Government action in the Age of Climate Change: Climate Adaption and Evolving Liability

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Foreseeability of Climate Impacts
Climate Change and Sea Level Rise Projections for Boston
The Boston Research Advisory Group Report
JUNE 1, 2016

PROBABLE FUTURE STORM FLOOD EXTENTS
At the 1% Annual Chance Storm Event
Climate Change Vulnerability Assessment

November 2015
City of Cambridge, Massachusetts

The CVA Report

1 Part

CITY OF CAMBRIDGE CLIMATE CHANGE PROJECTIONS
Increasing Public Discourse

Estimated % of adults who think global warming is happening, 2018

Select Question: Global warming is happening

Click on map to select geography, or:

National Average: 70%

United States

Yes 50%

No 14%
The Australian Building Codes Board: “[i]f the climate changes in accordance with high emissions scenarios ..., the current BCA is likely to be deficient in some areas.”

The Joint Standards Australia/Standards New Zealand Committee: “The wind speeds provided are based on analysis of existing data. No account has been taken of any possible future trend in wind speeds due to climatic change”
Static & Outdated Regulatory Framework

Harvey flooding outside FEMA’s “high-hazard” flood zones
- Flooding inside the zone
- Flooding outside the zone
- Houston city limits

Sources: FEMA, U.S. Census Bureau, Dartmouth Flood Observatory (Maximum Observed Flooding, Hurricane Harvey)
Note: Due to visual obstruction caused by buildings and other factors, observed flooding levels within city limits is limited.
What does this mean for governments?
Overview

PART I: Claims arising from Gov’t INACTION against climate change
• Negligence claim
• Takings claim
• Statutory claim

PART II: Claims arising from Gov’t ACTION to protect against climate change
• Takings claim
• Administrative Procedures Act claim
• Equal Protection claim
Some Preliminary Notes

• Not an exhaustive presentation on liability.

• This is not legal advice.

• Check out CLF’s report, *Climate Adaptation and Liability*. 
Part I: Claims for Gov’t Inaction against Climate Change

A. Negligence Claims

B. Takings Claims

C. Statutory Claims
Negligence

Negligence = Duty + Breach + Causation + Harm

1. Severity of the potential harm of the activity (hazardous activity?)

2. Foreseeability of the harm
   a. Warning, flood map, prediction models

**FACTS:** In 2013, heavy rains in Cook County, IL caused severe flooding & insurance paid millions on claims.

**CLAIM:** IL Farmers Insurance sought to recover those claims through class action against Water District, muni, & county govts, including negligence claim for mis-operation of SW system & knowledge of undersized system from 2008 Climate Action Plan

**STATUS:** Claim voluntarily dismissed
Burgess v. Ontario Ministry of Natural Resources and Forestry (2016)

**FACTS:** September 2016, property owners filed class action suit seeking C$900 million in damages from Ministry for recent flood events.

**CLAIM:** Complaint alleges Ministry had duty to avert foreseeable flooding, knew lakes at dangerous levels early in 2016, yet negligently allowed lakes to flood by not drawing down water level, destroying adjacent structures.

**STATUS:** Case pending, still undecided.
Sovereign Immunity

- A sovereign (or a government) is immune from lawsuits or other legal actions except when it consents to them.

- Extends to states and state officials acting in their official capacity

- Different governments have waived immunity (i.e., consented to being sued) in differing degrees under different circumstances.
Federal & State Tort Claims Acts

• Primary way that the federal government has waived its immunity is through the Federal Tort Claims Act (torts = negligence, nuisance, trespass, and more).

• Federal Tort Claims Act waives sovereign immunity for negligence claims EXCEPT any claim based on exercise or performance, or failure to perform, a “discretionary duty” of the government, even if discretion abused.
Discretionary Function Exception (“DFE”)

Supreme Court developed **two-part test** for determining whether gov’t conduct qualifies as a discretionary function or duty:

1. Conduct must involve “**an element of judgment or choice**” vs. a prescribed course of action that an employee must adhere to.

2. Conduct must be based on “**consideration of public policy**.”
   - Proper inquiry is not whether decisionmaker “in fact engaged in a policy analysis when reaching his decision but instead whether his decision was **susceptible to** policy analysis.”
   - The very existence #1 creates strong presumption of #2.
MA Tort Claims Act
(G.L. c.258, §1)

• 3 year statute of limitations
• Cap on damages – up to $100K per plaintiff (not per claim)
• Gov’t is fully immune from ten enumerated categories, including:
  • Discretionary functions (e.g., planning, design, materials selection)
  • Permitting decisions
  • Failure to inspect or negligent inspection of property
  • Failure to act, diminish, or prevent harm **EXCEPT** where:
    • Gov’t made **explicit and specific assurances** of safety or assistance; or
    • Negligent maintenance of public property.
Takeaways from Negligence

• As understanding of climate change impacts increases, so too does a gov’ts duty of care.
• As a result, negligence suits against gov’ts for failing to act in face of this knowledge are likely to increase
• Ultimately, liability will depend on specific facts and whether the exceptions apply.
Continuing Part I: Claims against Gov’t for INACTION

A. Negligence Claims

B. Takings Claims

C. Statutory Claims
“Takings” Claims

• The 5th Amendment of US Constitution prohibits federal gov’t from taking property for public use without “just compensation.” This prohibition extends to states under Due Process Clause of 14th Amendment.

• Traditionally, takings claims occur when gov’t ACTS in some way that impacts property rights (e.g., permit decision, adopts zoning ordinance).

• BUT … beginning to see takings claims arise out gov’t inaction.
**ISSUE:** Did Army Corps of Engineer’s construction, expansion, operation and failure to maintain the Mississippi River – Gulf Outlet (“MR-GO”) result in temporary takings by causing increased flooding of the plaintiffs’ properties during Hurricane Katrina?

**OUTCOME:** Army Corp not liable for flooding damages. Gov’t cannot be held liable under Takings Clause for inaction and, must include benefit of levy (even if failed) in causation analysis. Compare with Arkansas Game & Fish Comm’n v. U.S., 133 S. Ct. 511 (2012) (Government-induced flooding, even if temporary, is not categorically exempt from a takings claim).
ISSUE: Did local govt’s failure to reasonably maintain a county-owned road to such extent that it deprived landowners access to their land amount to a “taking” of property?

OUTCOME: Yes. “Governmental inaction – in the face of an affirmative duty to act – can support a taking claim.”
Continuing Part I: Claims against Gov’t for INACTION

A. Negligence Claims
B. Takings Claims
C. Statutory Claims
Statutory Law Claims

Americans with Disabilities Act (ADA)

• Brooklyn Center for Independence of the Disabled (BCID) v. Bloomberg, 980 F.Supp.2d 588 (2013) (class action against New York City for inadequate emergency response planning (i.e., flooding, loss of power) on behalf of 900,000 New York residents with disabilities included people with vision, hearing, mobility, and mental disabilities who had unequal access to city services. (Settled).

Clean Water Act (CWA)

• First Amended Compliant, Conservation Law Foundation v. McCarthy, Case No. 11-cv- 11657 (2012) (outdated local water quality management plan required to consider climate change, sea level rise, & storm surge to be used as basis for federal funding).
Part II: Claims arising from Gov’t ACTION to protect against climate change

• Takings claims

  • Administrative Procedures Act claim
  • Equal Protection Clause (constitutional claim)
  • *Ultra vires* (beyond one’s legal authority)
Two Types of Gov’t “Condemnation”

I. Direct condemnation (“eminent domain”)

II. Inverse condemnation
   A. Physical Taking (e.g., flooding)
   B. Regulatory Taking
      1. Categorical Taking (e.g., Lucas, regulation rendered property valueless)
      2. Regulations with overly severe impact (e.g., Palazzolo, Penn Central). Court does ad hoc inquiry of the following factors:
         i. Economic impact of regulation
         ii. Reasonable investment-backed expectations (background principles of nuisance – if state law doesn’t allow it, no expectation)
         iii. Character of gov’t action (public good vs. public harm)

*Condemnation itself is not illegal; condemnation w/o compensation is illegal.
B. Regulatory Taking from Gov’t Action

REGULATORY TAKINGS FLOW CHART

Do Background Principles Bar the Proposed Use?

Yes → No

No → Does the regulation wipe out all value as in the Lucas case?

Yes → Probably a Taking

No → Does the regulation have an overly-severe impact on the plaintiff’s value and expectations so as to fail the Penn Central test?

Yes → Probably a Taking

No → Probably No Taking

By: Mike Rubin, RI Attorney General’s Office
A. Physical Taking - from Gov’t Action

*In re Downstream Addicks and Barker Flood-Control Reservoirs* (Fed. Cl.), Case No. 2017-CV-09001

**FACTS:** During Hurricane Harvey, Army Corps chose to release water from reservoir that flooded thousands of downstream homes to safeguard integrity of dam; according to Corps analysis, dam breach could have resulted in thousands dead and dozens of neighborhoods, downtown Houston, and Texas Medical Center under water.

Documents show that the Corps analyzed the issue decades ago and determined downstream property owners might sue Corps if flooded but had slim likelihood of success, a conclusion that supported decisions not to pursue upgrades to the aging dams at the time.

**CLAIM:** These class action suits assert that the use of private property for federal floodwater storage is an uncompensated taking.

**OUTCOME:** *Case pending.*

Regulation ≠ taking

**ISSUE:** Did zoning board’s denial of a residential building permit for a parcel of land located in coastal conservancy flood district subject to severe coastal flooding constitute a “taking”?

**OUTCOME:** No, because it did not deny landowner all economically beneficial use of land and zoning rooted in legitimate state interests (reduce risk to people and property from extreme high tides and the rising sea level).

Courts sympathetic to evolving police powers

Rhode Island Supreme Court explained:

“The power of the state to regulate for the protection of public health, safety, and morals, also known as the police power, is not a static concept. As advances in scientific knowledge have increased public awareness of certain harms, the power of society to guard against these newly perceived dangers must adjust accordingly. Activities that have previously been considered harmless may come to be recognized as serious threats to the public wellbeing.” Milardo v. CRMC, 434 A.2d 266, 269 (R.I. 1981) (internal citations omitted).

FACTS: Developer (Argos) submits rezoning application to City to develop 36 single-family residential homes; City Council denies application based on concerns over ingress/egress issues from occasional flooding, and failure to analyze 1.5 ft. SLR scenario in stormwater analysis.

CLAIMS:
- Administrative Procedure Act – arbitrary, capricious, unreasonable decision
- Equal Protection Clause – no rational basis for approving rezoning app of neighboring developer (personal animus)
- Ultra vires – City had to follow strict protocol to gain authority to issue more stringent SW requirements than those already in law/regs, and it failed to do so

OUTCOME: case pending
Conclusions

• Climate related hazards are becoming increasingly “foreseeable” and “predictable” so the govt’s duty to protect against those harms is also rising.

• Takings claims for inaction may arise at state level where affirmative duty to act exists, but unlikely to succeed at federal level.

• Courts generally uphold restrictive regulations when they are in the interest of protecting public health and safety, which most adaptation measures are.

• Virginia Beach case highlights need for fair, transparent transition in regulating development in face of climate change
So....

What can be done proactively?
Chatham Coastal Conservancy District

“protect persons and property from the hazards of flood and tidal waters which may result from unsuitable development in or near swamps, ponds, bogs and marshes, along water courses or in areas subject to flooding, extreme high tides and the rising sea level”

City of Boston – Article 37 Checklist and Flood Resiliency Overlay District (forthcoming)

40 inches Sea Level Rise by 2070

Town of Arlington

“The Applicant shall, to the extent practicable and applicable as determined solely by the Commission, integrate considerations of adaptation planning into their project to promote climate change resilience so as to protect and promote resource area values into the future”

Town of Duxbury

Predicted Rates of Sea Level Rise

Town of Hingham

Predicted Rates of Sea Level Rise

MassDEP Chapter 91 Licenses

- installation of rapidly deployable flood barriers
- installation of dry flood-proofing on the ground floors and elevation of mechanical rooms for critical building systems
- sea level rise-related elevation of first occupied floor more than three feet above FEMA base flood elevation
Thank you. Questions?

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