



Legal Issues with Climate, Sea Level Rise and Planning

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Communicating About Legal and Policy Issues



- Who needs to start planning?
- How do we take the science and plan ahead?
- What facts do we communicate?
- 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)?

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

734 total cases as of February 2015

- Green & Energy Building/Codes (New Mexico case)
- Money damages and insurance coverage (common law claims)
- Protestors and scientists
- Protect my future

STORM SURGE DURING HURRICANE KATRINA

Much of the area's flooding from Katrina resulted from storm surge that rocketed through a narrow "funnel" created where the Mississippi River-Gulf Outlet (MR-GO) joins the Intracoastal Waterway (GIWW).

- *In re Katrina* (La. 2009).

- 400+ plaintiffs in the Mississippi River-Gulf Outlet (MR-GO) litigation.

- 7 of these plaintiffs filed suit in the Fifth Circuit and the Eleventh Circuit.

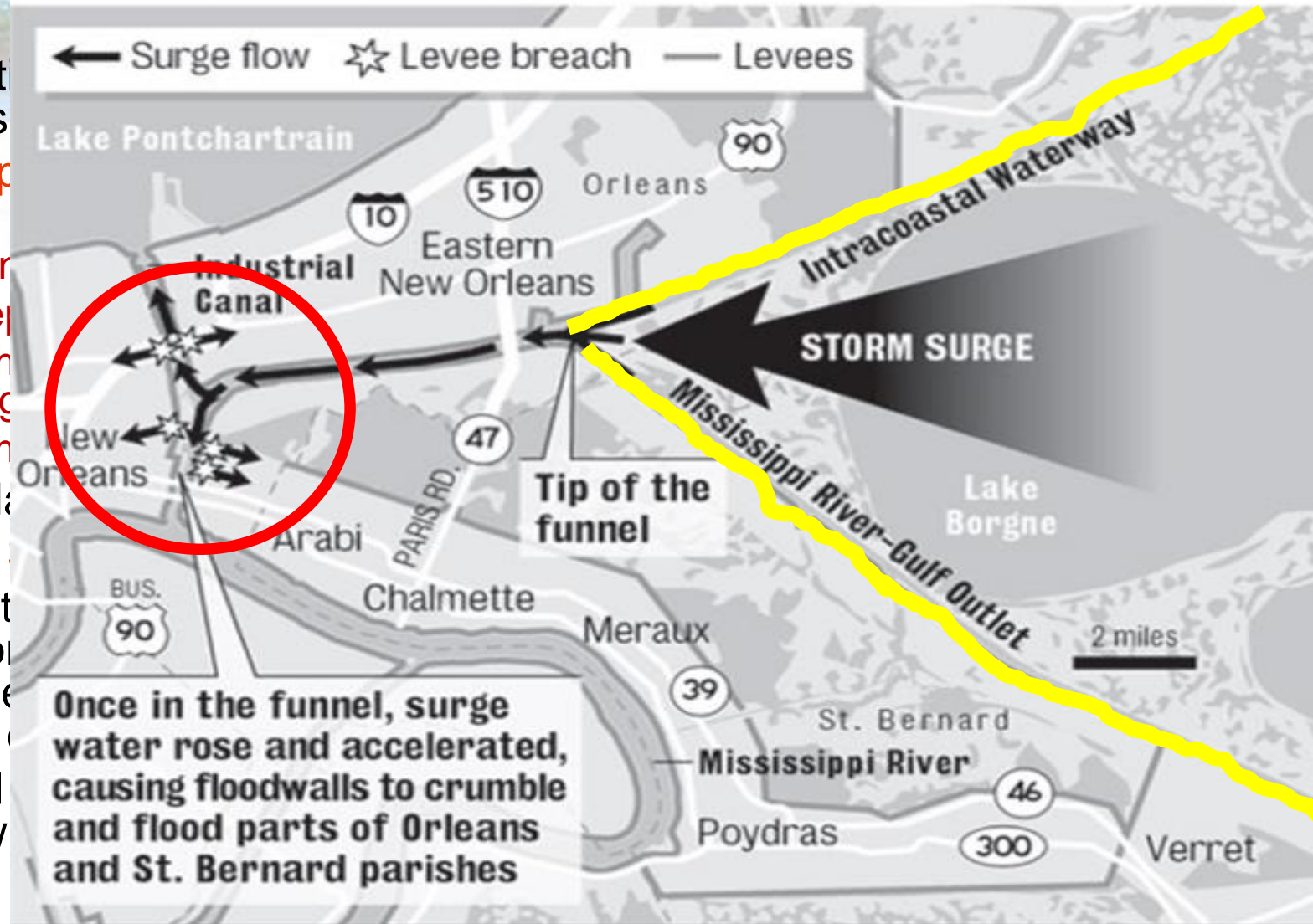
- No deference to the Corps' engineering expertise
- No exception for the Corps' "specialized knowledge"
- Should have been able to predict the changing conditions
- Negligence

- Scientific data

- Just under 100,000 people were displaced.

- The U.S. 5th Circuit found that the Corps' "exceptional" performance was "exceptional" and "exceptional"

- "The Flood matter how levees"



STAFF GRAPHIC BY EMMETT MAYER III

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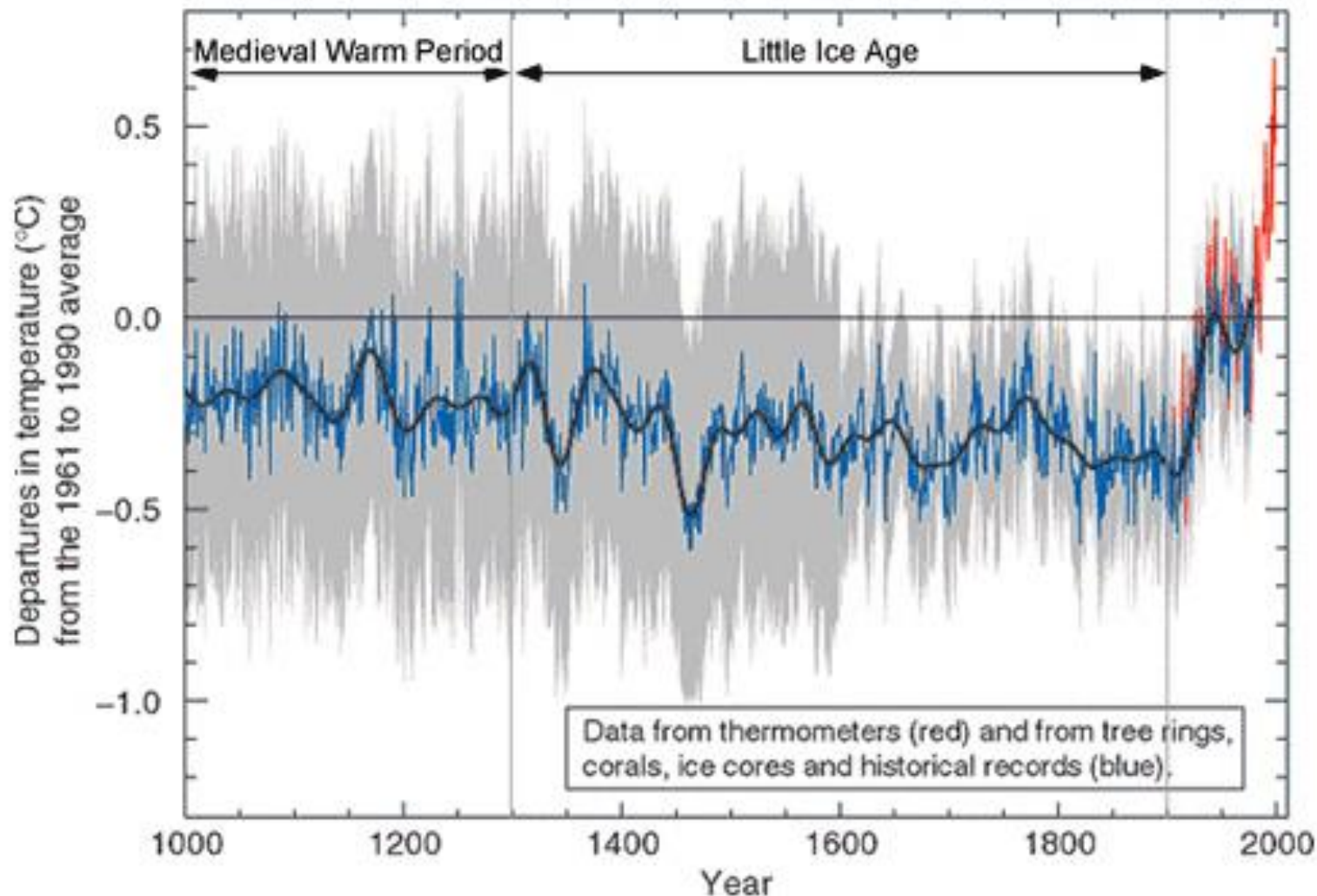
New Life for Katrina Theories- Takings (St. Bernard Parish v. US)

- Case originally filed 2005. Federal judge (5/1/15) rules that Corps' construction and absent maintenance of MRGO created a "ticking time bomb"
- "Temporary taking" of the value of residential, business and parish-owned property
- MRGO contributed to increased erosion of wetlands, eroding **natural** protection and increasing flood risk
- "Certainly by 2004, the Army Corps of Engineers knew that the levee system by a substantially expanded and improved MRGO had shielded the St. Bernard Parish from destruction. It is not surprising that the Corps did not recognize that a hurricane **e ticking time bomb** created the destruction of wetlands that had shielded the St. Bernard Parish from destruction."
- May 4, 2016 Judge rules that the Lower 9th Ward of \$3.16 billion is a "temporary taking"
- Appeal July 6, 2016 by Justice Alito
- Case relying heavily on: Arkansas v. United States (2012), USC 10105, which holds that it's possible for gov't to constitute a "taking" of property under the Fifth Amendment if that compensation could be



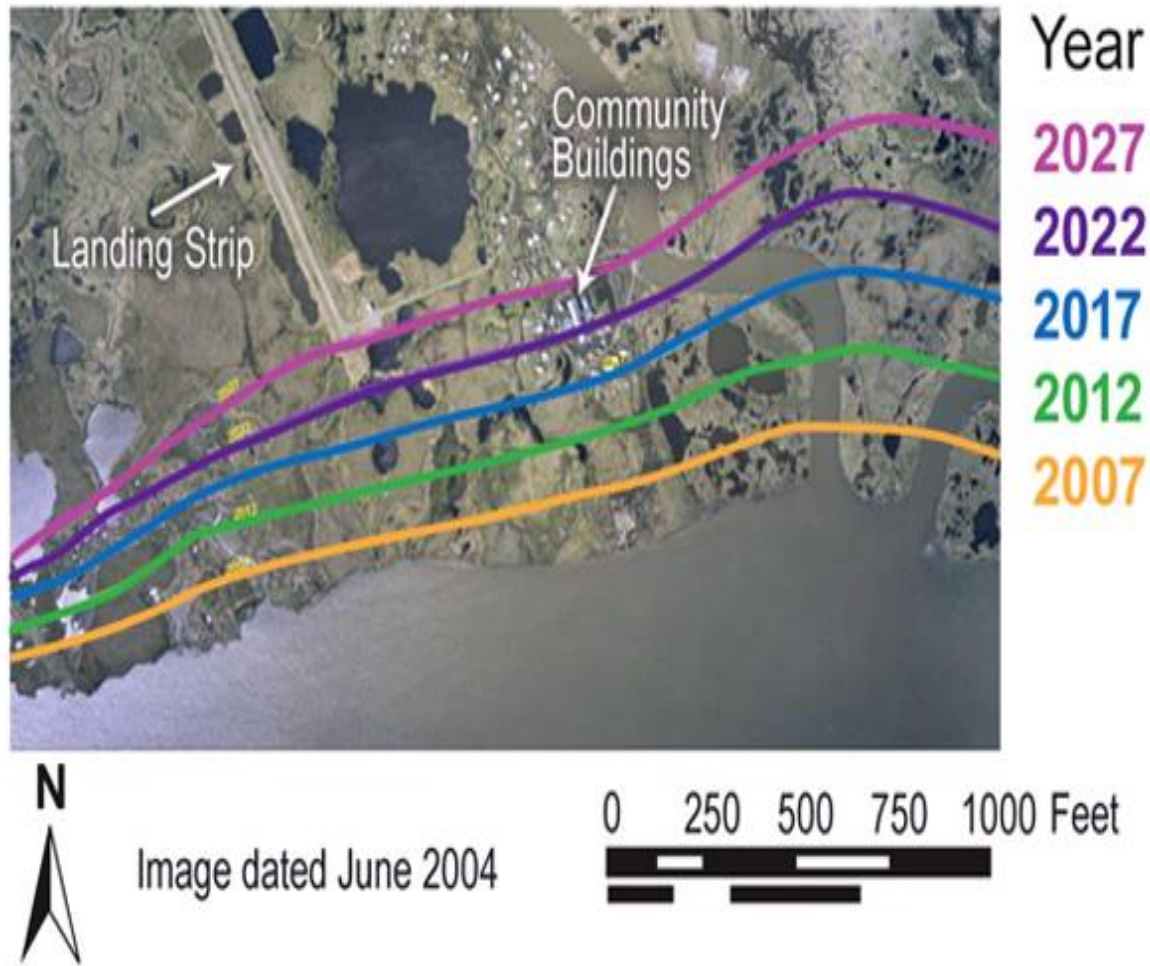


- Mann of environmental National Geographic
- Article in National Geographic magazine – “Medieval Warm Period and Little Ice Age—events that are largely absent in this record.”
- Trial in court



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Case Studies in Relocation



could become environmental refugees by 2050

Planning for New Transportation Systems



Newtok, AK
Charles Mason
NY Times
In Planning August/
September 2016

Kivalina & Steadfast- Who is Going to Move the Alaskan Tribe?

- Nuisance claim for \$ from the energy industry for flooding damage caused by climate change.
- Supreme Court passes May 20, 2013 on reconsideration of appellate dismissal.
- “...if an individual driving a car (and thus contributing to emissions) could also be a defendant, and if so, **how a court could determine who was liable**”? - CAUSATION
- Steadfast had no duty under the CGL policies issued by it to defend its insured, AES Corp., against climate change/global warming-based causes of action (Vacated, Rehearing and Reaffirmed 4/20/12)
- Steadfast: did the damage result from an “occurrence”? Answer: No (x2)
- “If an insured **knew or should have known** that certain results would follow from his acts or omissions, **there is no 'occurrence' within the meaning of a CGL policy**...”



Kivalina, Alaska



Other Evolving Legal Aspects

NFIP Reform

- FIRM Existing Flood Risk
- Technical Mapping Advisory Council
- Future flood risk

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”

NEPA

- Agency experience and expertise to determine whether an analysis of GHG emissions/climate change impacts would be useful
- “Rule of reason” to ensure that the type and level of analysis is appropriate for the anticipated environmental effects of the project.
- 8/2/16 Guidance- # on GHGEs if feasible & indirect effects

FFRMS

- Federal investments implemented through Hazard Mitigation Assistance Grants and the Public Assistance Program
- FEMA grants for construction activities in or affecting a floodplain
- Land, land use, construction for “federal projects”

Florida Laws

- Reduction of emissions to 2000 levels by 2017, to 1990 levels by 2025, and by 80% of 1990 levels by 2050.
- Florida adopted California vehicle emission standards reductions (22% by 2012 and 30% by 2016).
- Building Efficiencies/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)- wind resistance/energy efficiency initiatives for financing (future use for flood mitigation?)
- **Adaptation Action Areas (2011)**
- HB 7117 (Energy Bill- 2012)
- Virtually nothing 2013/2014
- 2015- 5 Bills Passing Related to flood insurance, wind insurance, construction standards/building codes, Citizen's insurance, **Peril of Flood (SB 1094)**

Florida's Law: How Far Does it Go?

- **Comp Planning standards on data:** “Appropriate” and “professionally accepted” data (science on GHG emissions and climate change?)
- **Types of principles in planning:** “Use ecological planning principles and assumptions in the determination of the suitability of permitted development.”
- **Its “sprawl” if:** (VIII) plan or plan amendment allows for land use patterns or timing which disproportionately increase cost in time, money or energy of providing & maintaining facilities / services, including roads, potable water.
- **“Discourage the proliferation” of sprawl if:** project incorporates a development pattern or urban form that achieves four (4) or more of the following.... (IV) promotes conservation of water and energy.
- **Conservation element:** must contain principles, guidelines and standards for conservation that provide long term goals to protect air quality ...
- **Use of mapping tools:** CHHAs and AAAs? Define and provide permissive designations of areas.

Other Authority Related to Planning

- Section 163.3177, F.S. – limit expenditures & protect human life in coastal areas
- Section 163.3178, F.S. – restrict development activities; hazard mitigation; redevelopment; coastal high hazard areas (below Cat 1 storm determined by SLOSH); levels of service for infrastructure
- Section 163.3177, F.S. requires annual reviews of the Capital Improvements Elements to update the Five-Year Capital Improvement Schedule with projects to ensure that adopted level of service standards for public facilities will be achieved and maintained for the five-year period



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



Cases have held there is no liability 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).

- Plaintiffs
Dr. James Hansen
– Alleged that the government
get out of the way of
constitutionally
an order
direction
• Defendants



Aji Piper, WA



Hazel Van Ummersen, OR



Xiuhtezcatl Martinez, CO



Sahara Valentine, OR



Levi Draheim, FL



Victoria Barrett, NY



Nick Venner, CO



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MTD

US: Your MTD is DENied

- 11/10/16 – “This change is happening for the purposes of questions before responsible for s 2) whether plain change policy in defendants to ch separation of po
- See you in court



that climate is driving it. For undisputed. The defendants are climate change, its' climate court can direct running afoul of the

Takeaways & Tips

- Climate infrastructure not be possible
- Federal programs have been critical (incentives, grants) to help communities recover, rebuild
- Data is not readily available for preparation



Key Largo,
Photo Credit Joyce Stiner

<http://resiliencyflorida.org/>



Thank You

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