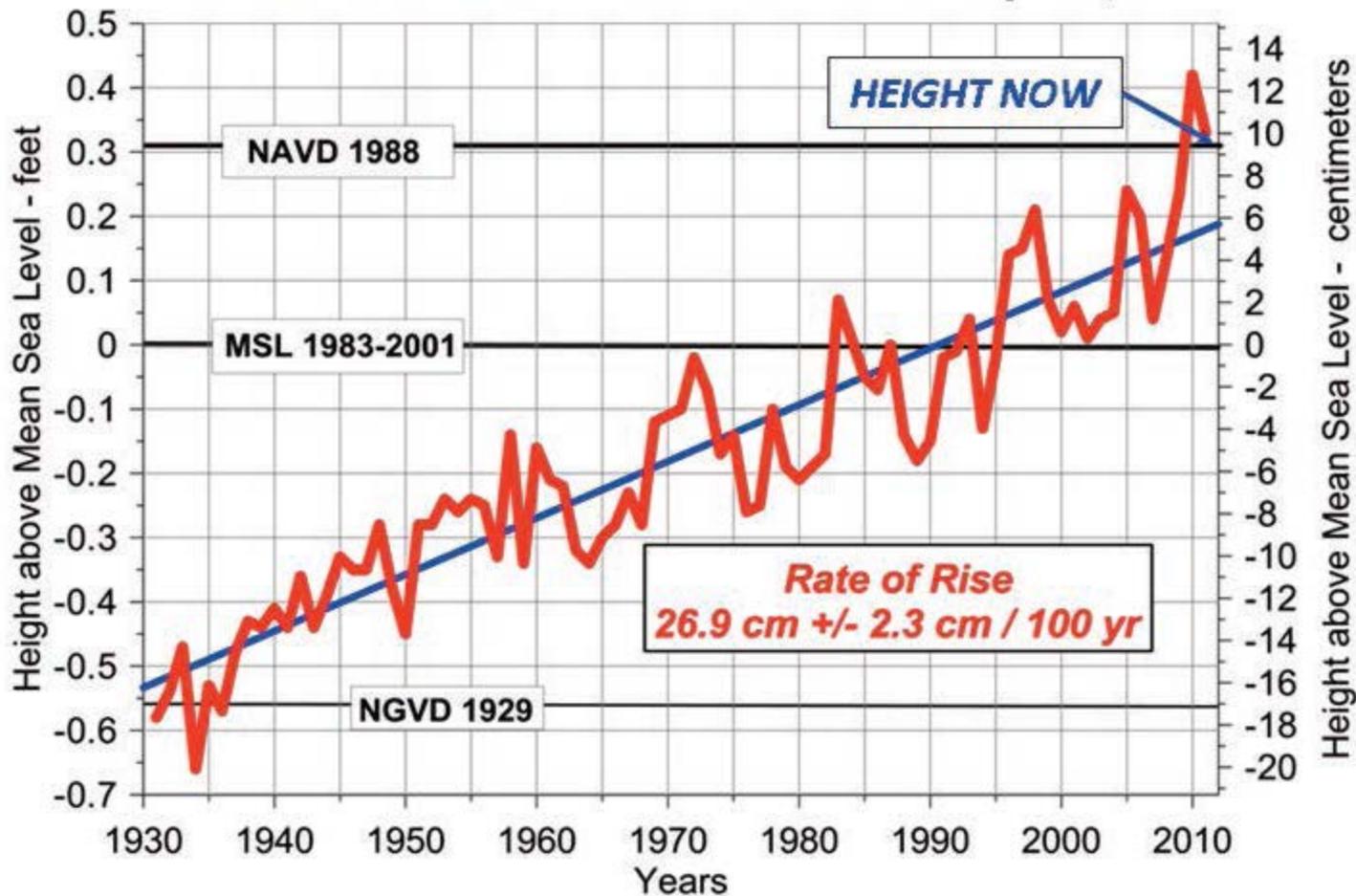
CRMC

AP 4-9-12

2011 Orthophotography



HISTORIC SEA-LEVEL RISE - Newport, RI



More legal implications

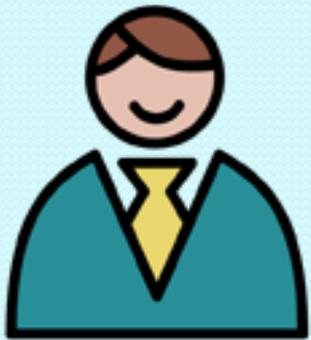
- Citizen interests: Life, liberty, pursuit of happiness, and “reasonable investment-backed expectations”
- Government interests: health and safety, resolution of conflicts, police power of state, public trust doctrine
- Market-based incentives/disincentives
- New calculus to quantify value, risks, benefits

“Takings” loom large

- 5th Amendment of the U.S. Constitution requires that private property cannot be taken for public use unless there is just compensation
- actions that amount to depriving an owner of the use and enjoyment of his/her property
- when government regulation removes all economically viable use of private property, courts describe as a “regulatory” or “constructive” taking
- “Reasonable investment-based expectations” (RIBE)

What's "reasonable?"

- The "reasonable man"
- "Reasonable" behavior
- "Reasonable" expectations





I'm sorry, man, but I've got magic. I've got poetry in my fingertips. Most of the time - and this includes naps - I'm an F-18, bro. And I will destroy you in the air. I will deploy my ordinance to the ground.

Here's the good news. If I realize that I'm insane, then I'm okay with it. I'm not dangerous insane.

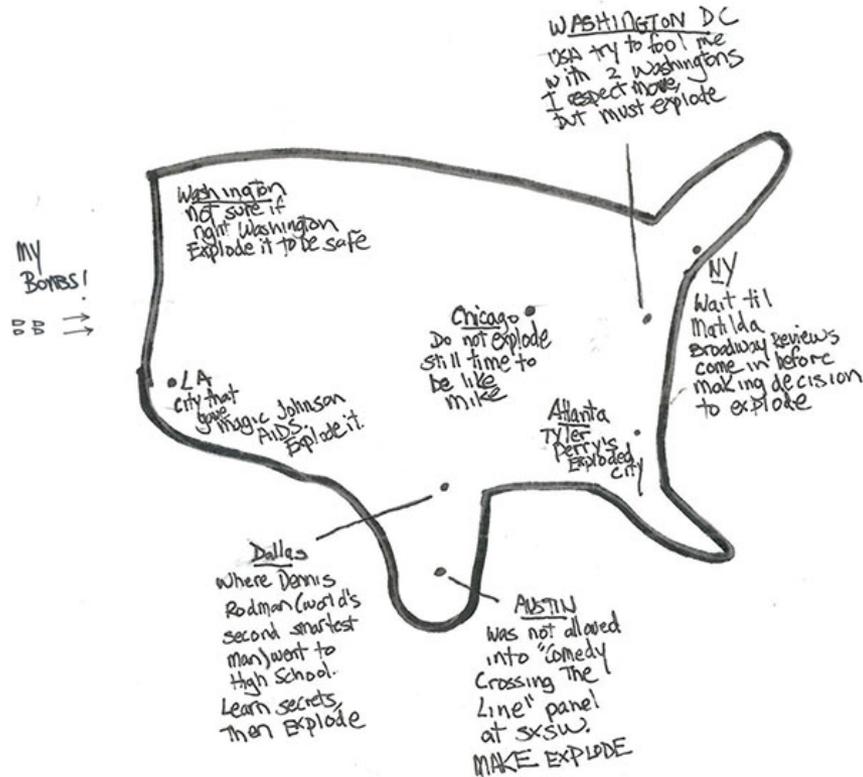
- Charlie Sheen



FROM THE DESK OF
The All Powerful Kim Jong Un



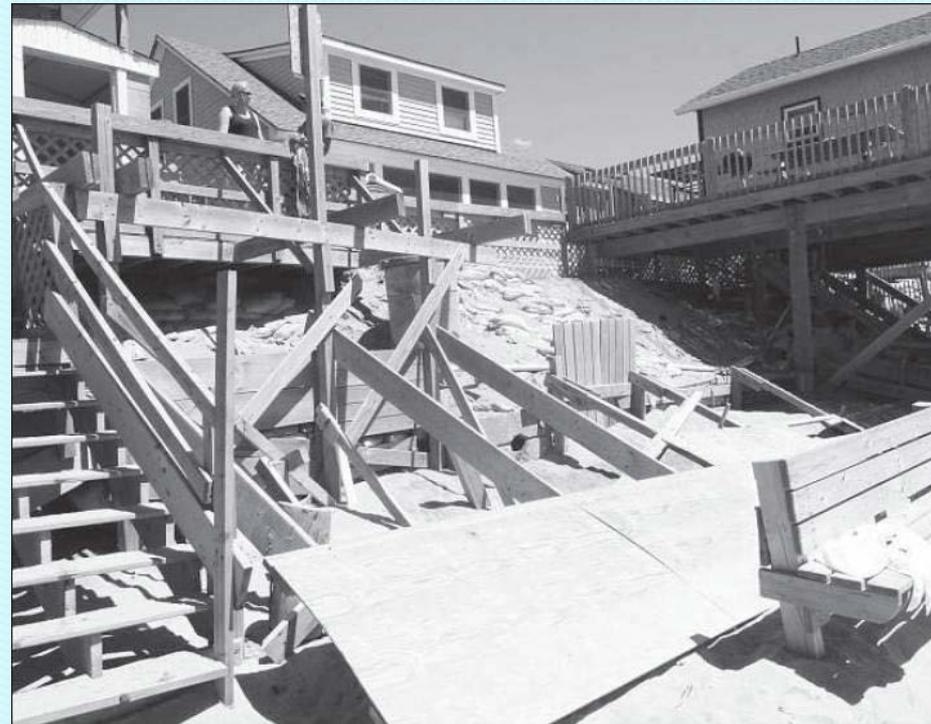
Dear Leader's Map of U.S.A cities to EXPLODE





Matunuck Beach rebuild issues

- Town proposed wall to protect beach, split residents and businesses
- Many unauthorized makeshift attempts to protect property
- Concerns re only road access for 250 residences and disabling water line serving 1,600 people, hardening shore, beach access
- Council initially rejected than compromised, wouldn't act on illegal structures while establishing an experimental zone to examine erosion controls



Beachfront adaptations

- Shoreline armoring
- Hardening of shore to protect coastal properties vs. wetlands, 'soft' shorelines
- Would an anti-armoring statute trigger a taking if a coastal property collapses into the ocean? Probably not, because cause of collapse is rising sea level, not the law

Beachfront protection

- In absence of armoring prohibitions, individual property owners may want to install defensive structures
- These can actually increase damage to neighboring properties by changing flow of water and increasing erosion
- “Common enemy” doctrine says one may defend self against sea even if then cause your neighbor increased damage and encourage THEM to armor
- Many states moving away from “common enemy” and towards “reasonableness,” unless your interference with waterflow is “reasonable,” can be held liable for damage to neighboring properties

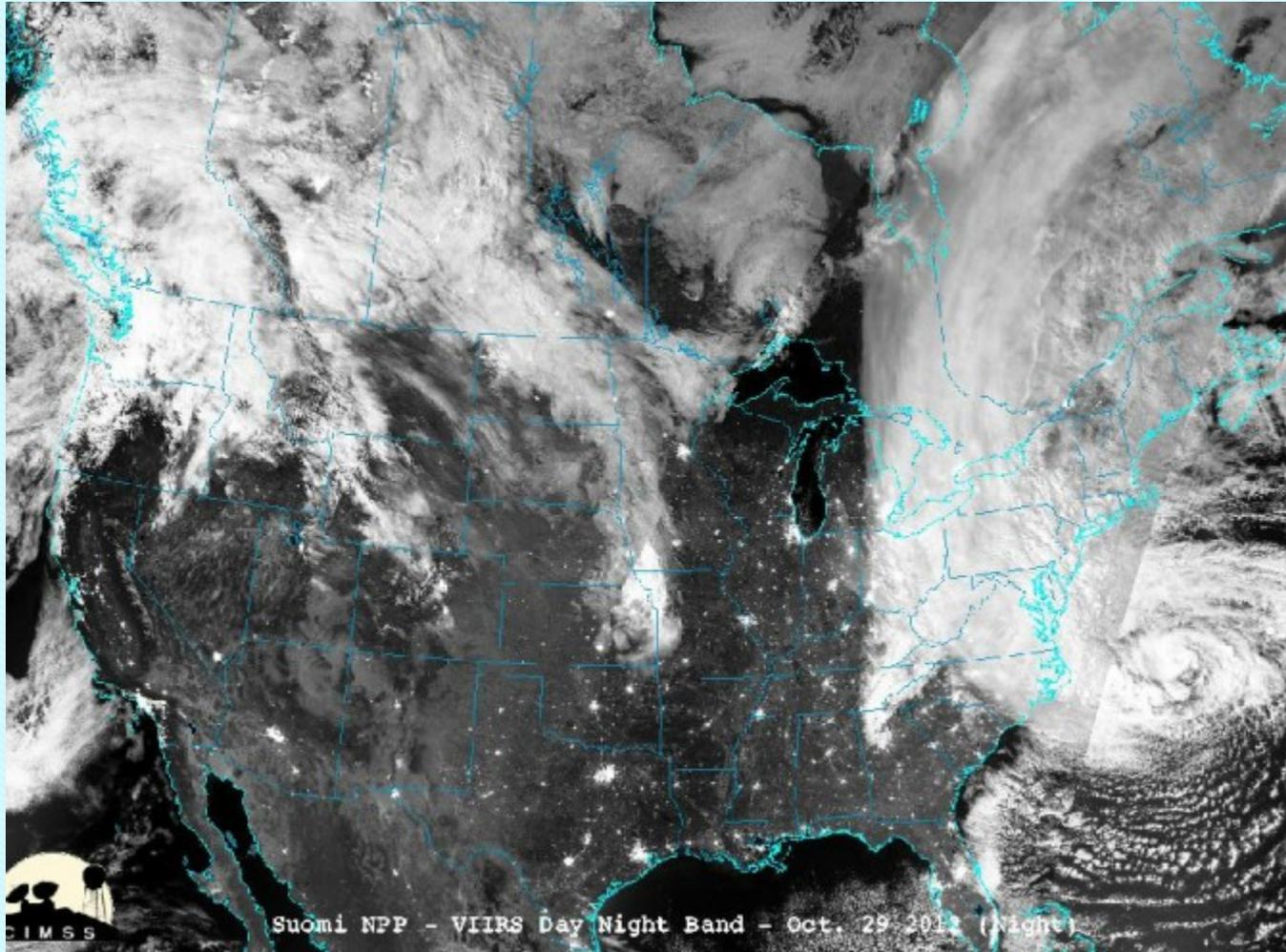


Photo: RIDOT



RI Community Impacts



Westerly

Photo: RIDOT



Charlestown



Narragansett



South Kingstown



Onsite Wastewater Treatment System Impacts

RI CRMC Emergency Policy

- Emergency Permit procedures went into effect after emergency declaration
- 30-day maximum moratorium in effect
- Based on extensive coastal damage, CRMC extended application deadline for Emergency Permits to May 31, 2013
- Emergency Permits valid until August 31, 2013
- CRMC permits not required for roof shingle repairs, siding, window or door replacement until February 8, 2013
- December 3, 2012 - CRMC not requiring a permit for DEM-exempted OWTS repairs along the coast
- CRMC coordinated with DEM on revised repair guidance for storm-damaged OWTS along the coast

RI CRMC Emergency Policy

- Repair authorized for repair to pre-storm condition only – no expansion or improvements
- Waiver of existing standards on a case-by-case basis
- Structures relocated/rebuilt within a prohibited area (on a coastal feature or dune setback) cannot be expanded beyond pre-storm condition for remaining life of structure
- Landward relocation and elevation of structures (encouraged regardless of condition)

Post-emergency choices

- Rebuild:
 - Infrastructure
 - Access
 - Private property
- Rebuilding conditions:
 - Floodplain
 - Other conditions
 - Insurance

Post-emergency considerations

- Certain exemptions of Clean Air Act, Clean Water Act, CERCLA and NEPA after natural disasters
- No EIS under NEPA is required under the Stafford Disaster Relief Act when restoring a facility “substantially” to pre-disaster condition
- Dept of Transportation regs allow for no EIS when rebuilding highways, bridges, rail and bus facilities
- Limited cases thus far indicates environment *and* facility is status quo
- If environment isn't the same, then . . .

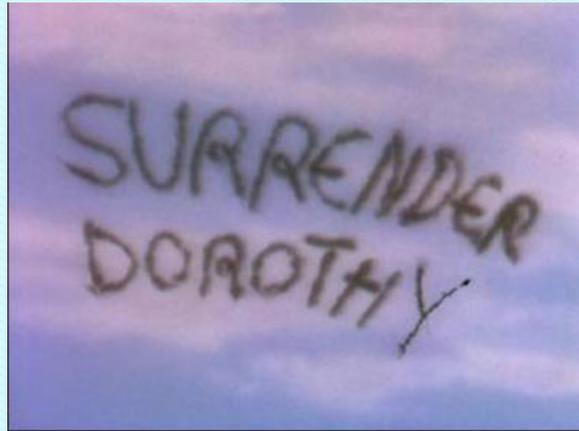
Rebuild?

- Roads, bridges
- Water lines
- Wastewater treatment plants
- If government decides NOT to rebuild, in the interests of public health and safety, environmental protection, economic necessity, can a private property owner contest based on a denial of access, or RIBE?
- Does it matter if it is an immediate vs. a gradual disinvestment? Ex: billboard removal program over several years effectively deflected takings claims

Floodplain designations?

- Changing floodplain designations after events:
 - Alerts potential buyers that property is vulnerable
- Does this reduce market value?
- Does this increase insurance?
- Does this reduce “reasonable investment based expectations?”
- If so, might be a taking

Retreat!



Retreat!

- Proactive: discouraging new development in disaster-prone areas
 - National Flood Insurance Program
 - Local jurisdiction participation is voluntary, agree to meet minimum NFIP requirements, in turn NFIP makes subsidized flood insurance available to residents
 - Courts have rejected taking claims based on NFIP-inspired floodplain ordinances or similar non-NFIP floodplain ordinances
 - BUT changes to NFIP law in 2012 directs sea level rise to be taken into account
- Reactive: discouraging rebuilding in disaster-prone areas
 - Does prohibiting rebuilding trigger a takings?
 - What if there was a widely-publicized government retreat strategy?
 - What if all rebuilders and new purchasers of property in disaster-prone areas are required to receive written notice of the risks in the area?

RI Climate Change Policy -2008

- Coastal managers charged with reviewing “policies, plans and regulations to *proactively* plan for and adapt to climate change and sea level rise”
- Based on legislative mandate “to preserve, protect, and where possible, restore the coastal resources of the state through comprehensive and coordinated long-range planning”
- Council will “accommodate a base rate of expected 3-5 foot rise in sea level by 2100”

The Rhode Island Shoreline Change Special Area Management Plan (Beach SAMP) – 4/4/13

- 3-year, \$1.37 million study
- Shoreline management plan to guide future management decisions
- Review existing polices and develop a state management plan with guidance for communities adapting to short-term and long-term shoreline change

**“LIVING WITH LESS:
RHODE ISLAND TACKLES
SHORELINE CHANGE”**



THE
UNIVERSITY
OF RHODE ISLAND



Resources

- *SHIFTING SEAS: The Law's Response to Changing Ocean Conditions*, November 14 & 15, 2012
Roger Williams University School of Law
This Symposium examined the laws and policies that are implicated as climate change impacts coastal and ocean environments.
<http://law.rwu.edu/marine-affairs-institute/symposiaconferences/9th-marine-law-symposium>
- Rhode Island Beach SAMP
<http://seagrant.gso.uri.edu/coast/beachsamp.html>
- Congressional Research Report, “Climate Change and Existing Law: A Survey of Legal Issues Past, Present, and Future,” Nov. 2012
<http://www.fas.org/sgp/crs/misc/R42613.pdf>