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### SLIDES: Sea Level Rise: Let the Lawsuits Begin!

John P. Casey

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John P. Casey, *Sea Level Rise: Let the Lawsuits Begin!*,  
*in* CLIMATE CHANGE AND THE FUTURE OF THE AMERICAN WEST:  
EXPLORING THE LEGAL AND POLICY DIMENSIONS (Natural Res.  
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## Sea Level Rise – Let the Lawsuits Begin!

John P. Casey, Esq.  
Robinson & Cole LLC  
Hartford, Connecticut

Using the changing nature of coastal shorelines as a basis for his presentation, Mr. Casey will discuss the challenges of protecting a landowner's interest in preserving her land, while at the same time protecting the environment and respecting the natural changes that are bound to occur over time. Mr. Casey will focus on the how the application of laws designed to protect the environment - especially in cases where changes take place over time to alter the physical characteristics of the land - have limited development rights and raised claims of regulatory takings, and how the decisions in those cases might predict how courts will address climate change, and its ensuing effects, caused by man-made activities in the future.



# Sea Level Rise Let the Lawsuits Begin!

**Natural Resources Law Center, University of Colorado School of Law  
Climate Change and the Future of the American West:  
Exploring the Legal and Policy Dimensions**

**Climate Change and its Implications for  
Land Use Planning and Transportation**

**John P. Casey, Esq.  
Robinson & Cole LLC  
Hartford, Connecticut**



Why a  
coastal lawyer?

● ● ● | “Climate Change and the Future of the American West”



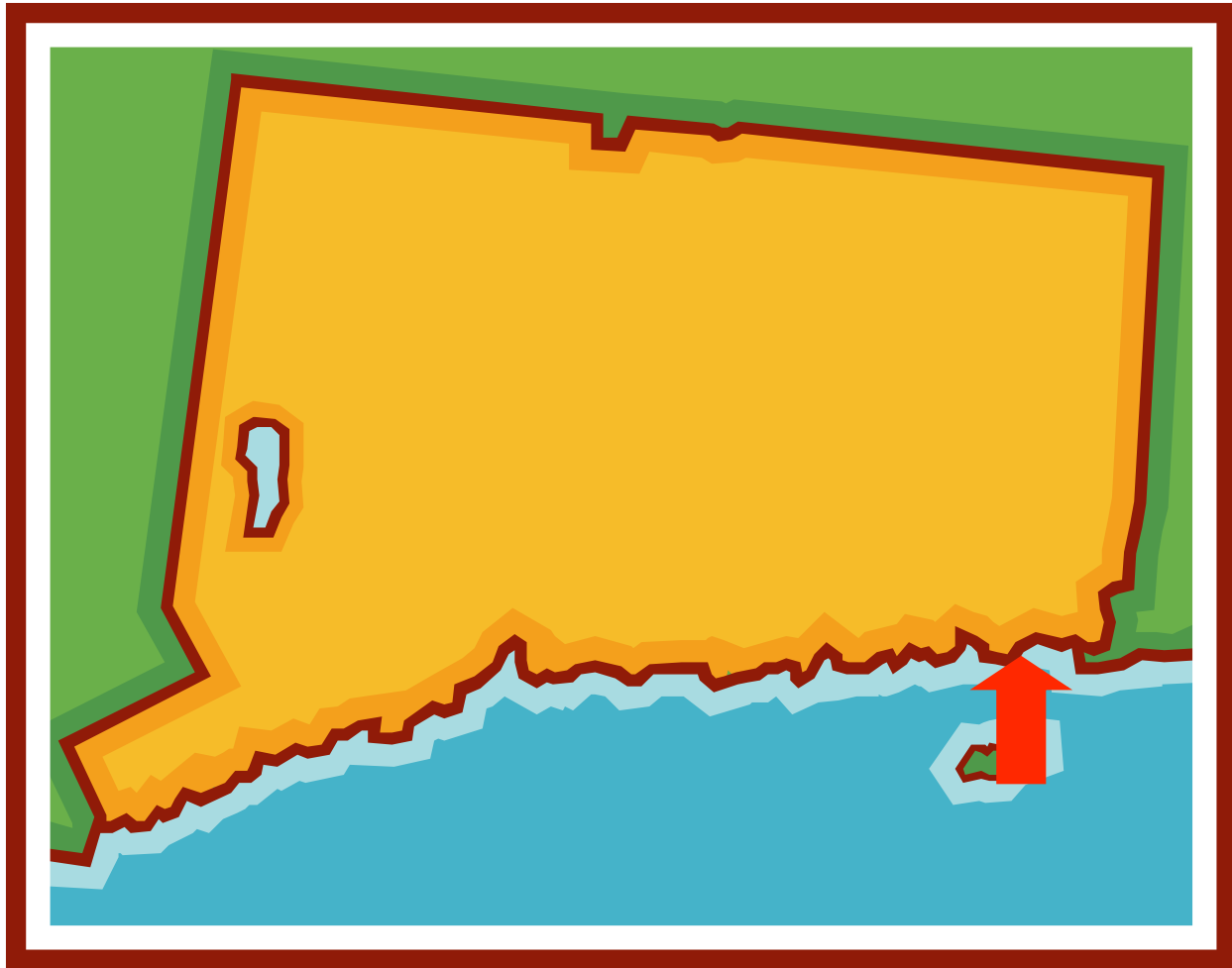


I am here





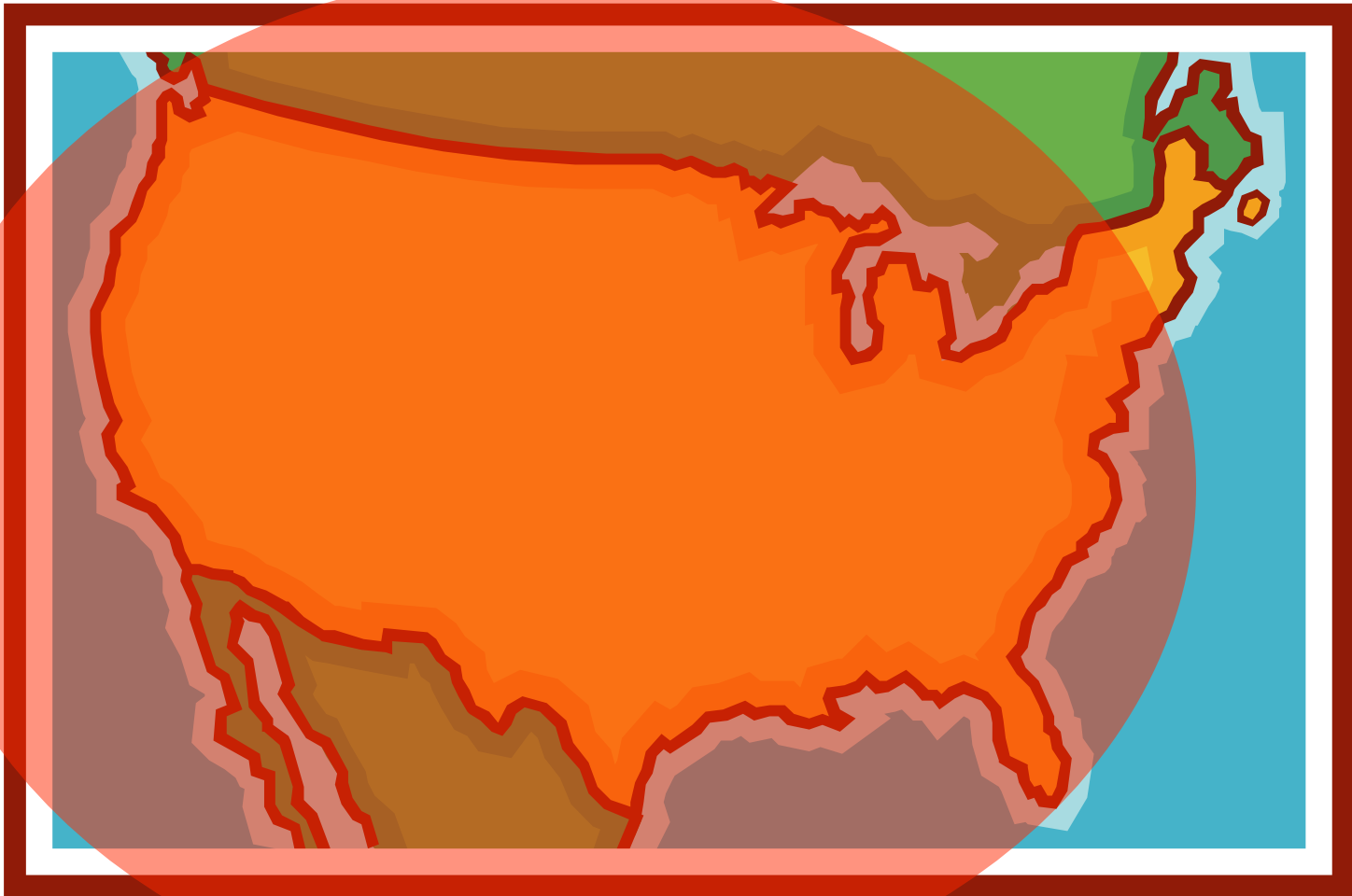
# Closer view







To me, this is the West



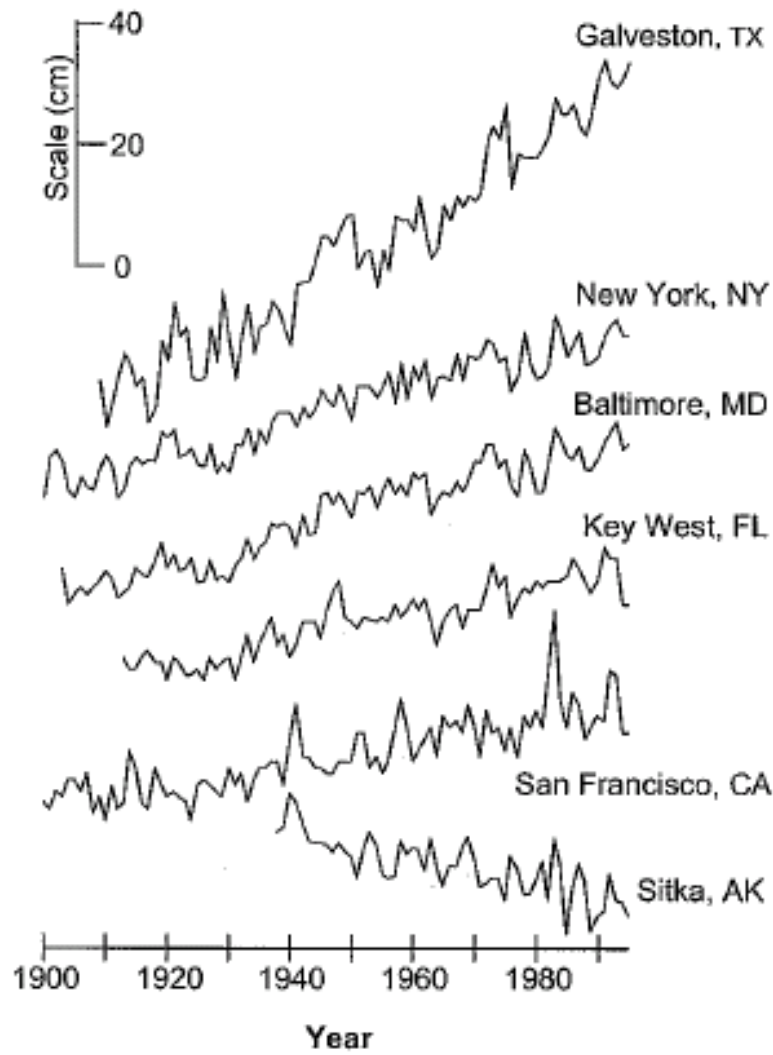


# Coastlines

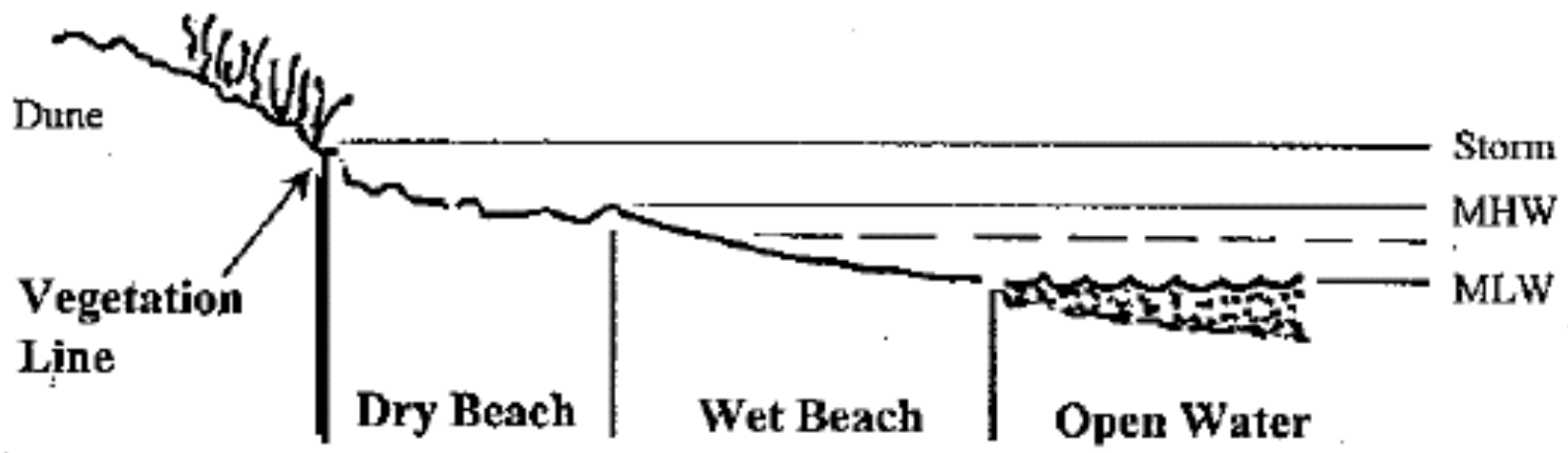
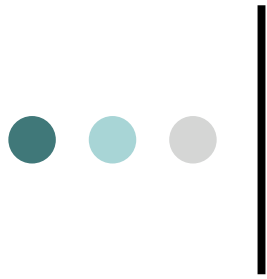
- Dynamic – affected by nature and man
- The public has an established interest in this natural resource
- Already considered by the courts
- Methods developed to respond to planning issues caused by coastline changes could be adapted to deal with other climate change effects



## U.S. Sea Level Trends: 1900-97

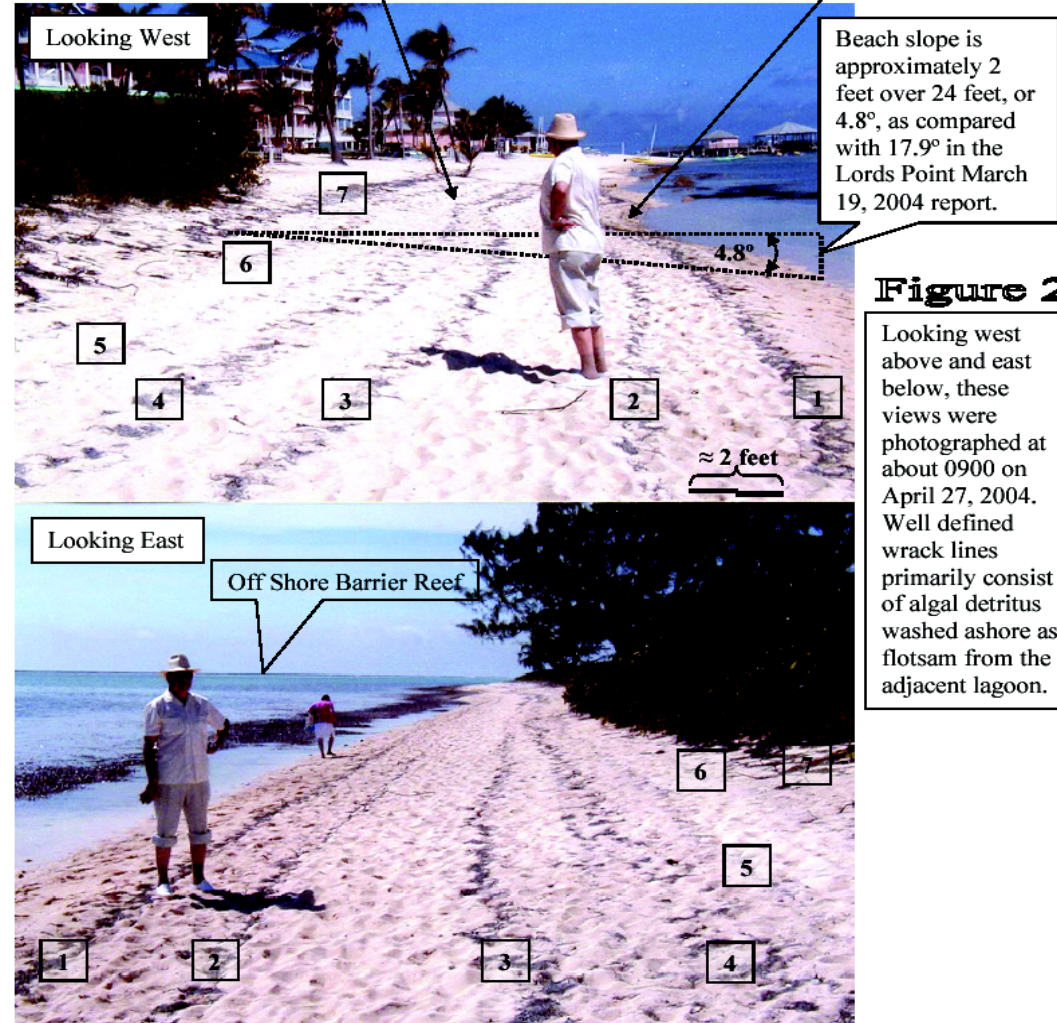


Source: National Oceanic and Atmospheric Administration.



## Findings

The low profile sand beach of small tropical islands is an ideal laboratory for the study of wrack lines. There, the pure oceanic tide of approximately 1 foot separates relatively minor flotsam deposits carried by each tidal cycle such that these wrack lines are clearly separable. There were no storms reported for several weeks preceding these reported observations. Note how regularly each parallel wrack line is distributed. One low tide scour resulted in a slight 3 foot translocation of wrack lines 3 and 4, depicted below.



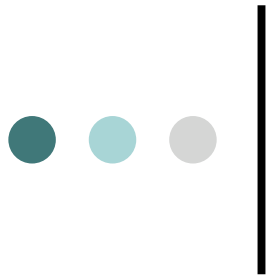


Figure 2 – June 15, 2002 1502 hrs  
MHW – 1315 hrs

Highest distinct wrack deposit.

Estimated Mean High Water.



# Public Trust

- Shorthand, catchy, simplistic
- Belies complex history of public's interest in property



# Public Trust - History

- Ancient

“By the law of nature these three things are common to mankind – the air, running water [and] the sea”

- Justinian Institute 2.1.1





# Public Trust – History, con't

- Magna Carta

“(47) All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated similarly. ”



## Public Trust – Caselaw

- *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892)

“The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils underneath them ... than it can abdicate its police powers in the administration of government and the preservation of the peace.”



# Public Trust – Resources

- Largely navigable waters and tidelands
- But has been extended to broader natural resource and environmental and even historic structures and places



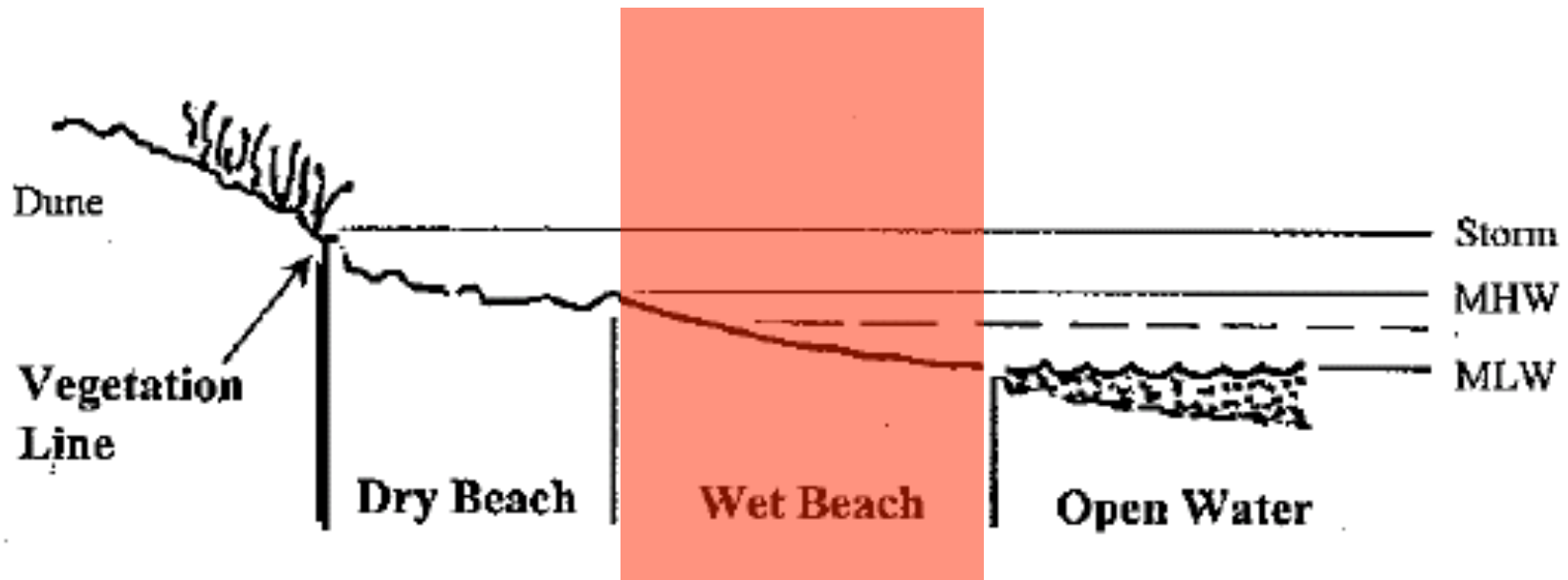
## Public Trust – Connecticut

- *Water Street Associates Ltd. Partnership v. Innopak Plastics Corp.*, 230 Conn. 764 (1994)

In Connecticut, “[i]t is well established that ... the state, as the representative of the public, is the owner of all land between the high and low water marks upon navigable waters, ...”



# Public Trust – Connecticut





# Public Trust – Concepts

- Public has many interests in public (and private) lands
- These interests are often “indelible”
- Cannot be “erased” when public property is transferred or private property purchased



## Public Trust – Natural Effect

- Rising sea level may create public interests in private lands

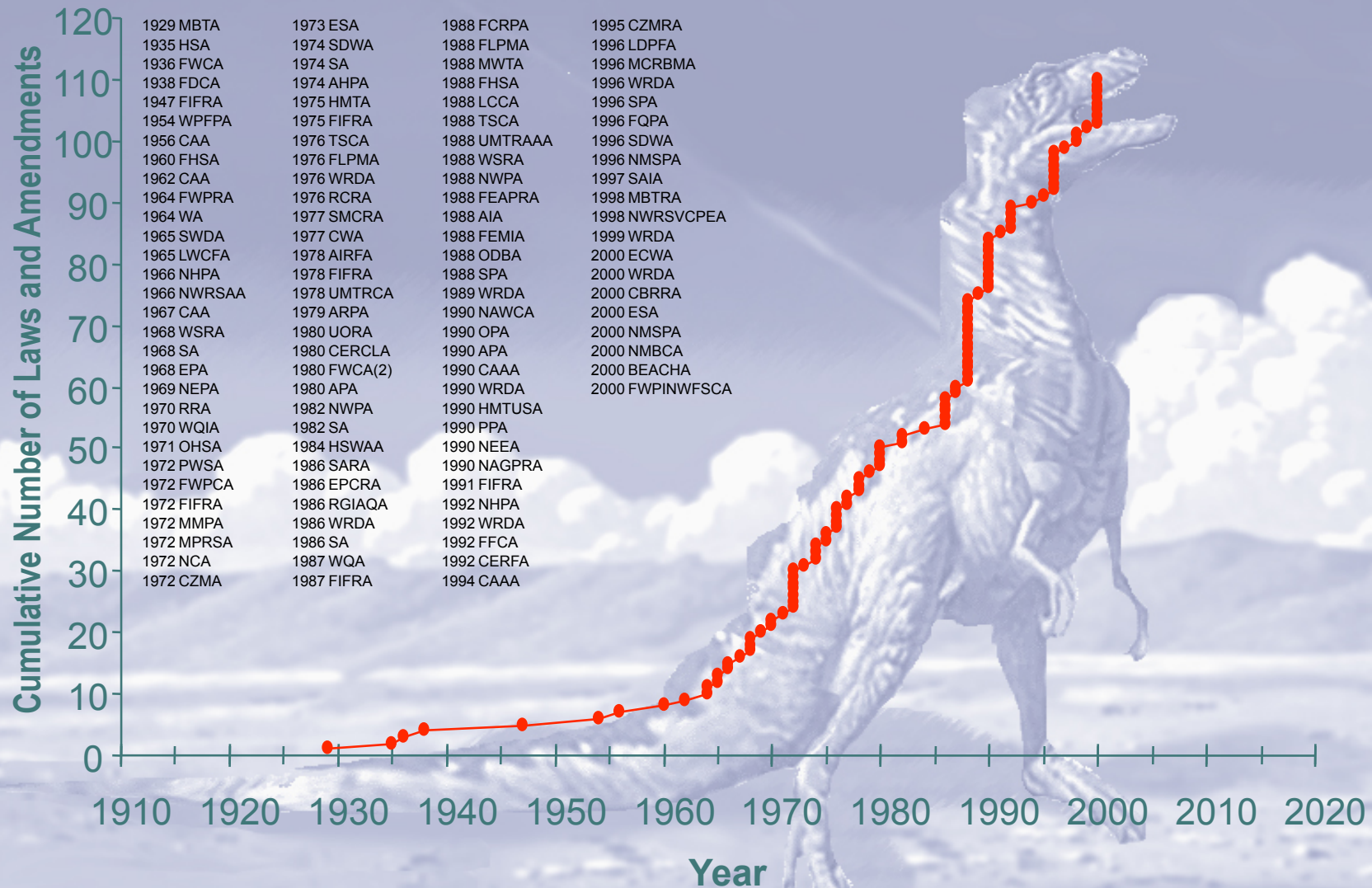


# Statutes and Regulations

- Federal
- State
- Local
- Caveat: *This is not meant to be all encompassing!*



# Federal Environmental Legislation





# Coastal Zone Management Act of 1972

- Voluntary partnership between the federal government and U.S. coastal states and territories
- 34 coastal states and 5 island territories have developed CZM programs
- These programs protect more than 99 percent of the nation's 95,331 miles of oceanic and Great Lakes coastline
- CZM programs focus on balancing often competing land and water uses while protecting sensitive resources

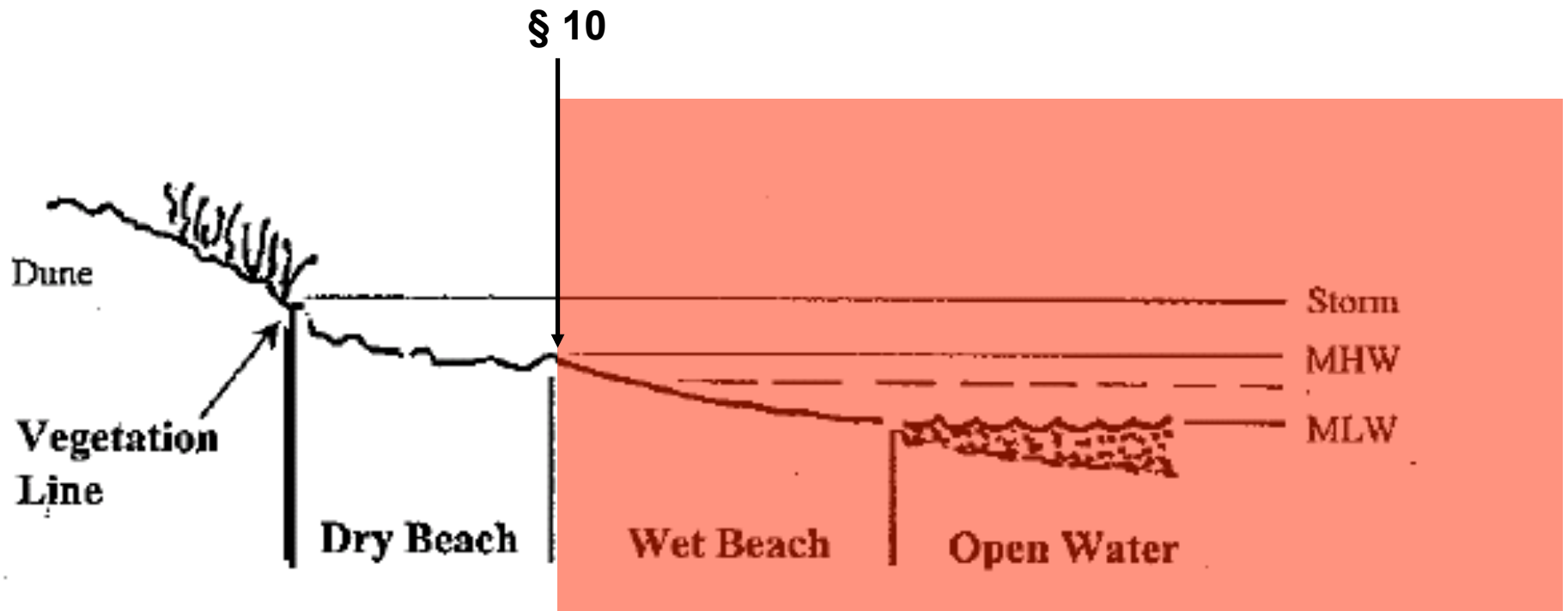


# ACOE Regulatory Jurisdiction

- Section 10, Rivers & Harbors Act, 33 U.S.C. § 403
  - Jurisdiction: navigable waters up to the ***Mean High Water Line***
- Section 404, Clean Water Act, 33 U.S.C. § 1344
  - Jurisdiction: tidal waters up to the ***Mean High Tide Line*** or to the limit of adjacent wetlands

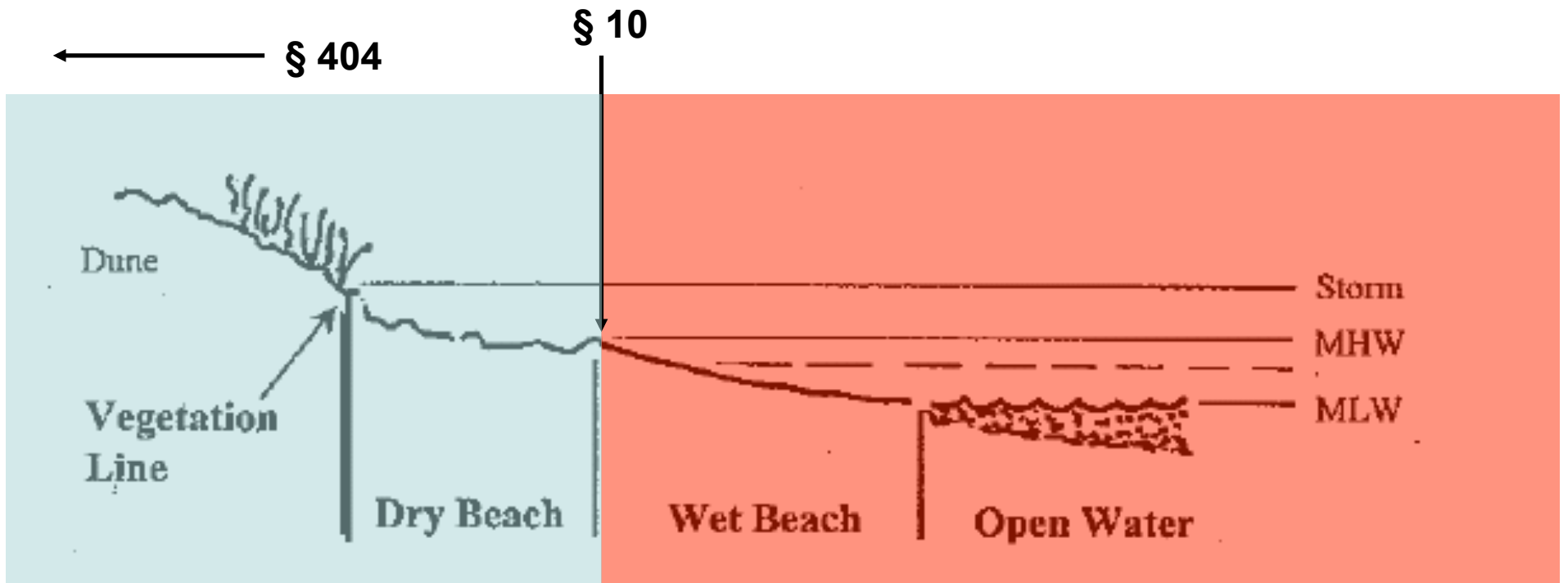


# ACOE Regulatory Jurisdiction





# ACOE Regulatory Jurisdiction





# CT Regulatory Jurisdiction

- Structures, Dredging & Fill Act, C.G.S. 22a-359 *et seq.*
  - Jurisdiction: ***High Tide Line***
- Tidal Wetlands Act, C.G.S. § 22a-28 *et seq.*
  - Jurisdiction: areas which border on or beneath tidal waters, including areas now or formerly connected to tidal waters and whose surface is at or below an elevation of 1 foot above ***Local Extreme High Water***, and which may be vegetated or capable of growing tidal wetlands plants

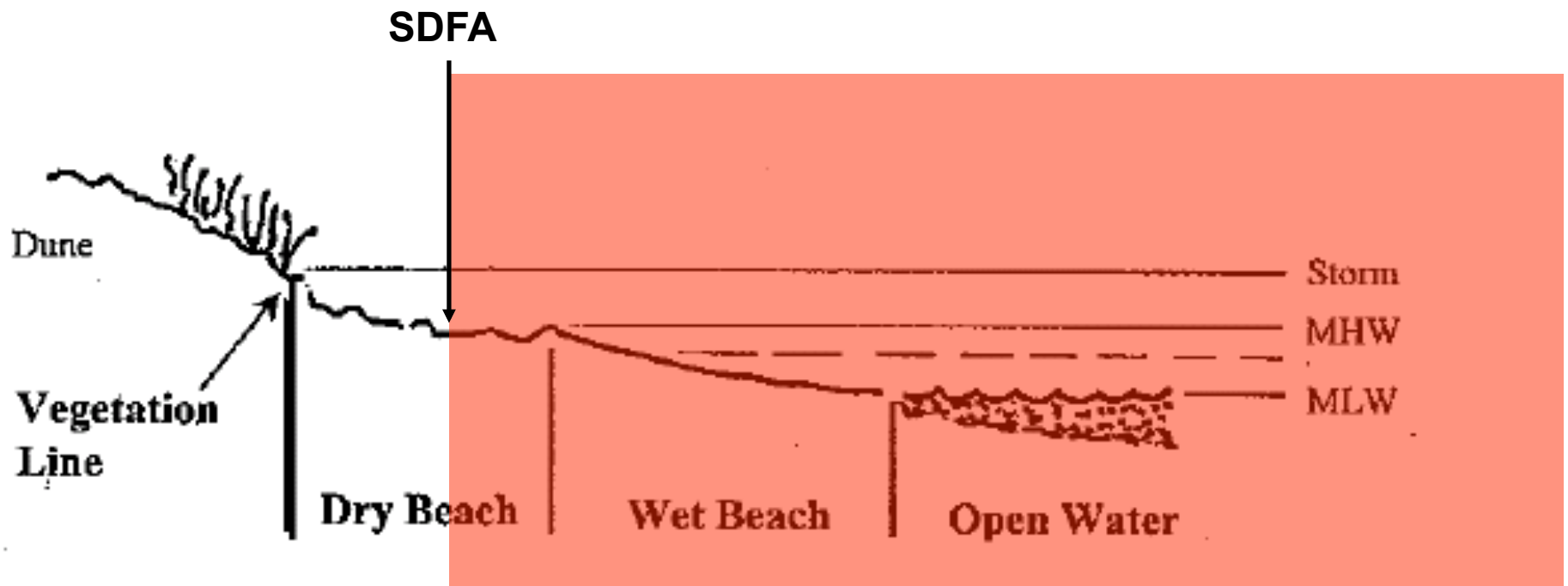


# CT Regulatory Jurisdiction

- Coastal Management Act, C.G.S. § 22a-90 *et seq.*
  - Regulates all development within the Coastal Boundary
    - 100 year flood boundary
    - 1000 foot linear setback measured from ***Mean High Water Line*** or the inland boundary of tidal wetlands, whichever is furthest inland



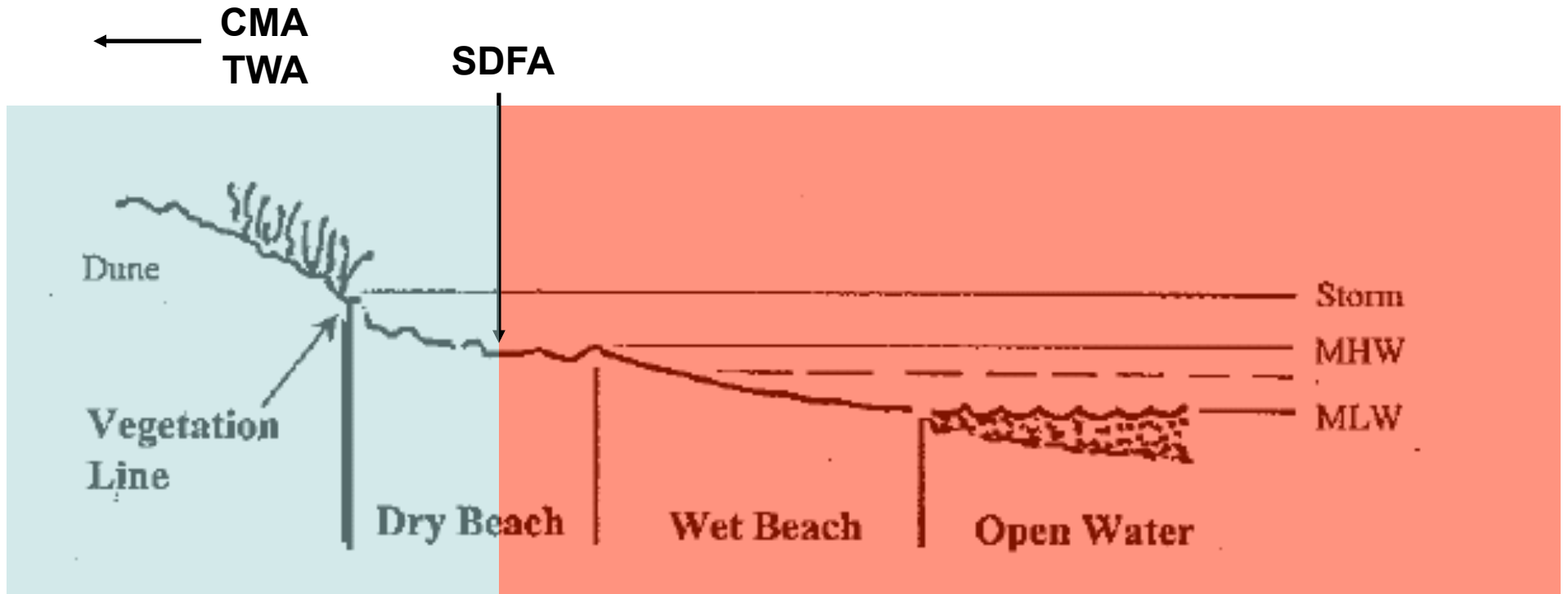
# CT Regulatory Jurisdiction







# CT Regulatory Jurisdiction





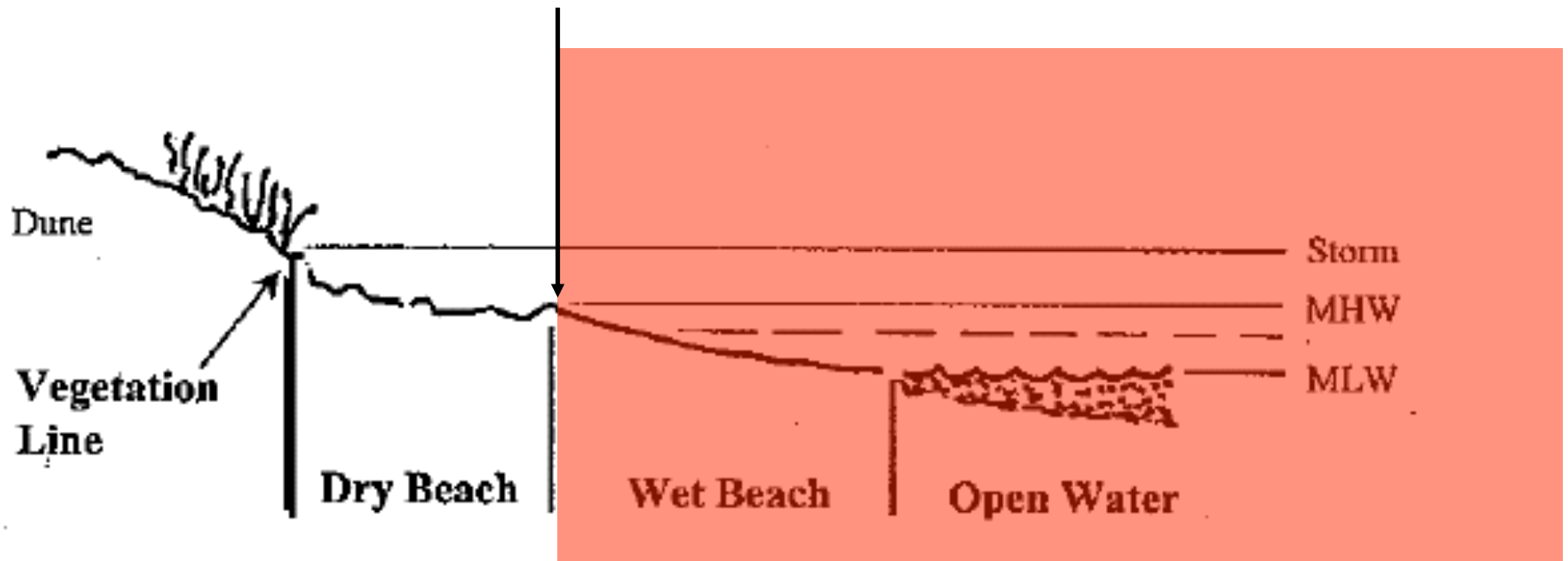
# FEMA Regulatory Jurisdiction

- Floodplain Management Regulations, 44 CFR § 60.1
  - Require municipalities to maintain certain zoning regulations and standards in order to remain part of the Federal Flood Insurance Program
  - In coastal high hazard areas (“V Zones”), all new construction within any of the V zone must be located landward of the reach of the ***Mean High Tide Line***
  - Municipalities can implement more stringent requirements



# FEMA Regulatory Jurisdiction

No new construction below MHW



TODAY



Your proposal to fill the wetlands violates the Public Trust Doctrine, the Tidal Wetlands Act, and §404 of the Clean Water Act!



ABC DEVELOPMENT



REJECT

BUT...  
THIRTY YEARS  
LATER



MUCH  
BETTER!



Some  
FISH!

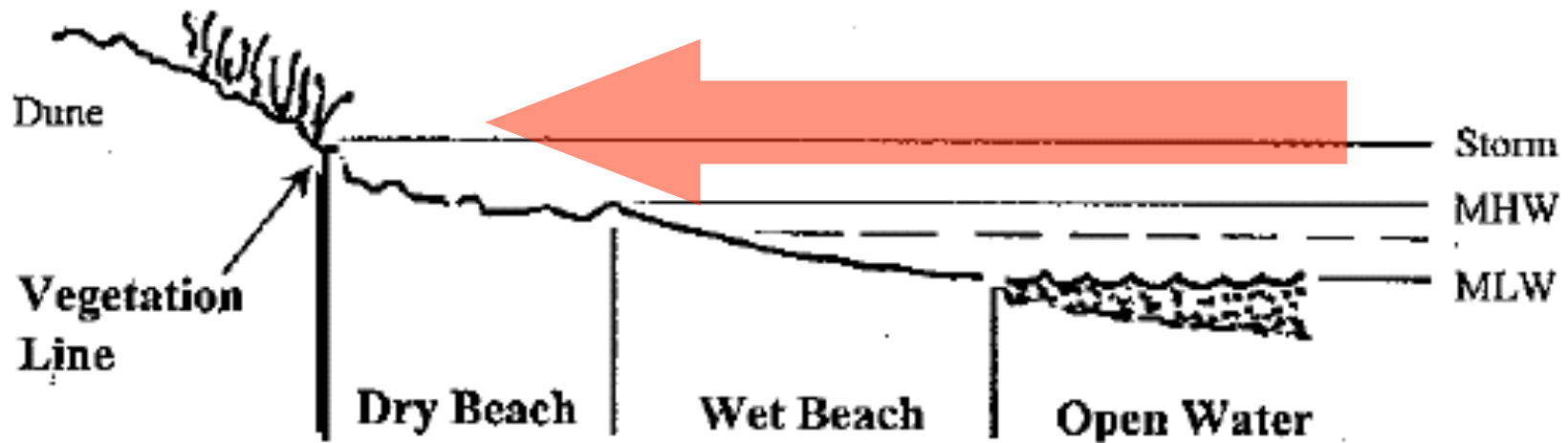


## Issue – How to Regulate without Taking Private Property

- Property owners expect to be able to use and develop their land
- Governments want to protect natural resources, protect the public trust, and protect other landowners
- Does it matter if the jurisdictional boundary line changes due to an act of nature or an act of man?



How far can the line move in?





# Coastlines Change

- Historically, because of nature
- Recently, because of man



# Coastal Development

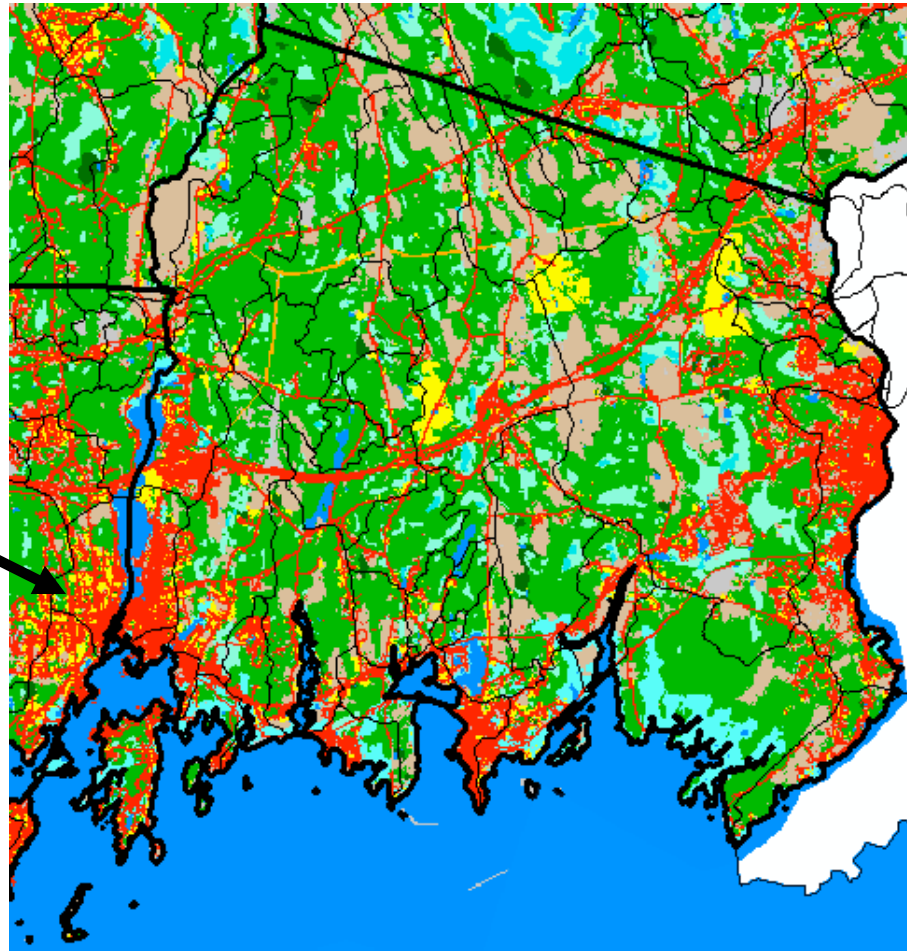
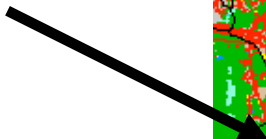
- 153 million people (53% of the population) live in 673 U.S. coastal counties (17% of all U.S. land area)
  - An increase of 33 million people since 1980
    - Source: NOAA, *Population Trends Along the Coastal United States: 1980-2008*, September 2004





# Southeast CT Land Cover

Mystic



Source: Center for Land Use Education  
and Research, Univ. of Connecticut

● ● ● | Westport, CT  
Saugatuck River – 1934





● ● ● | Westport, CT  
Saugatuck River - 1951



● ● ● | Westport, CT  
Saugatuck River – 1965





● ● ● | Westport, CT  
Saugatuck River – 1970



● ● ● | Westport, CT  
Saugatuck River – 1934





# Why is regulation important?

- To Protect the Environment
  - In Connecticut, it is estimated that as much as 90% of the tidal wetlands in the state have been lost due to filling, dredging and similar activities
- To Protect Life and Property
  - FEMA estimates that floodplain management regulations prevented over \$1.1 billion annually in flood damage



# Is it a Taking?

- Three Cases

- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)
- *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)
- *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, *cert. denied*, 540 U.S. 982 (2003)





## *Lucas v. South Carolina Coastal Council*

- A taking occurs when a property owner is denied all economically beneficial uses of land
- A state cannot defend the regulation by simply relying on “the legislature’s recitation of a noxious-use justification”



## *Lucas* – con't

- In order to support its regulation, a state must identify “background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is now found.”
- The legislation was enacted after Lucas bought the lots



## *Lucas* – con't

- What are *background principles of nuisance and property law*?
  - The degree of harm to public lands and resources or adjacent private property
  - The social value of the landowner's activities and their suitability to the site
  - The relative ease with which the alleged harm can be avoided through measures taken by the landowner and the state



## *Palazzolo v. Rhode Island*

- Palazzolo acquired “full” interest in 18 acres of coastal wetlands after statute to protect tidal wetlands was enacted
- Court found that post-enactment acquisition is not an absolute bar to a taking challenge
- Court agreed with lower court that because Palazzolo retained at least \$200,000 in development value (6.4% of \$3.15 million claimed loss) he was not deprived of “all economically beneficial use”



# *Palazzolo* – The Site





## *Palazzolo* – con't

- Court did not address the “relevant parcel” problem, i.e., should a court consider the entire parcel or just that portion subject to regulation
- The Case was remanded to consider the *Penn Central* multi-factor takings analysis



## *Palazzolo* – con't

- Court did not decide at what time a legislative act becomes a *background principle of state law* under *Lucas*
- Background principles may include
  - an existing general law; or
  - “common, shared understandings of permissible limitations derived from a State’s legal tradition”



## *McQueen v. South Carolina Coastal Council*


- An example of private lands lost to the imposition of public interest as a result of sea level changes



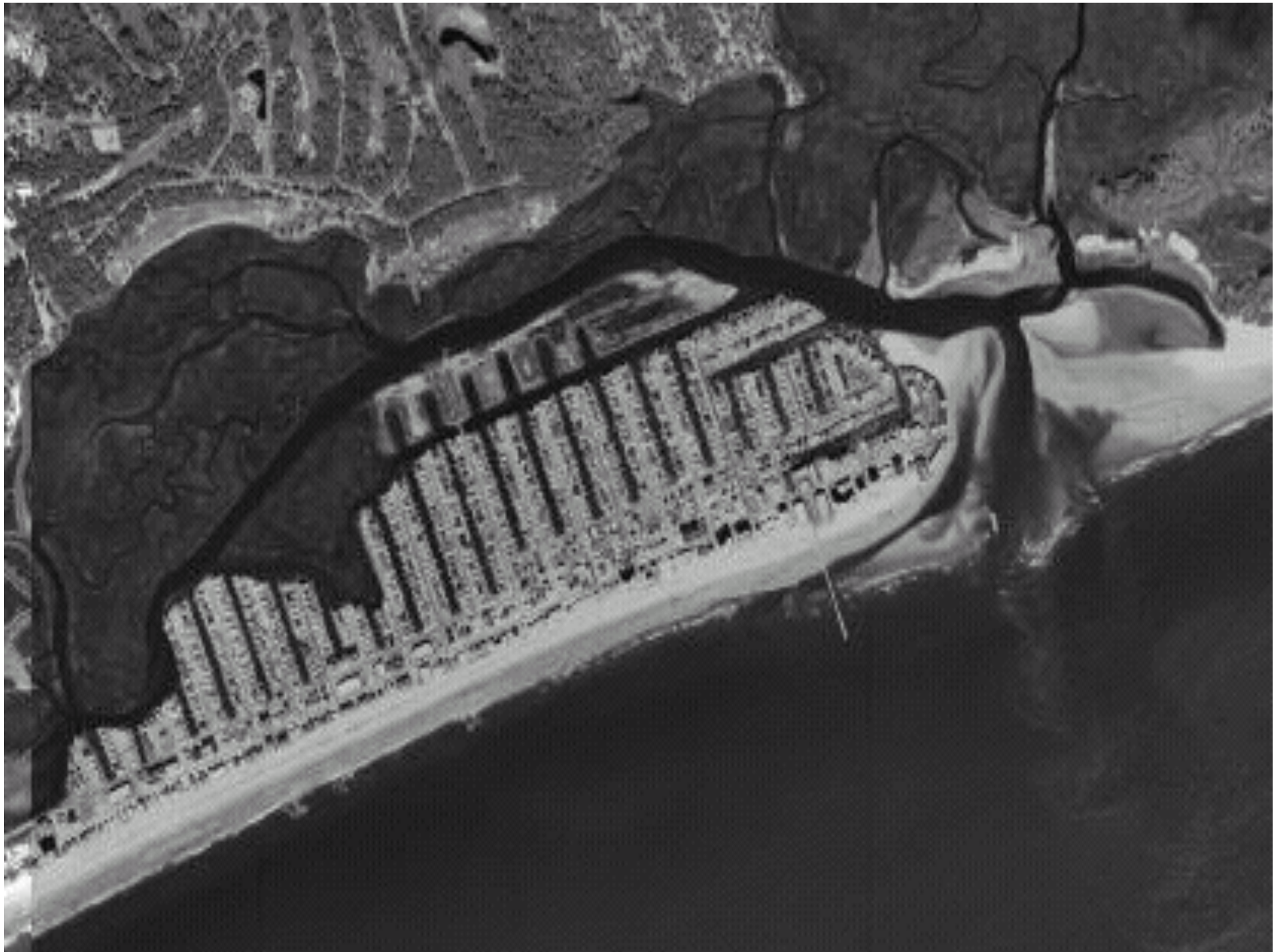


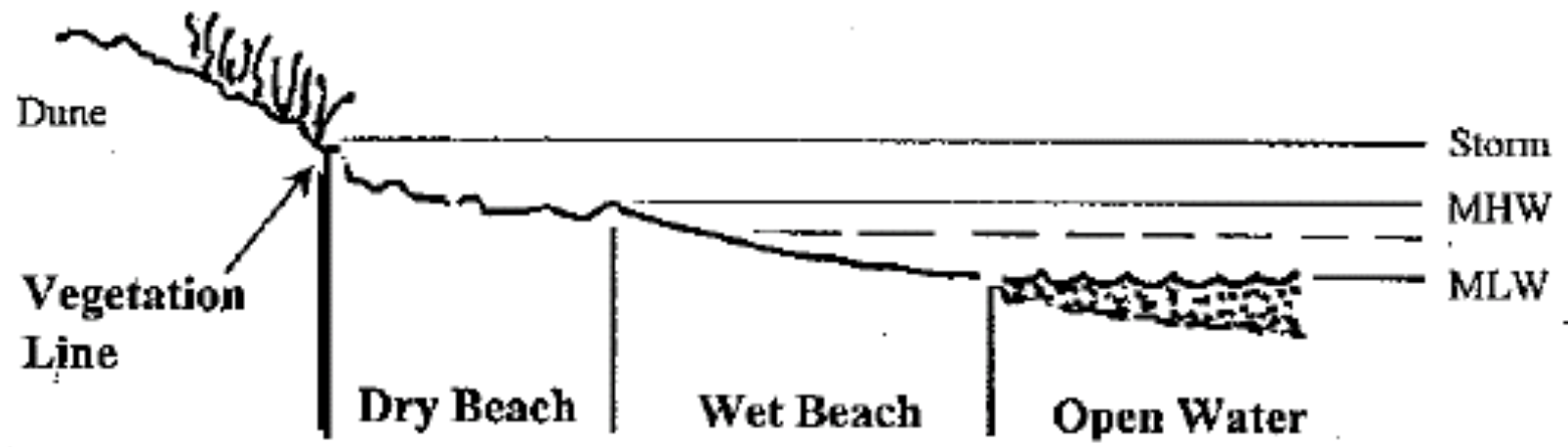
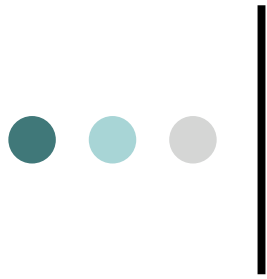
## *McQueen* – History

- Purchased lots in 1961 and 1963.
- Submitted to Coastal Council in 1991; resubmitted in 1993; denied.
- Lots surrounding improved with seawalls
- By the time Sam McQueen applied for seawalls, his lots had “reverted to tidelands or critical area saltwater wetlands.”
- Eventually, roads will need to be bulkheaded to be protected.



48th Av N, north myrtle beach, SC







## *McQueen* – Issues

- Is denial of Sam McQueen's application for a bulkhead and fill a compensable taking?
- When sea level rise converts upland to subtidal land, will there be legitimate takings claims?



## *McQueen* – Ruling

- “First, we accept as uncontested that McQueen’s lots retain no value and therefore a total taking has occurred.”



## *McQueen* – Ruling

- “Historically, the State holds presumptive title to land below the high water mark. ... The State’s presumptive title applies to tidelands.”



## *McQueen* – Ruling

- “Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State’s presumptive title to tidelands.”





## *McQueen* – Ruling

- “Any taking...is...by the forces of nature and McQueen’s own lack of vigilance in protecting his property.”



# A Few Real World Examples



# Rowayton, Connecticut





# Rowayton, Connecticut







# Fairfield, Connecticut





# Fairfield, Connecticut





**What to do?**



# Disclaimer

- *A word from my sponsors... this commentary, to the extent it may be misinterpreted as opinions, has nothing to do with my clients past, present or future...*





## What to do?

- Stop development in the wrong places; especially, stop bulkheading.



# What to do? – con't

- Set the rules of the game in advance.
  - Life estates
    - Two or three generations
    - Defeasible when sea level rises
  - Extinguished approvals
  - Gifts
  - Eminent domain of full or partial interests



# What to do? – con't

- Compensable regulation
  - Landowner enters a covenant with the government to keep land undeveloped
  - Landowner maintains the property and receives compensation only when the land is sold
  - Government must pay the difference between the sale price of the land and the assessed market value if the land did not have a 'no-development' restriction



## What to do? – con't

- Prevent the rebuilding of structures on some lots
  - Freezing development rights
  - No compensation for the public increment
  - Need enough money to fill in the big gaps



## What to do? – con't

- There is something to be said for a “wait and see” attitude



The End