S.O.S. Maine

Annual Meeting

July 12, 2008

John Delahanty

William Taylor

TOPICS FOR DISCUSSION

1. Sand Dune Regulation
2. Rights of Private Property Owners
3. Takings
4. Public Access
5. Beach Nourishment
6. Federal Flood Insurance

Sand Beach/Dune Resource

- Only about 1% of Maine's coastline is sand beach
- 40 miles of sand beach; 20 miles owned by public
- 50% of beach length is armored
- 10% of beach is highly erosional (2 feet per year)
- Highly valuable recreational resource
- Endangered and threatened species -- Piping Plover and Least Tern

Sand Dune Regulation

Dunes are Regulated Under NRPA and NRPA Implementing Regulations

DEP Chapter 355 first adopted 1983; several subsequent amendments.

Key provisions:

- Prohibitions on construction in frontal dunes -- exceptions
- Storm damage reconstruction
- Sand and water movement standard
- Variances

Beach Property Damage Before Rules

Erosion undermines homes at Hunnewell Beach, Phippsburg

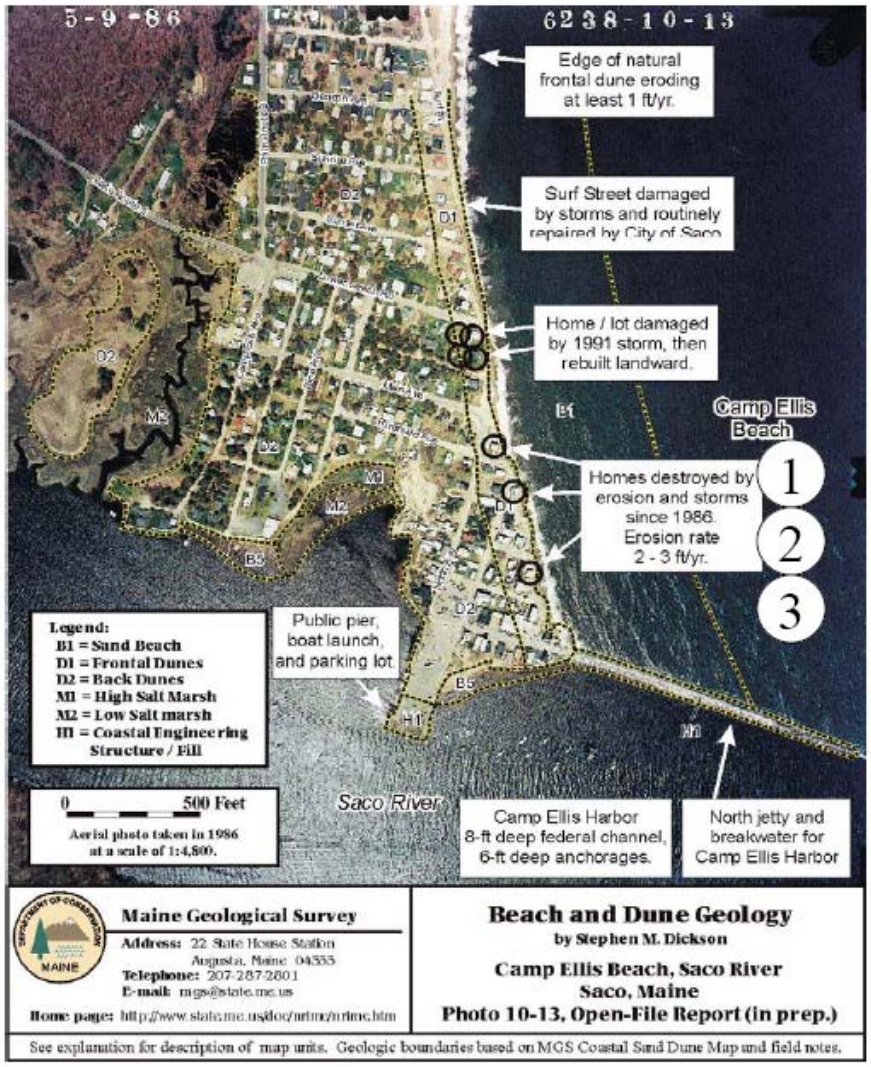
J. T. Kelley, 1976

1976 beach erosion at Hunnewell Beach, Phippsburg

L. K. Fink, 1976

Prior to the Sand Dune Rules about 40 structures collapsed on various beaches and were not rebuilt (in a time without rules). At least 20 houses at Camp Ellis in Saco, 10 houses and a hotel in Popham, and a hotel at Higgins Beach in Scarborough have been destroyed by storms in the last century.

Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.



Three Homes Damaged >50%

Since the 1983 Sand Dune Rules went into effect, 3 homes in Saco were the only ones in Maine damaged by >50%. They were not rebuilt nor were the rules challenged in court. Three other houses, one in Saco and two at Popham Beach, were damaged <50% by waves and each was rebuilt farther inland.

Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.

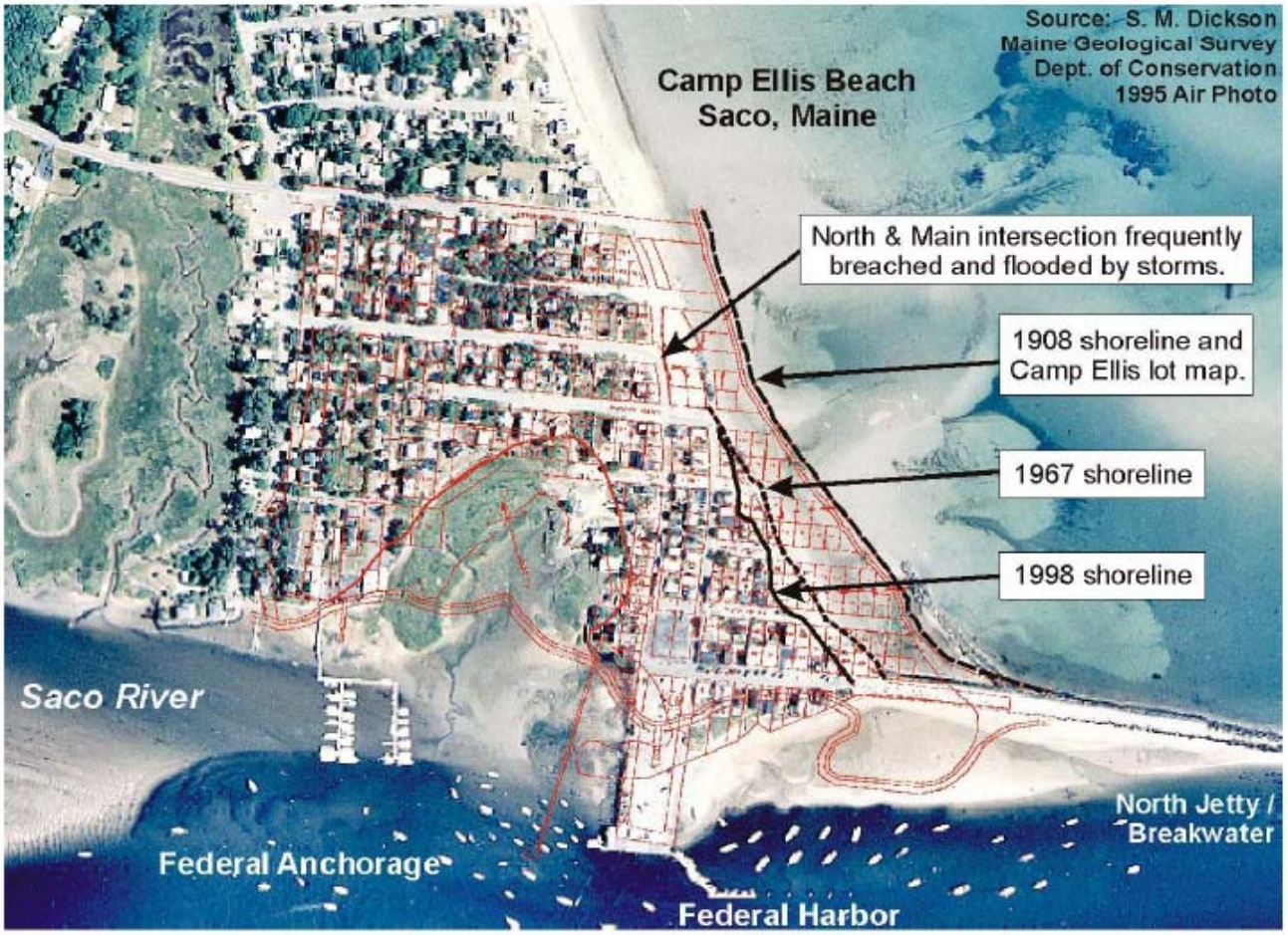
Camp Ellis Damage >50% (1 & 2)

Erosion undermines homes at Camp Ellis Beach in Saco

Surf and chronic erosion threaten the Camp Ellis neighborhood. The two homes in the left photo were destroyed (>50%) by different storms. The house on the left was behind a seawall; the one on the right was not. Neither building was rebuilt. MGS File Photos by S. M. Dickson, left 1986 and right 1990.

Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.

Camp Ellis Property Loss



Over 30 properties have been lost in less than 100 years. Historical lot map modified from Appendix E of the Saco Bay Regional Beach Management Plan, 2000. Shorelines mapped in 1998 by the Saco Bay Beach Erosion Committee.

Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.

Surf Street, Saco

Surf Street in Saco is landward of rip rap. The street is regularly damaged by storms and repaired by the City of Saco. MGS File Photo by P. A. Slovinsky, 2003.

Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.

Sea Level Rise Assumptions

- 2 foot rise over the next 100 years
- IPCC 2001 projects 0.5 meter (1.5 foot) rise by 2100
- City of Portland Tide Gauge 6 inch rise -- 1912-2002
- MGS demonstration project
- 2 foot rise -- MHW
  - Water level at base of seawalls at Wells Beach
  - Flooding of parking lot on Drakes Island
  - Intersection of Eaton Avenue and Drakes Island Road

Sea Level Rise (continued)

- At Highest Annual Tide
  - Extensive flooding -- both sides of Drakes Island Road and Causeway

- No Flooding of Oceanfront Properties Anticipated at 2 Foot HAT -- Some Lots Along Beach Road
  - However, does not take into account 1-3 foot additional water levels from stormwater and waves

Figure 3. Existing conditions within the study area. Marsh areas (below HAT) are dominated by high marsh (area between MHW-HAT), which accounts for 24% of the study area, while upland areas (no colors) account for approximately 48% of the study area. Low marsh (between OW-MHW) and open water areas account evenly for the remaining 28%.

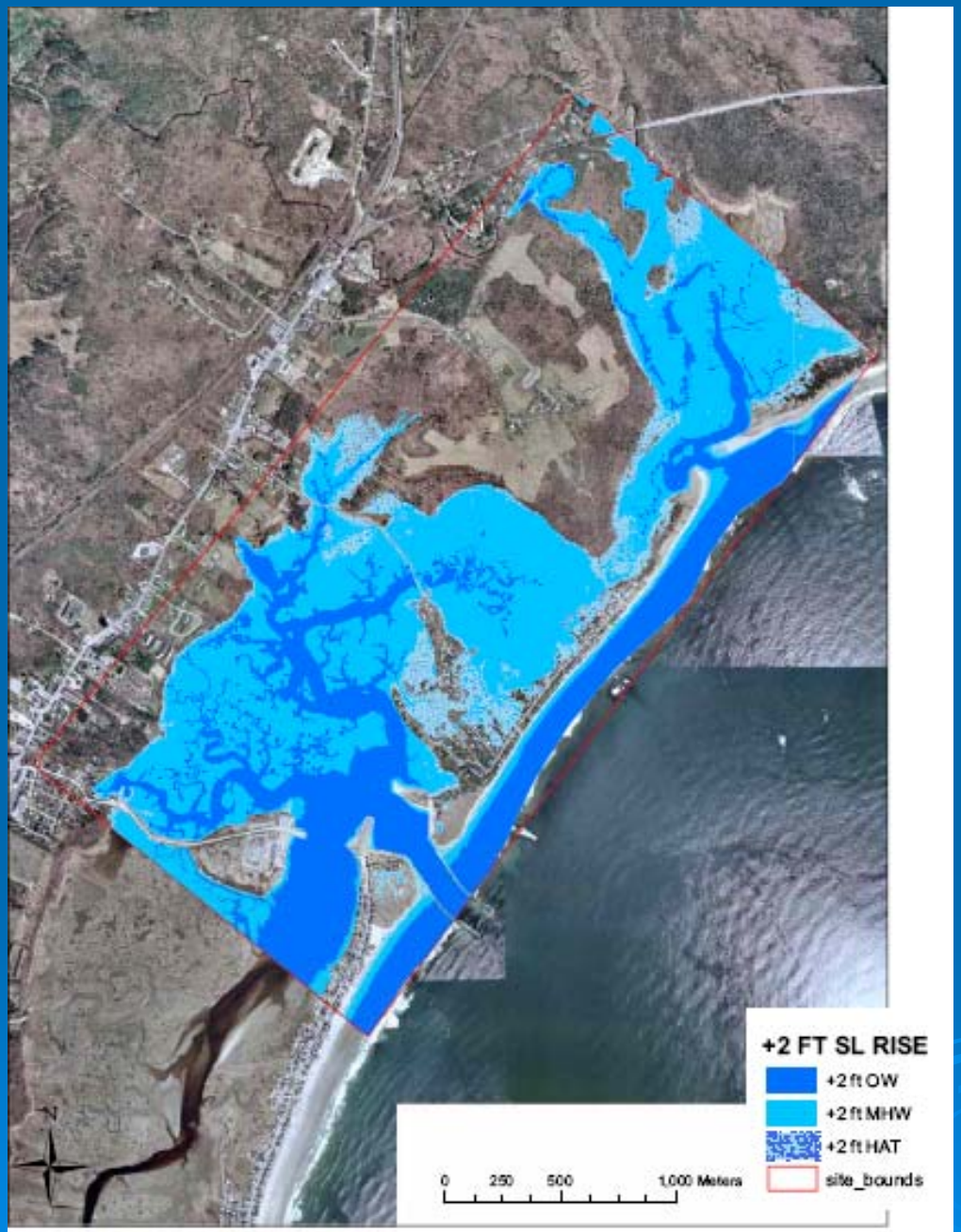
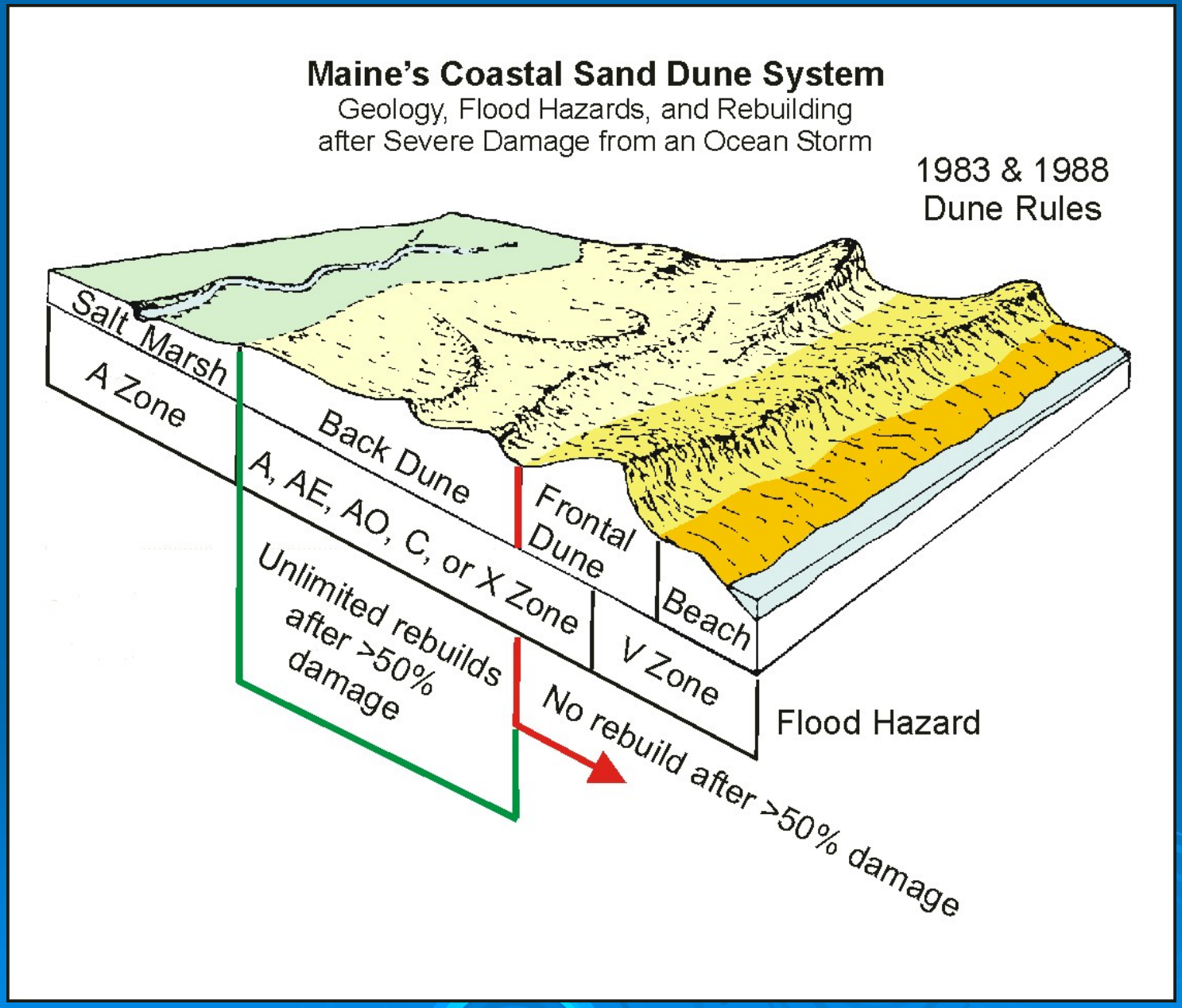


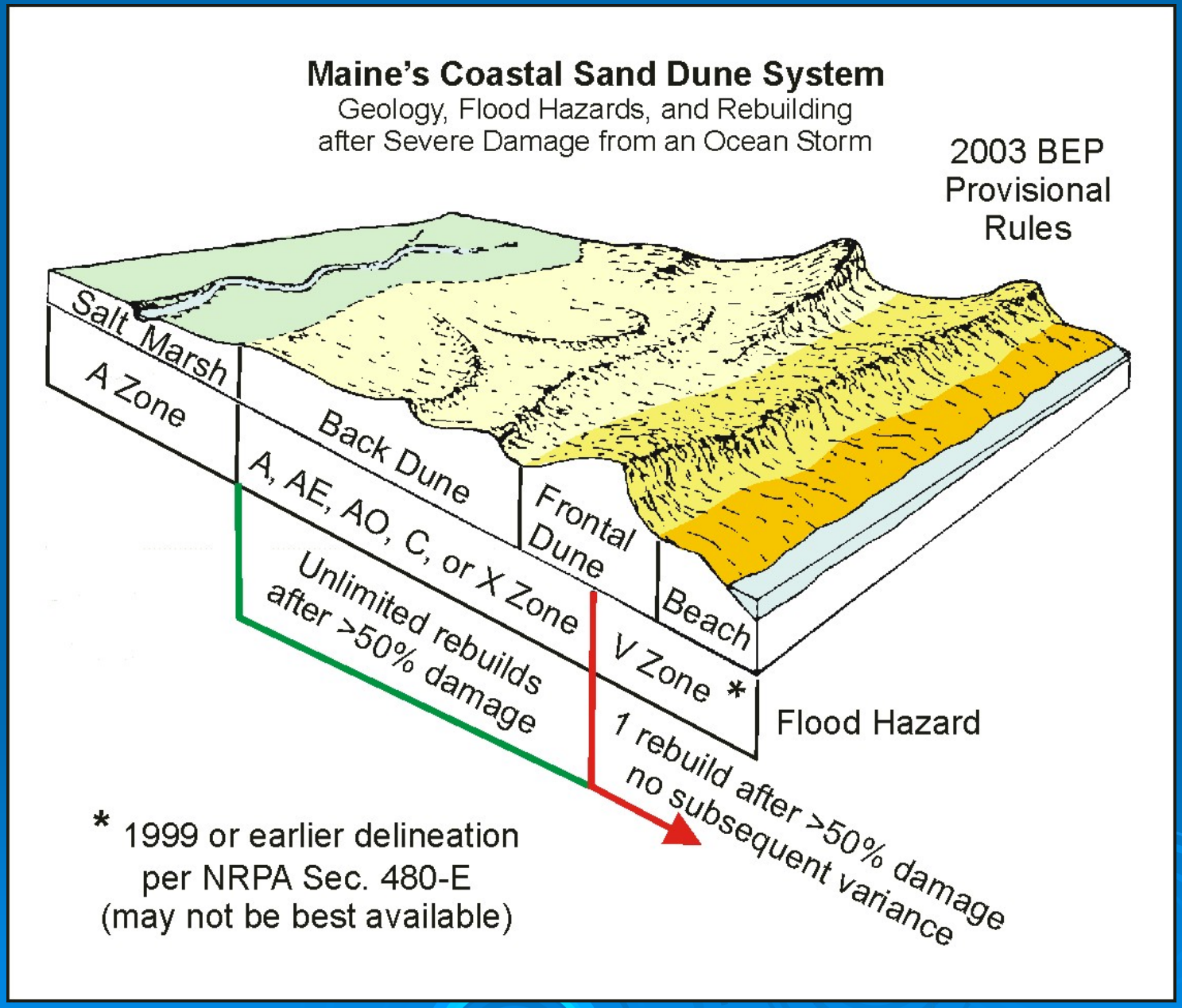
Figure 5. Conditions after a simulated 2 ft static rise in sea level. The low marsh (MHW) continues to overtake the high marsh areas, which is beginning to pinch out along steeper topography. Open water is now 19% of the study area, while low marsh comprises over 33%. Uplands have decreased to about 39% of the study area.

Figure 13. Simulated flooding of Drakes Island with 2 ft sea level rise at HAT conditions. Note that the causeway (Drakes Island Road) is now flooded. More extensive flooding occurs along the central portion of Drakes Island Road, Shady Lane, Eaton Avenue, and down Grove St. Isolated lots along Island Beach Road also undergo flooding.

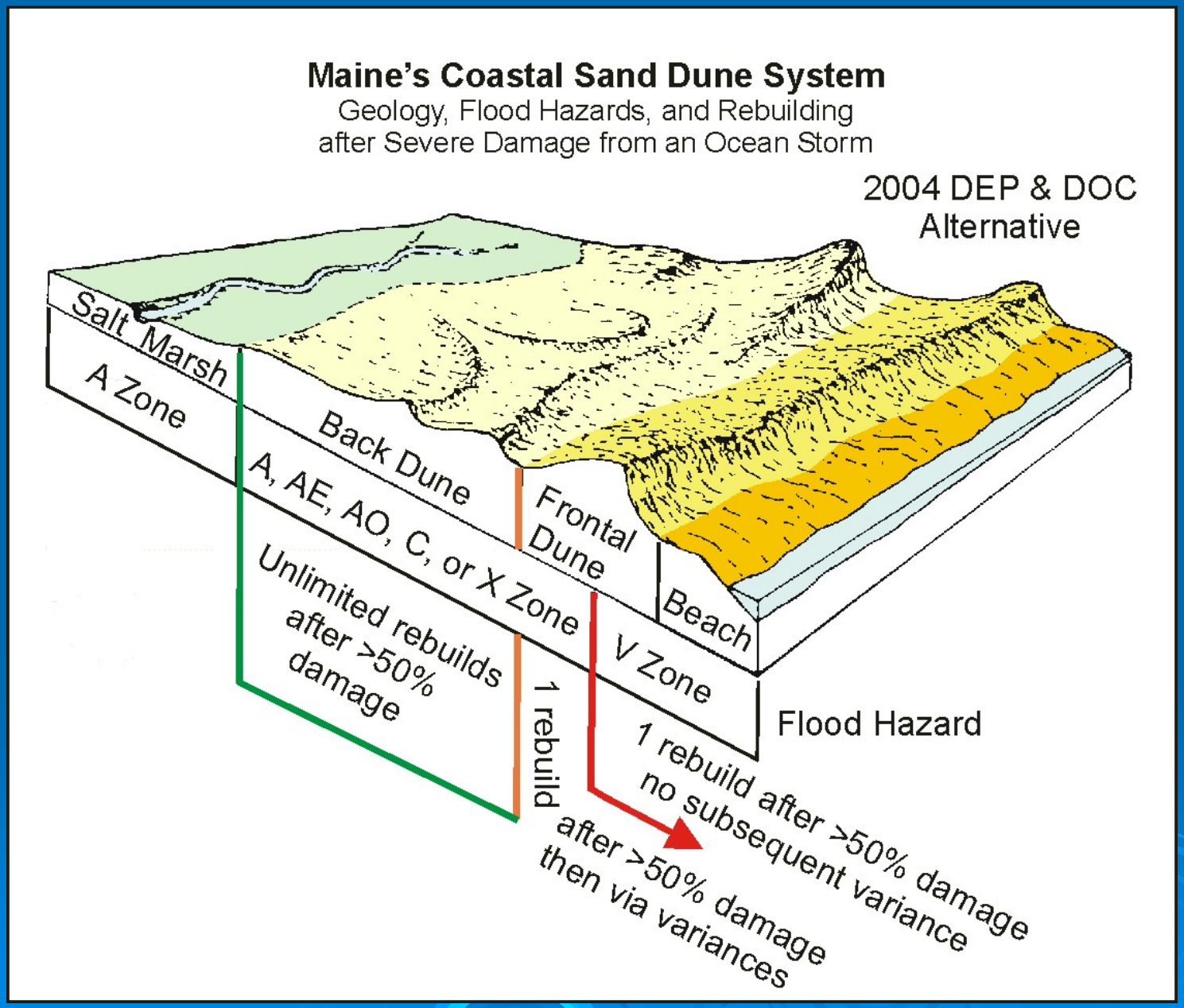
Figure 14. Simulated flooding for Wells Beach with 2 ft rise in sea level at HAT conditions. Only minor flooding is apparent on the marsh (Webhannet River) side of the island, where several low-lying areas are flooded. Portions of the existing jetties are also overtopped.



Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.



Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.



Source: DEP, Bureau of Land and Water Quality, Coastal Sand Dune Systems Web site.

Sand and Water Movement Standard

- Chapter 355(6)(G) added in 2004
- Standard requires all buildings modified or reconstructed to be placed on post or piling foundations
- Except --
    - detached buildings
    - sheds
    - garages
    - bathhouses, etc.
- Applies in back dune if erosion hazard area
- Variance may be granted if no practicable measures or alternatives -- no variance to date

Variances

- Variance for frontal dune or V-Zone construction may be granted if:
  ~ Denial of permit would constitute an unconstitutional taking, or
  ~ Strict application of the rules would result in undue hardship
    -- No practical economic use

Rights of Private Property Owners

- Right to transfer
- Right to exclude except for intertidal zone
- Right to build/develop property subject to valid federal, state, and local regulations
  - ~ Properly adopted
  - ~ Within authority of agency
  - ~ Just compensation for taking

Takings

- The Constitution prohibits the taking of private property by the government without just compensation
- Takings occur in two forms -- physical and regulatory

Physical Takings

- Occur when a government body takes title to private property
- Example: Municipality takes possession of a beachfront lot to allow public parking and access to the beach
- No dispute that the government must pay the dispossessed property owner just compensation

Regulatory Takings

- Occur when the government's regulatory burden on property goes "too far"
- The vague "too far" standard necessarily makes this a confusing and often inconsistent area of the law
- In practical terms, pursuing a regulatory takings claim is complicated, expensive, and often unsuccessful -- such a claim should only be pursued as a last resort
- In order to succeed, the regulation in question must render the property virtually worthless – *Hall* case

Public Access

- Under Maine law, most owners of waterfront property have title down to the mean low water mark
- However, the public has a right to use the intertidal zone for “fishing, fowling, and navigation” under common law principles dating to at least the mid-17th Century
- The public has no right to cross private property to reach the intertidal zone
- Public access can be secured via eminent domain, easements, landowner permission, or transportation by boat

Moody Beach Case

- *Bell v. Town of Wells*, 1989
- Maine Supreme Judicial Court ruled 4 to 3 that "fishing, fowling, and navigation" means just what it says, and does not include other recreational activities such as swimming or sunbathing
- Statute providing public right to use intertidal land for general recreation was found unconstitutional taking without just compensation
- Dissent argues "fishing, fowling, and navigation" is just a 17th Century way of describing general recreation -- should now include all recreational activities
- Case has been questioned, but is still good law

Eaton v. Town of Wells, 2000

- Affirmed grant of a prescriptive easement to the town to allow public access and general recreation in light of long history of public recreational use, and use of town resources to maintain beach
- Does not directly address *Bell*
- Concurring opinion by Saufley recommends overruling *Bell*

Risk for Landowners

- Court has indicated that it might overrule *Bell* and follow a broader definition of recreation
- Any landowner bringing a case for trespass, quiet title, etc. could be providing the vehicle for overruling *Bell*
- Failing to bring a case, however, could allow the type of continued use that gives rise to a prescriptive easement

Beach Nourishment

- Beach nourishment is the addition of natural materials such as sand and gravel to a beach
- Maine does not have a state-funded beach nourishment program
- A 2006 stakeholder report recommends a comprehensive state beach management policy including beach nourishment

Beach Nourishment
continued

- The recently revised Chapter 355 of the Code of Maine Rules provides:
  - Materials used must be similar in texture, particle size, and color to the natural beach material
  - Must match natural beach profile
  - Pre- and post-construction monitoring may be required
  - **If the project receives public funding, the impacted portion of the beach must be placed in state ownership or under binding agreements providing public access and prohibiting development**
  - Owners of property on a beach that will be nourished must enter into binding agreements for the management of wildlife habitat on the beach portion of their property (unclear if this applies only to state-funded projects)

National Flood Insurance Program

- Program instituted in 1968 to provide flood insurance to at-risk properties at affordable rates
- Homeowners' insurance doesn't cover flood damage
- Private insurers are unwilling to provide flood insurance at affordable rates due to high risk of near catastrophic loss
- Program was fully funded by premiums until Hurricane Katrina

Impact of Hurricane Katrina

- Rates charged by NFIP provided sufficient funds to cover an average year, but were not high enough to build up surplus in case of major natural disaster
- NFIP forced to borrow $20 billion from taxpayers
- Very unlikely that this debt will be repaid
- Increase in severe weather in recent years along with projected sea level rise widely attributed to climate change will likely lead to a large increase in flood damage in the years to come

NFIP Amendments

- Congress has debated NFIP reform at great length, but no substantive changes have yet been enacted
- Current state of reform -- H.R. 3121
  - Passed in the House; amended version passed in the Senate May 13, 2008
  - House and Senate versions still waiting to be reconciled and sent to President
  - Key provisions:
    - Write off $17.5 billion debt owed to U.S. Treasury
    - May include coverage for wind damage
    - Increases number of properties required to purchase flood insurance
    - Raises allowable annual rate increase to 15%
    - Phases out subsidies for second homes and commercial properties that have experienced repeated losses
    - Allows for additional rate adjustments to reflect risk as determined by updated FEMA flood maps

Sand Dune Regulations
Areas of Concern

- Post/piling foundation requirement for all modified or reconstructed buildings
- Relax variance standard
- Allow more flexibility where sea wall exists
  - → Fences
  - → Definition of permanent structures -- below grade structures
  - → Sea wall replacement options

Recommendations

- Targeted changes via legislature
- Board unlikely to change rules
- Another stakeholder process?
- Keep local legislators informed