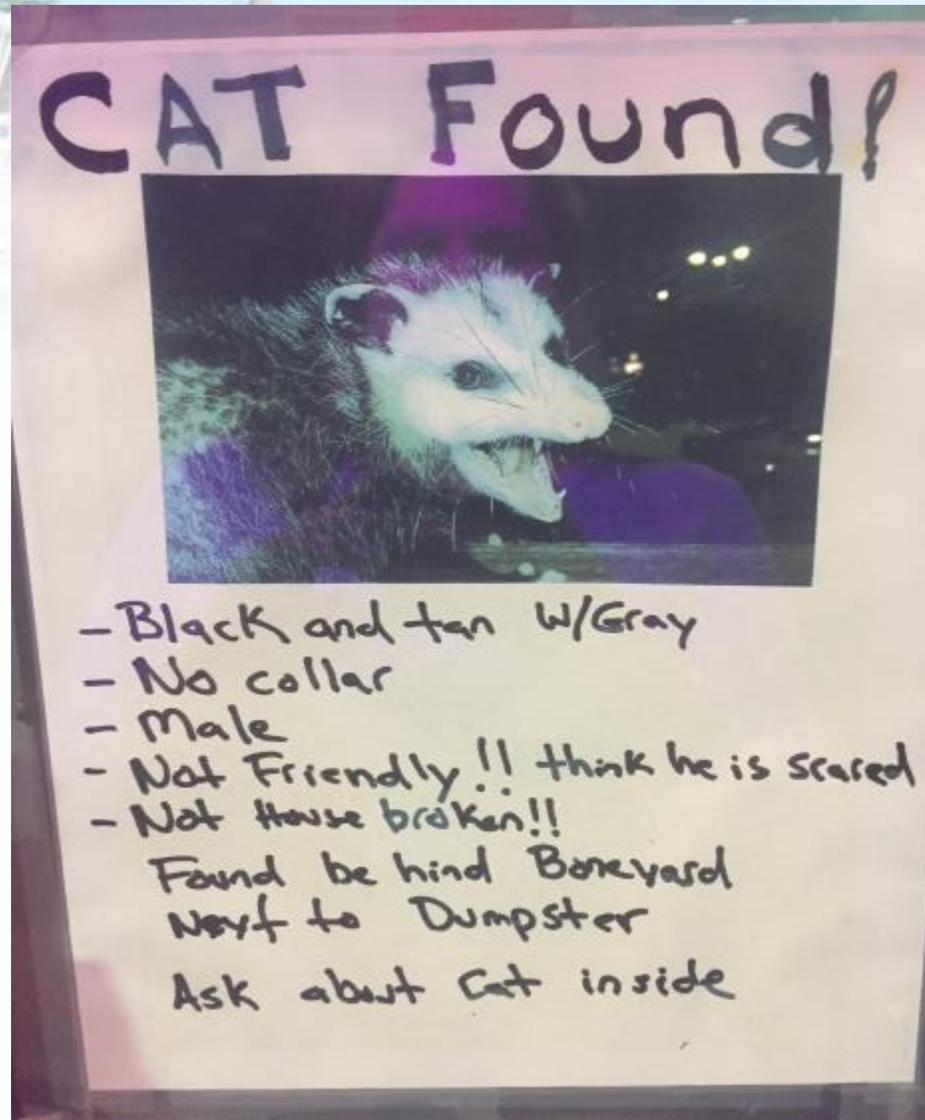


Planning and Legal Issues Related to Climate Change

Erin L. Deady, Esq., AICP, LEED AP

November 16, 2017

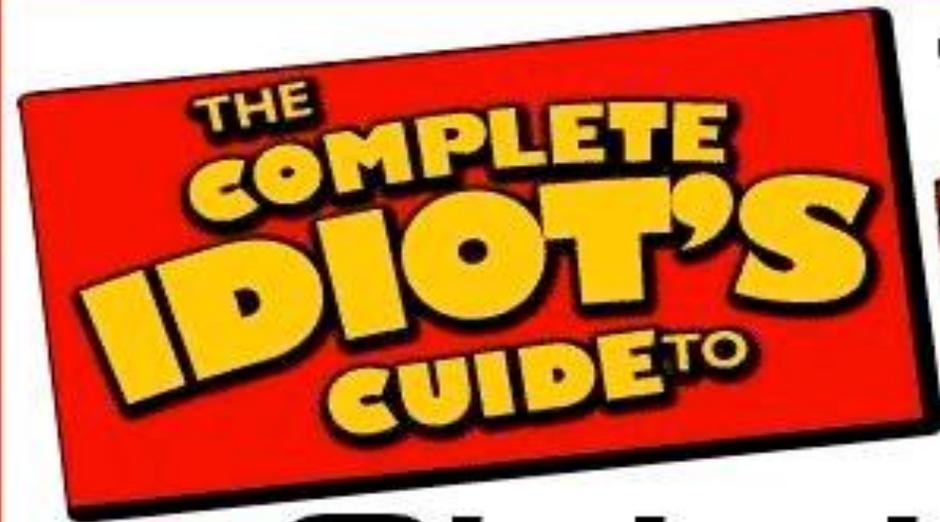
The Facts About Climate Planning & Policy



- Who needs to start planning?
- How do we take the science and plan ahead?
- What policies do we need to put in place to do that?
- What are we required to start doing?
- Who's doing it (so its not so scary)?



PART 1: THE BIG PICTURE AND HOW IT IMPACTS THE LOCAL DISCUSSION



US\$ 18.95



Global Warming

- ★ The quick and easy way to make anyone feel guilty simply for being alive
- ★ Idiot-proof steps for destroying world's economy
- ★ Down-to-earth advice on suppressing dissent by pulling "scientific facts" out of your ass

ThePeoplesCube.com



International Climate Agreements

Agreement	Targets Established	Signatories	U.S. Ratification
United Nations Framework Convention on Climate Change (UNFCCC) 1994, Rio	Voluntary goal of reducing GHGEs from developed countries to 1990 levels by 2000	198 Countries (“Parties”) have signed on and ratified	Treaty and received US Senate ratification
Kyoto Protocol 2005	1st Commitment period: Binding targets to reduce GHGEs 5.2% below 1990 levels by 2012 2nd Commitment period: 18% below 1990 from 2013 to 2020	Focus on “developed” Countries (37 total + EU)- over 120 countries signed	U.S. non-”ratifier”
Copenhagen Accord 2009	4% below 1990 levels by 2020 – not binding. Cuts in emissions required to hold the increase in global temperature below 2 degrees Celsius	114 Parties- Submit individual plans	No U.S. Senate Ratification needed
Paris Agreement December 12, 2015	Global rise in temperature “well below” 2 degrees Celsius + limit increase to 1.5 degrees Celsius (you chose your target and plan to achieve it “NDCs”)	196 Countries (developed/non-developed)	Acceptance & approval are both methods to bind a nation

Why it Matters at the Local Level

- Funding burden for adaptation (flooding, road elevation, beaches and shorelines, etc.)
- Data, tools and resources for actionable science
- State/local government “commitments to uphold” Paris Accord-
 - Option 1- “yeah we like it we should support it”
 - Option 2- “we are going to ‘uphold’ at the local level”- could mean GHG targets, reporting, etc.
- Commitments to Paris Accord regardless of Federal withdrawal:
 - Mayor’s National Climate Agenda (Local Governments)
 - United States Climate Alliance (States)
 - Outright passage of legislation (Hawaii)
 - Miscellaneous (<http://www.wearestillin.com/>)

**PART II- LAWS
AND LITIGATION
SHAPING
“CLIMATE
LIABILITY” AND
RESPONSES TO
CHANGING
CONDITIONS**



US Approach to GHG Reductions

- Response within U.S. (Prior to Paris):
 - In 1965 President Lyndon B. Johnson’s Scientific Advisory Committee Panel on Environmental Pollution reported that unabated CO₂ emissions would, by 2000, alter the climate, and Johnson charged Congress to address the problem
 - Section 1605(b) of the 1992 Energy Policy Act has program to track GHG emissions, weak reporting standards, no verification, and no penalties for companies that do not report
 - Numerous attempts at legislation
 - Mass v. EPA: EPA has authority to regulate CO₂ as pollutants based on the definition provided in CAA section 302(g)
- Endangerment finding = 6 GHGs may be reasonably anticipated to endanger public health and welfare, and four of them—CO₂, methane, NO_x and hydrofluorocarbons—are emitted from automobiles, which would allow their regulation under CAA section 202
- Additional Federal Rulemaking and now “rollbacks”
- “Red Team/Blue Team”



The Law: Where Does Climate Change Show Up?

- ESA
- NEPA
- CAA
- CWA
- MMPA
- FOIA/1st A
- Energy Policy Act
- Global Climate Change Research Act
- Corporate Reporting/Securities Disclosure
- FTC

- “Cap-and-trade” regulation where GHGE’s are capped and allocated through the market (representing a

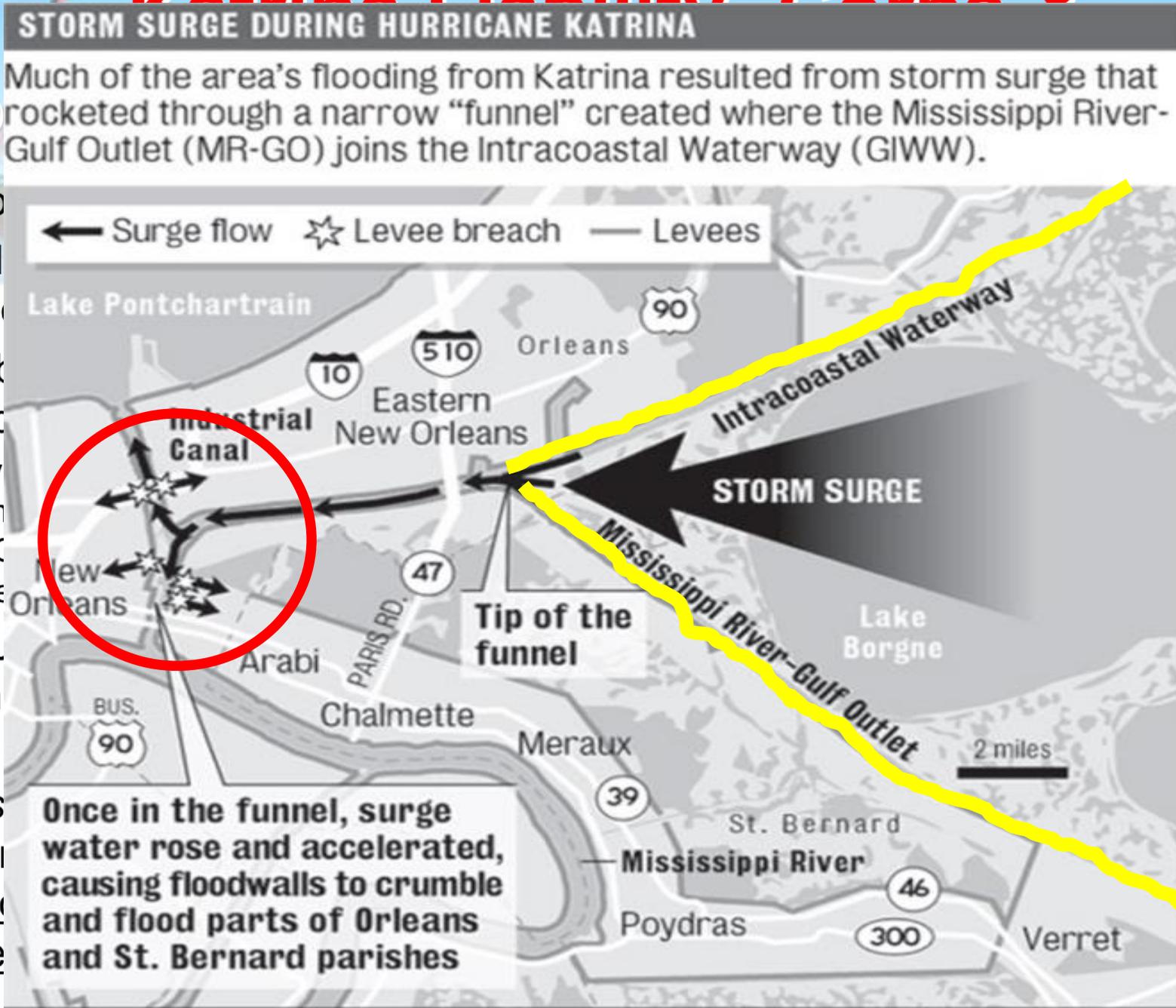
785 total cases as of June 2017

- (private), too much
- Green & Energy Building/Codes (New Mexico case)
- Protestors and scientists
- Failure to consider climate in permits
- Money damages and common law claims
- Protect my future

Katrina Liability, Corps & US

Tempo

- Corps not liable
- Case originally dismissed for lack of maintenance
- MRGO contributed to flooding
 - "protection and maintenance"
 - "Certainly by the Corps' failure to provide the necessary maintenance to the eroded MR-GO," Braden wrote.
- May 4, 2016 US District Court (the Lower 9th Circuit)
- Appeal July 6, 2016 Supreme Court on: *Arkansas v. Oklahoma* for government liability under Amendment to the Flooded Property Act



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BURNSIDE
CHICAGO INDUSTRIAL CORRIDOR
Richard M. Daley Mayor

14-2

SPEED LIMIT
30



Plaintiff v. Fossil Fuel Companies

- Kivalina- Nuisance claim for \$ from the energy industry for flooding damage caused by
- Connecticut entrusted decide how and that it to issue t
- Comer v. claims pro and plain their injuries caused by the companies' conduct (nuisance / trespass claims damage property in Katrina).
- San Mateo County, Marin County and the City of Imperial Beach v. Chevron (27 D'c) public ct, private they knew y, both for occurring to companies' behavior
- USSC in Kivalina- if an individual driving a car (and thus contributing to emissions) could also be a defendant, how can a court determine who was liable?
 - Causation v. "substantial factor"
 - Vulnerability assessments as evidence?
- the growing body of publicly available scientific evidence and persistently create doubt."
- NY State Attorney General email investigations

Post Storm Litigation: Why Its Important

Flooded homeowner sues bank for recommending he reject flood insurance

By L.M. Sixel | October 2, 2017



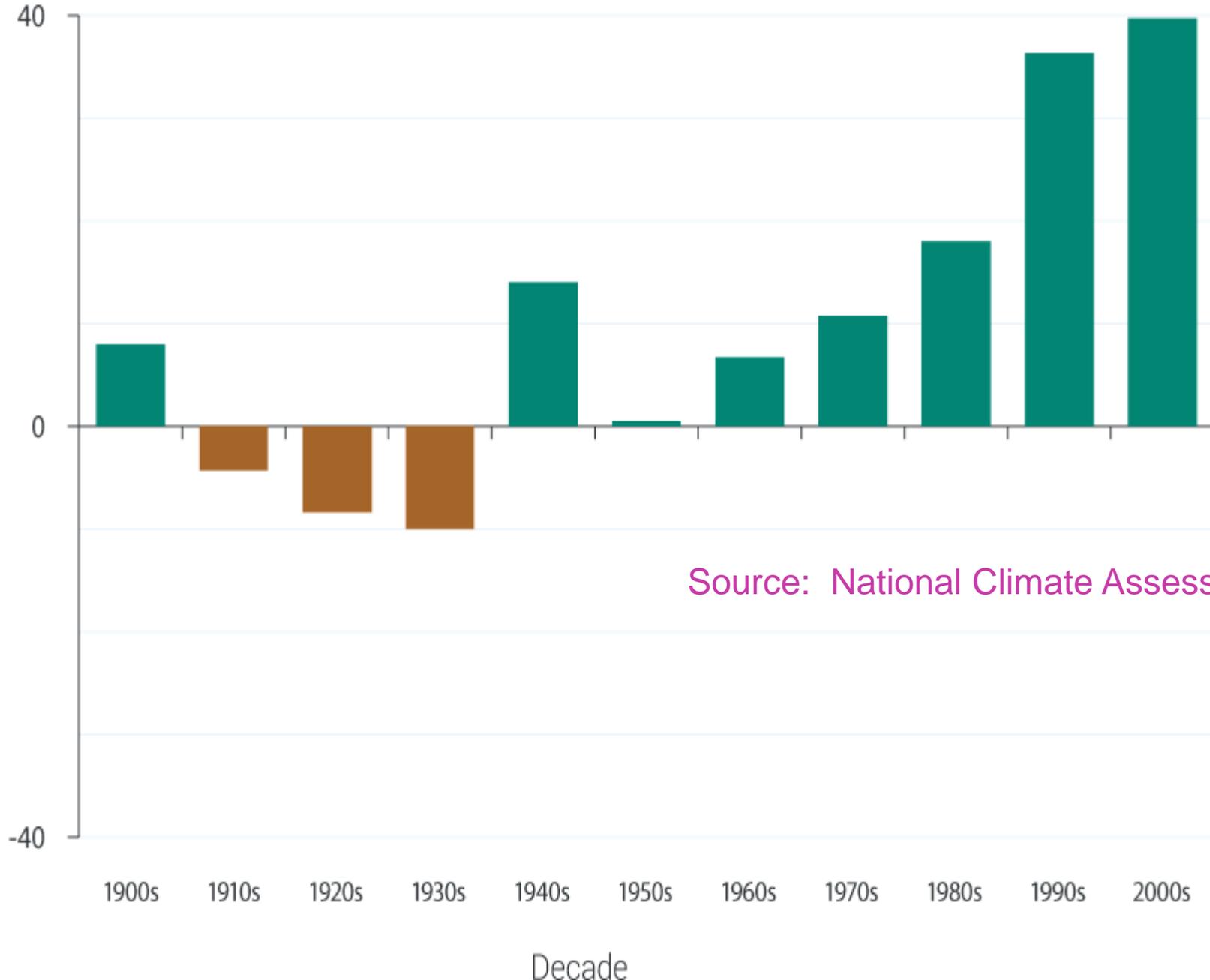
Deola Ali bought a house in Kingwood six years ago and considered buying flood insurance. Instead, he says, he followed the advice of his mortgage lender, which said he didn't need flood insurance because the property wasn't in a flood plain.

Observed U.S. Trend in Heavy Precipitation

PO

- Sue the difficult
- Buy ou
- Sue the
- Sue the
- Sue pro
- Sue the drainag

Relative Number of Extreme Events (%)



Source: National Climate Assessment

but

ers or

Other Evolving Legal Aspects

NFIP Reform

- FIRM Existing Flood Risk
- Technical Mapping Advisory Council
- Future flood risk
- Expired 9/30 and reauthorized until 12/8
- Band aid or full reform?

CRS

- Sea Level Rise Credits ~ 500 pts.
- Mapping
- Improvement of rating score
- Example- County x receives a CRS score of 5, but to improve to a 4, these points are pivotal.

Corps of Engineers

- Corps "(Engineer Technical Letter 1100-2-1) covering "Procedures to Evaluate Sea Level Change: Impacts, Responses and Adaptation" (July 2014)
- Previous "Incorporating Sea-Level Change Considerations in Civil Works Programs"
- Sea level rise calculator (2017) with 3 scenarios
- Guidance on Inland Climate Change
- Principles for Risk in Planning

NEPA

- Agency experience and expertise to determine whether a project requires a NEPA analysis or a categorical exclusion
- "Rulemaking to ensure that the type and level of analysis is appropriate for the anticipated environmental effects of the project"
- 8/1/17 guidance on NEPA if the project effects are significant
- Early 2017- CEQ directed to withdraw

FFRMS

- Federal investments implemented through Hazard Mitigation Grant Program and the National Flood Insurance Program
- FE... cons... activities in or... floodp... Land, cons... "fed... Exe... re... F... 8/...

On a Recent Front-Center for Biological Diversity v. USFWS (Potentially?)



- **PART 2:
WHAT'S GOING
ON IN THE
STATE
RELATED TO
PLANNING FOR
THESE NEW
CHALLENGES?**



Florida Trend & Associated Press

Basic State Legal Concepts in Government Actions/Liability for Capital Improvements and Roads

But wait, there's one more thing to consider... government inaction (*Jordan v. St. John's County*)...

1. What is the maintain v. upgrade obligation?	Generally cases have found there is a duty to “maintain” (roads) but <u>no</u> duty to “upgrade”. There is no direct case on duty to maintain or upgrade <u>from sea level rise</u> yet...
2. What actions can be taken or not? Planning versus operations.	Duty to maintain or upgrade due to sea level rise could depend on whether road design decisions are deemed “discretionary planning” actions or “non-discretionary operations/maintenance” actions.
3. Why is planning versus operation important?	Once you build it, you must maintain it with “reasonable care” to function as designed (now it becomes a non-discretionary operations).
4. Sovereign Immunity	Discretionary planning decisions are immune from liability under the Tort Claims Act. Cases have held there is <u>no liability</u> for failure to build, expand or modernize capital improvements, cases have deemed these “planning” actions (road widening). Nor liability for basic design of roadway and decision on whether or not to upgrade (planning level).

Florida Policy on GHG Reductions and Climate

- EO 07-127: Reduction of emissions to 2000 levels by 2017, to 1990 levels by 2025, and by 80% of 1990 levels by 2050 & California vehicle emission standards reductions (22% by 2012 and 30% by 2016).
- Building Efficiencies/Energy Code, Chapter 553, F.S. increasing standards
- HB 7123: Model Green Building Code (2007)
- HB 697 (GHG reduction strategies in local government's Comprehensive Plan). Some requirements later eliminated.
- HB 7135 (State and Local Government Buildings "greener")
- HB 7179 (PACE)- financing wind resistance/energy efficiency initiatives
- Adaptation Action Areas (2011)
- HB 7117 (Energy Bill- 2012)- increase solar output
- 2015- 5 Bills Passing Related to flood insurance, wind insurance, construction standards/building codes, Citizen's insurance, Peril of Flood (SB 1094)
- 2016- Solar Constitutional Amendments
- 2017- SB 90 on solar disclosures and Amendment 4 Implementation & Natural Hazards coordination

Natural Haz

- “Natural hazards”
heat, drought, wild
surge, saltwater in
inland flooding, an
- Executive branch
- ¼ meetings
- Progress reports



Image: Terrell Forney

What are local governments doing?

Adaptation Action Areas

- 195 local governments have Coastal Management Element
 - 161 municipalities and 34 counties
- As of May 2017:
 - Approximately 43 (22%) explicitly mention or address **sea level rise in their Comprehensive Plans**
 - Eleven (11) mention **AAAs** in their Comprehensive Plans
 - Five (5) have a physical designation:
 - **Satellite Beach** designates ocean side and bayside
 - **Village of Pinecrest** designates AAAs
 - **Broward County** sand bypass project at Port Everglades
 - **Ft. Lauderdale** 16 areas 38 stormwater projects
 - **Yankeetown** designated natural resource AAA

Flood Peril Legislation (SB 1094)

What are the principle requirements?

- Development and redevelopment principles, strategies, and engineering solutions that reduce flood risks and losses
 - Elevation certificates submitted to DEM
 - “Flexible” flood insurance coverage
 - Other provisions such as flood insurance policy requirements
1. Development and redevelopment **principles and strategies**, that reduce the flood risk in coastal areas from high-tide events, storm surge, flash floods, stormwater runoff, and **the related impacts of sea-level rise**.
 2. **Best practices** for the removal of coastal real property from FEMA flood zones
 3. **Site development techniques** that may reduce losses and claims made under flood insurance policies
 4. Be consistent with, or more stringent than, the flood-resistant construction requirements **in the Florida Building Code** and flood plain regulations
 5. Construction activities consistent with **Chapter 161**.
 6. Encourage local governments to participate in the National Flood Insurance Program **Community Rating System**

Recent and Current EAR Based Amendments

In Compliance with SB 1094			
West Palm Beach		Yankeetown	
Ponce Inlet		North Miami	
Santa Rosa County		Palm Bay	
Boynton Beach		Clearwater	
Jupiter		Broward County	
Jupiter Inlet Colony		Pinecrest	
Sunny Isles Beach			

City of West Palm Beach: Coastal Amendments

- Submitted proposed comprehensive plan amendment, complete as of November 16, 2016
 - Stormwater master plan, freeboard, CRS
 - DEO reviewed and sent response letter back January 17, 2017
 - Objection 2: DEO expressly identified need for revision based on SB1094 requirements
 - City submitted Final Adopted Proposed Comprehensive Plan Amendment on March 3, 2017
 - specifically addressed Objection 2
 - included revised language addressing Peril of Flood
 - DEO approved amendments April 19, 2017
- Added maps of 1, 2, 3' SLR from Compact
 - Provided more “date certain commitments”
 - Provided “data and analysis”
 - Re-emphasized applicability or non-applicability of certain requirements



Toth v. City of Treasure Island

Amended Complaint De

- Crux of argument is fail to comply with SB 1094 (coastal element related allegation)
- Linkage to Community Development Initiative Study (alleged to support Coastal Element (Section 309 Grant funding) DEO for planning)
- Alleged failure to apply for comments regarding Coastal Element compliance



vidence states that the City must comply with SB 1094 requirements by November 2020 (on due date) and has no comments regarding important state resources or facilities. Comments on SB 1094-related issues in technical assistance comment”

Dismiss filed 8/5 (jurisdiction and standing) Motion to Dismiss Amended Complaint filed (jurisdiction and standing)

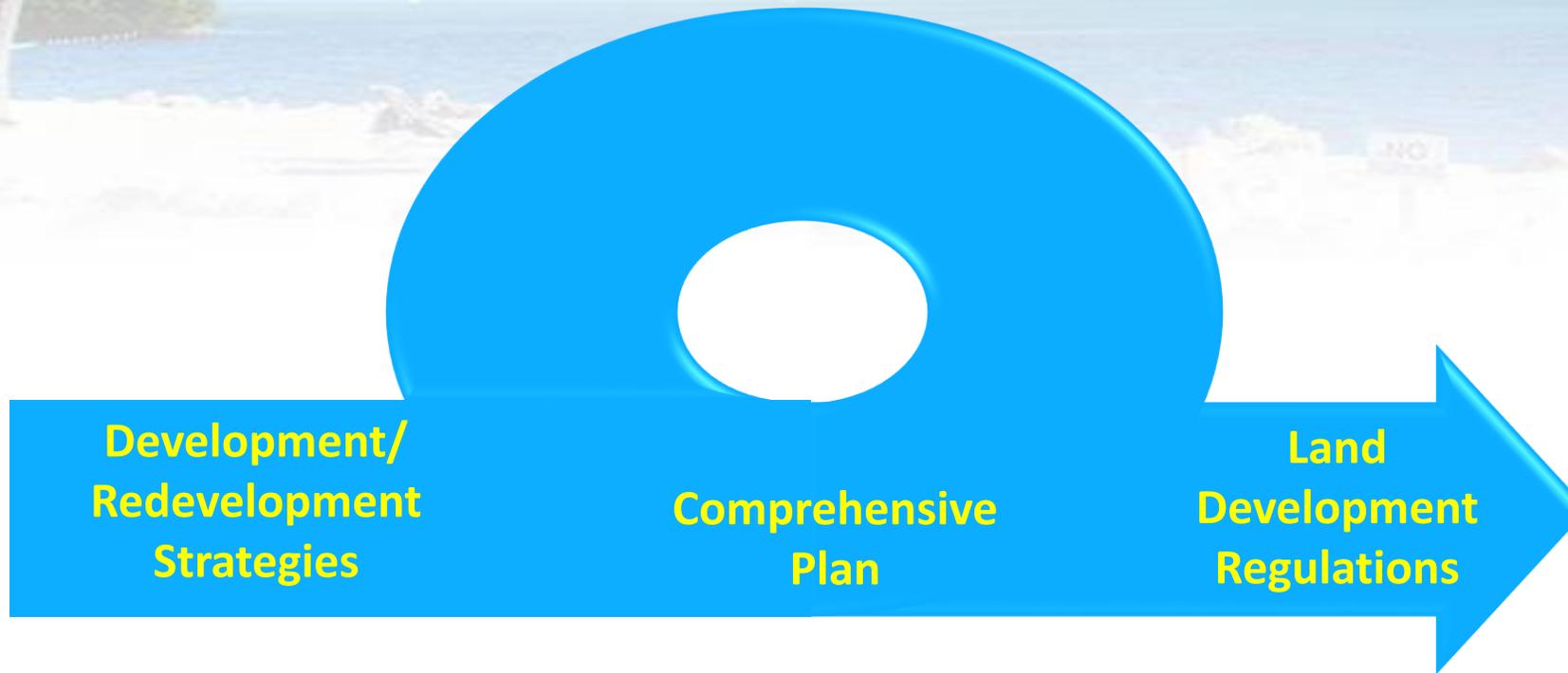
Motion to Dismiss granted and case dismissed with prejudice on 11/10/16

Motion for Rehearing and or to Set Aside

Withdrawal or Motion for Rehearing and Voluntary Dismissal filed 12/21/16

Sample Planning Strategy

How do these requirements relate to or affect planning activities and infrastructure investments in the short- and mid-term?



Short Term

- Compliance (POF) Strategy (timeline and scope)
- Frame “development”
- Short term capital projects
- AAAs

Mid Term

- Comp Plan Goals, Objectives and Policies
- Review land uses

Long Term

- LDRs: Development / design standards
- Areas subject to flooding
- ESLs
- Infrastructure LOS

Example Planning Efforts Around the State (not all listed)

Jurisdiction	Activity
West Coast Southeast Florida	Regional Collaboration and involvement of regional planning councils
Broward	Enhanced modeling: seawall heights and future conditions groundwater maps
Miami Beach	Stormwater pumps, road elevation and seawall policy
Ft. Lauderdale	Adaptation Action Areas (19), seawall ordinances for design criteria
Monroe County	Road elevation policy accounting for sea level rise and demonstration projects & SLR Modeling through CRS (to achieve “4” rating)
East Central FL	Satellite Beach- HAZUS modeling and plan development (new Volusia and Brevard initiatives)
St. Augustine	Historic properties, post-Matthew infrastructure and planning
Multiple Cities/Counties	Sustainability/Climate/Vulnerability planning initiatives (Central FL, West Coast, South Florida)
DEO	Pilot / demonstration vulnerability analyses in 3 communities

Texas-size \$61 billion Harvey plan includes 'Ike Dike,' new reservoirs, buyouts

Mike Ward and Kevin Diaz | November 1, 2017

- Immediate, case specific (e.g., work with owners, maintain)
- Capital planning & funding (e.g., bond referenda, etc.)
 - Special assessments (assessments)
 - Referenda can reduce risk
 - Doing nothing can be costly
- Better regulations and standards
 - Integrate “future code” into existing regulations
 - Old Ex: FFRMS
 - Ex: Broward growth management
 - “Above code” resilience



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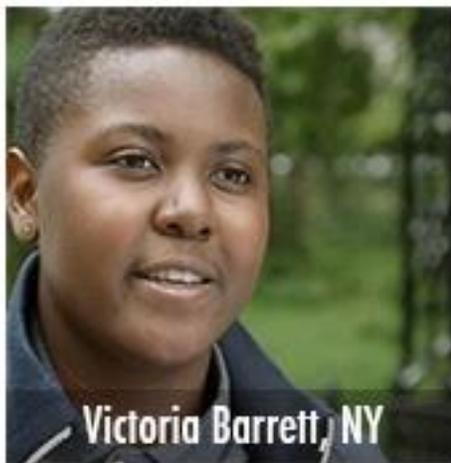
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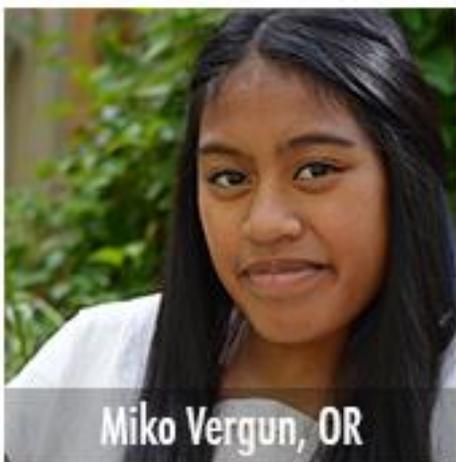
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Victoria Barrett, NY



Nick Venner, CO



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Journey Zephier, HI

v. U.S.

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US: Your MTD is DENIED

- Federal defendants file Writ of Mandamus to stay proceeding and evaluate denial of MTD filed 6/9/17
- 11/10/16 – “This lawsuit is based on the undisputed fact that human activity is causing climate change. The question is whether defendants are responsible for some of that change. The Court can direct defendants to take steps to reduce their contribution to climate change without running afoul of the separation of powers.”
- Fossil Fuel intervenes and challenges the Court’s authority
- See you in court? 2/5/17



1) whether climate change is happening or not, 2) whether plaintiffs have standing, 3) whether defendants are responsible for some of that change, 2) whether plaintiffs have standing to sue, and 3) whether this lawsuit is premature without running afoul of the separation of powers.

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Why the Law of Climate Change Matters: From Paris to a Local Government Near You

by Erin L. Deady

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Climate change has received much national attention recently, but the laws, regulations, issues, and caselaw evolution, have a history that is not well known. International strategies are one important element in solving the climate change challenge. Impacts locally such as street flooding, compromised drainage, habitat and species changes, accountability, and liability confluence bring a new reality to the importance of understanding what is being done, or not done, at all levels of government. This article summarizes the climate change law highlights at the international, state, and local levels and provides insight as to why it matters.



Thank You

erin@deadylaw.com
www.erindeadylaw.com

ERIN L. DEADY, P.A.

