



conservation law foundation

**Marine Law
Symposium**

Nov. 16 2018

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

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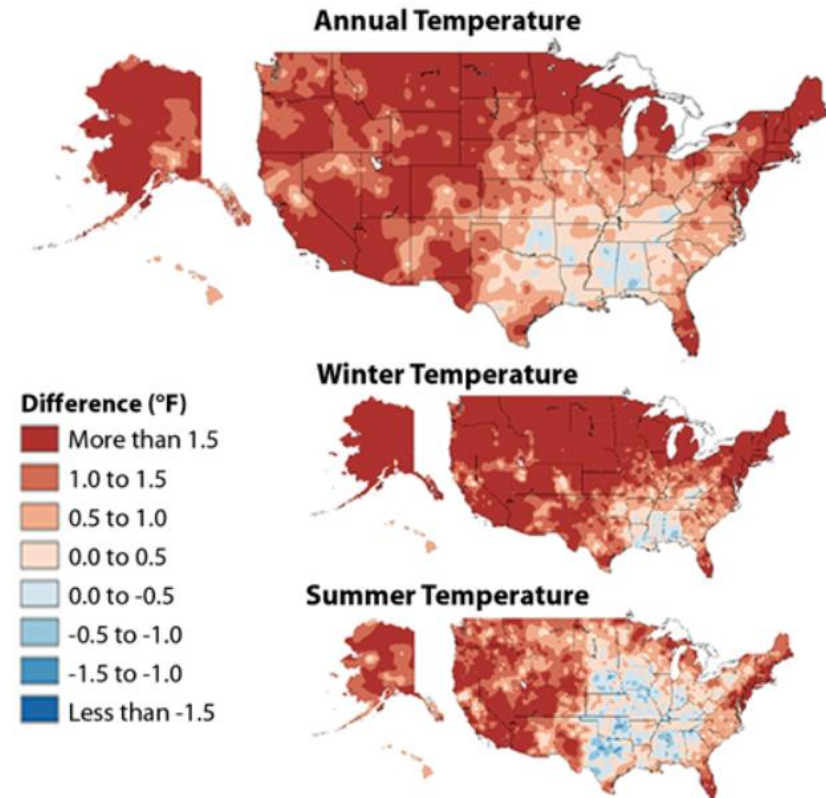
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Foreseeability of Climate Impacts

FROM THE 2017 CLIMATE SCIENCE SPECIAL REPORT

Observed changes in annual, winter and summer temperatures, 1986-2016 compared to 1901-1960.*



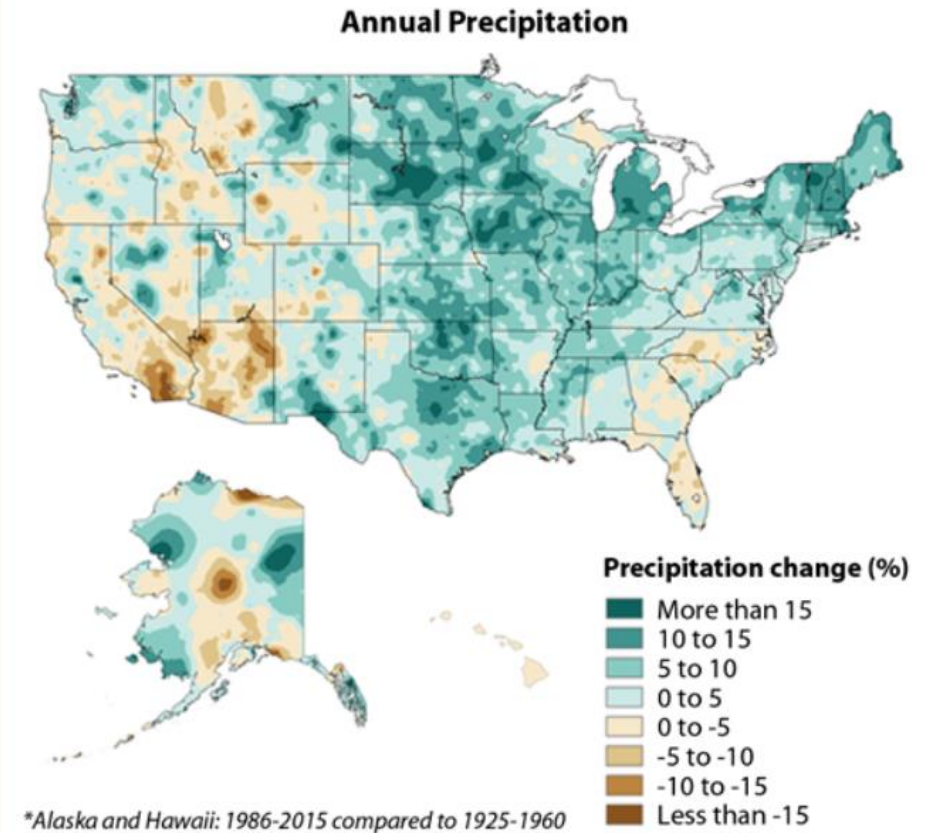
*Alaska and Hawaii: 1986-2016 compared to 1925-1960

SOURCE: U.S. Global Change Research Program

InsideClimate News

FROM THE 2017 CLIMATE SCIENCE SPECIAL REPORT

Annual precipitation changes, 1986-2015 compared to 1901-1960.*




*Alaska and Hawaii: 1986-2015 compared to 1925-1960

SOURCE: U.S. Global Change Research Program

InsideClimate News

CITY OF BOSTON CLIMATE CHANGE PROJECTIONS




**CLIMATE
READY
BOSTON**


**UMASS
BOSTON**


Climate Change and
Sea Level Rise Projections for Boston

The Boston Research Advisory Group Report

JUNE 1, 2016

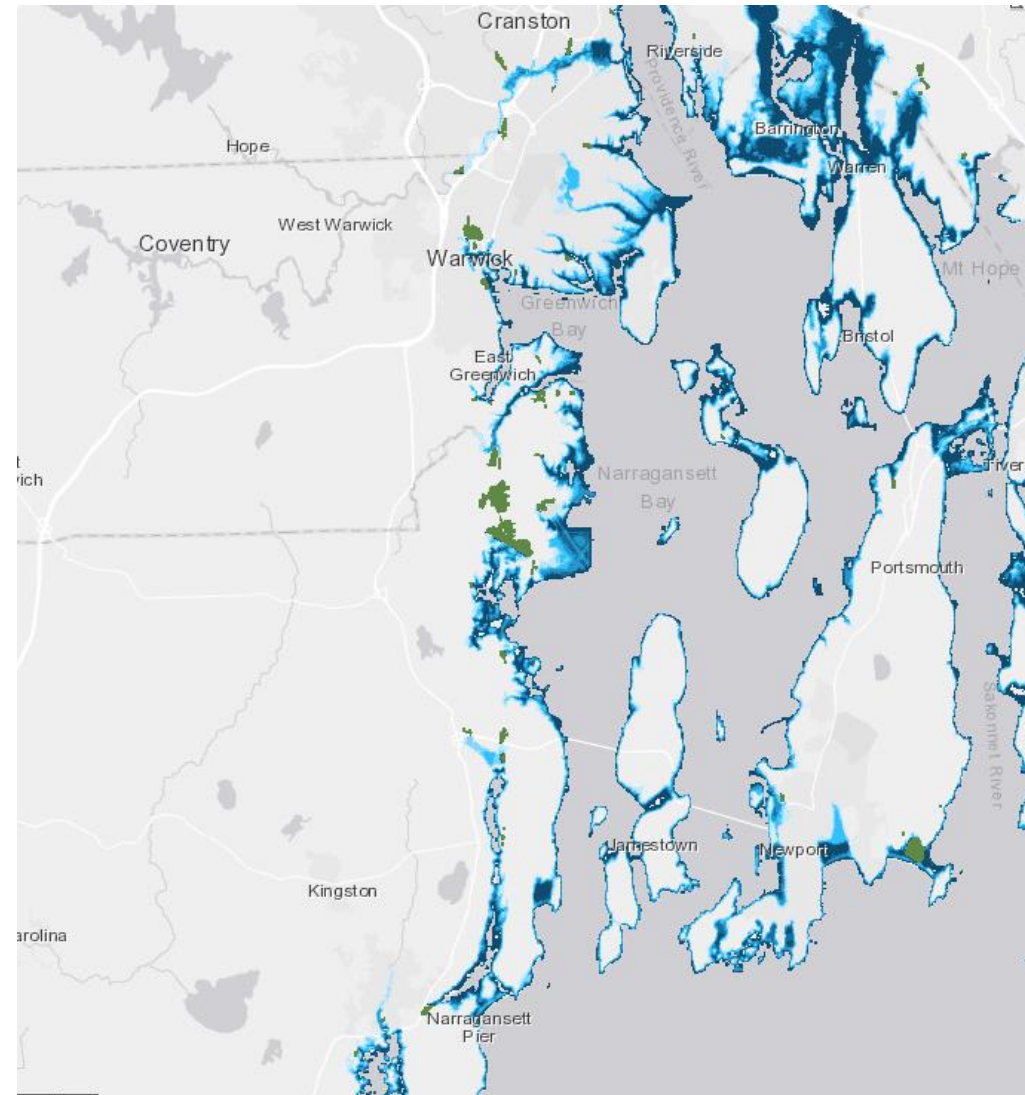
 City of Boston
Mayor Martin J. Walsh

 BOSTON
Green Ribbon
COMMISSION



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RI CRMC SEA LEVEL RISE & STORM MAPS



Attribution of Harm

Kivalina v. ExxonMobil (2008)

CLAIM: Public nuisance; GHG emitters unreasonably interferes with P's right to use and enjoy property in Kivalina.

OUTCOME: dismissed; political question and lack of standing.




AEP v. CT (2011)

CLAIM: The lawsuit alleged that five utility companies, which operate facilities in 21 states, were a public nuisance because their carbon-dioxide emissions contribute to global warming.

OUTCOME: "The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."



A photograph of a parking garage with a large octopus on the floor. The octopus is a large, translucent, multi-limbed creature with a central body and many long, thin tentacles spread out on the wet, reflective floor. The background shows several cars parked in the garage, including a dark SUV and a red car. The floor is wet and reflects the overhead lights, creating a shimmering effect. The octopus is positioned in the lower center of the frame, looking towards the camera.

Is the
“octopus in the parking garage”
the new
“elephant in the room”?



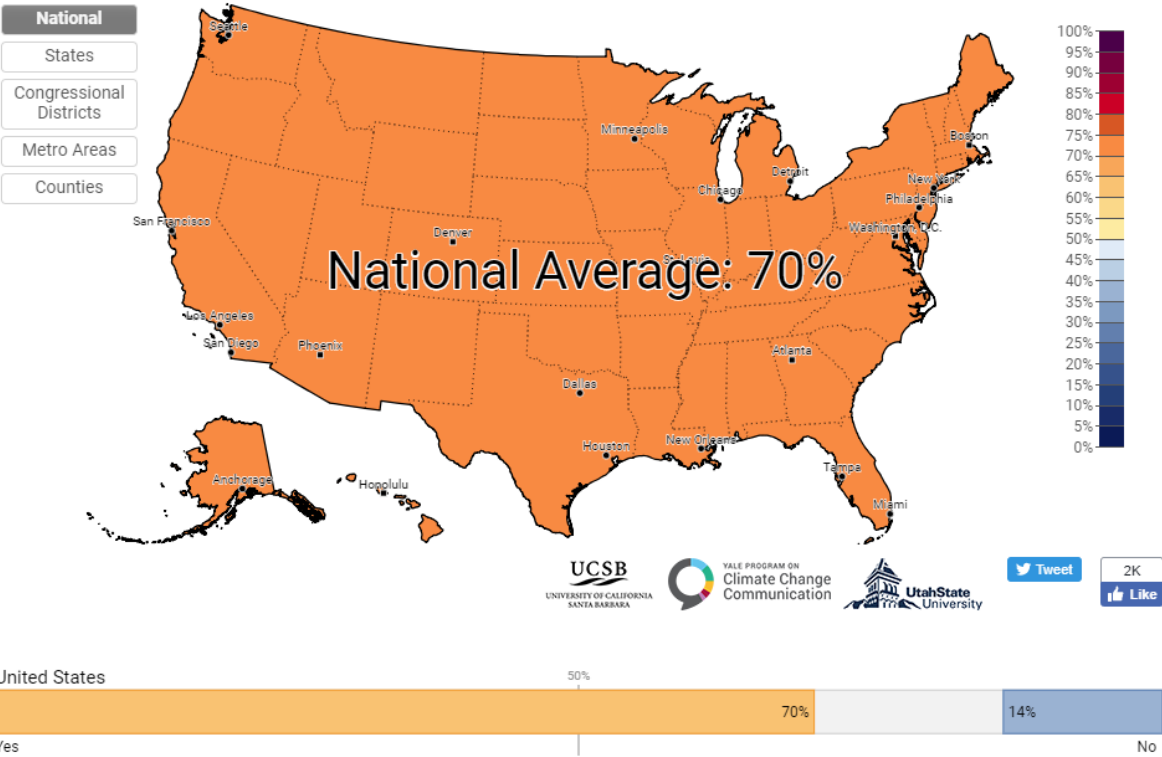
Increasing Public Discourse



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

Select Question: Absolute Value

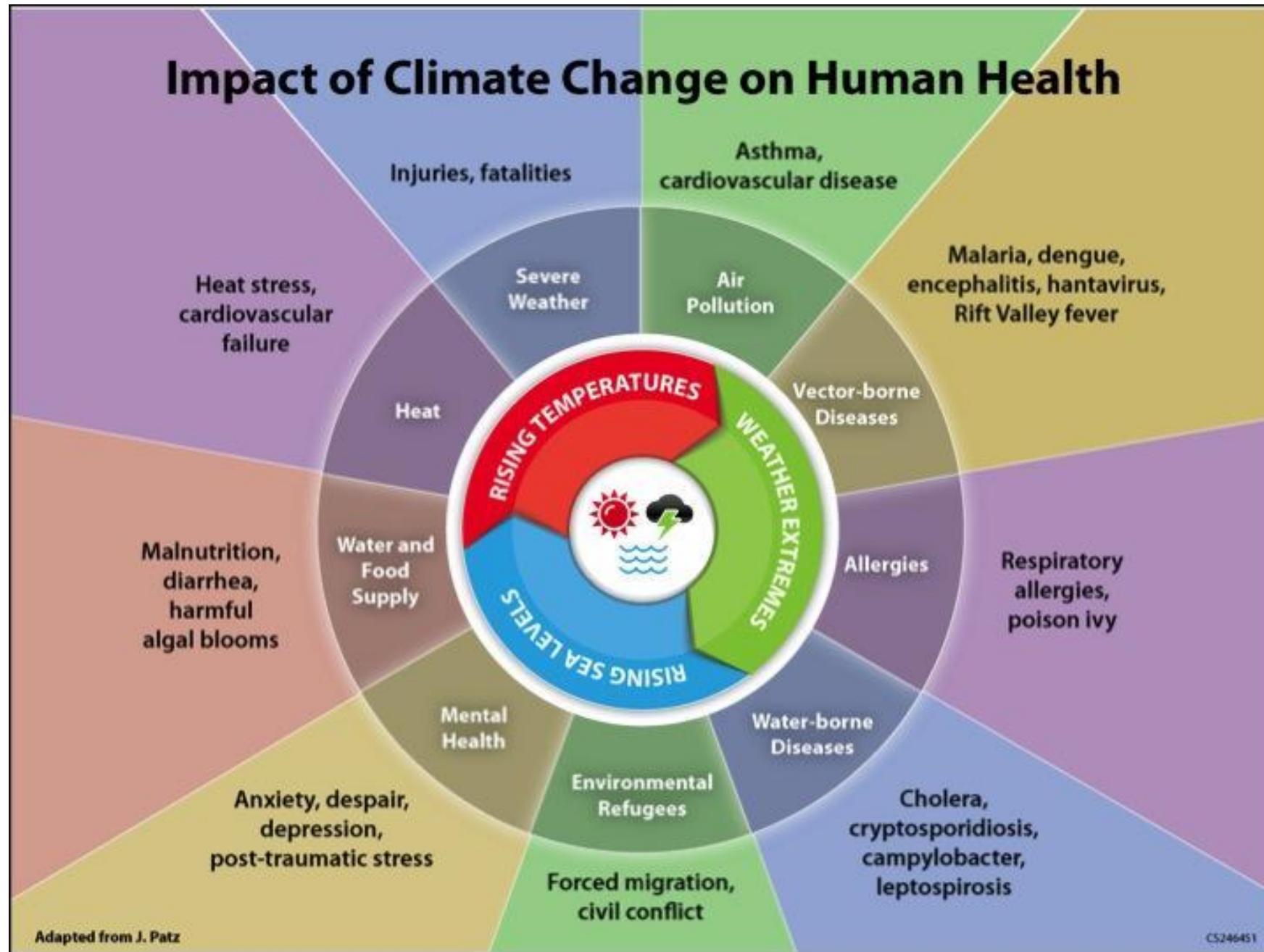
Click on map to select geography, or:

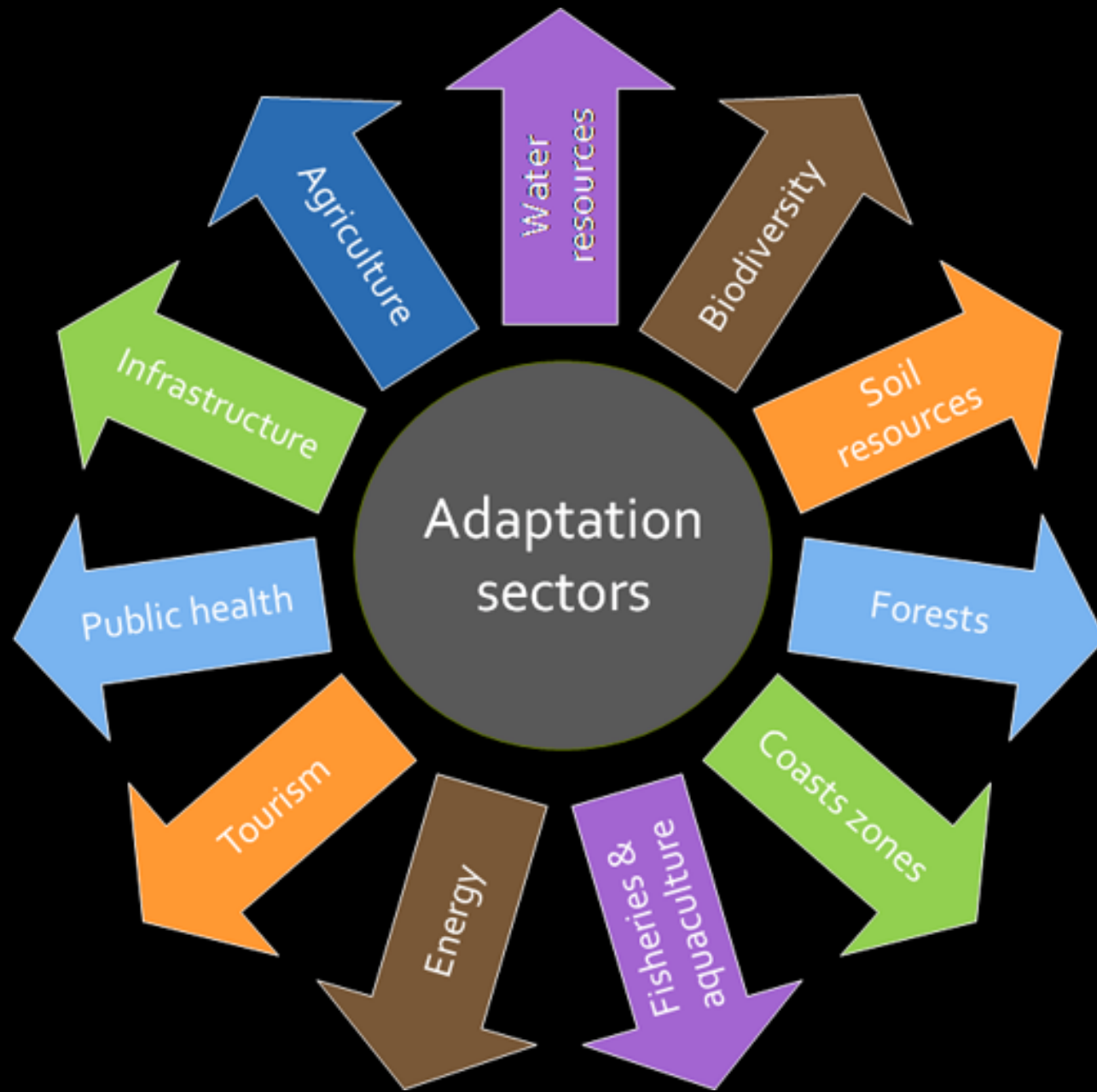




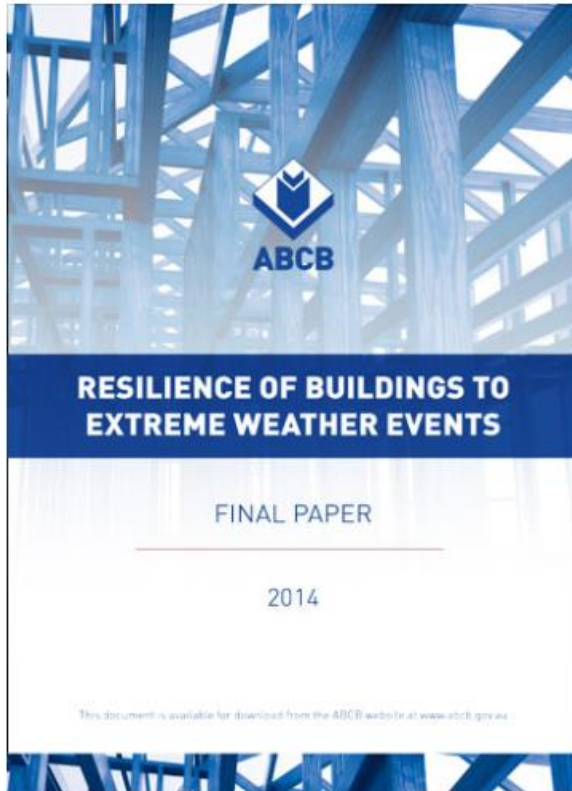


Impact of Climate Change on Human Health

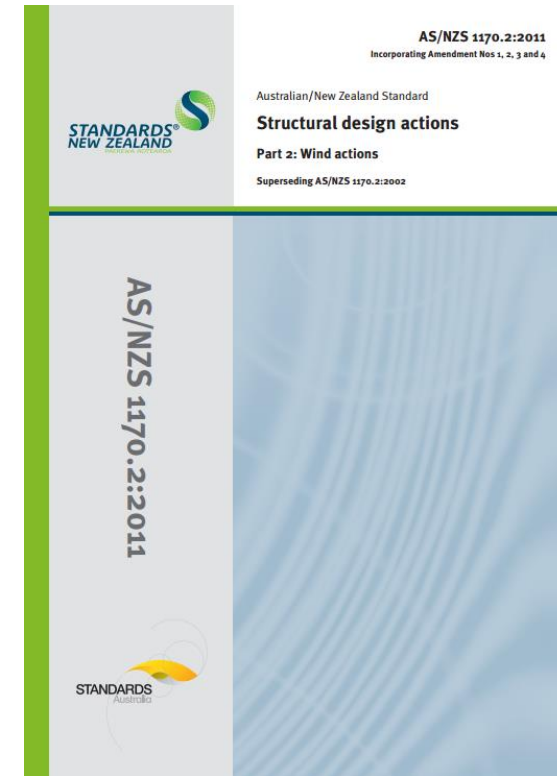




Static & Outdated Regulatory Framework



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.”

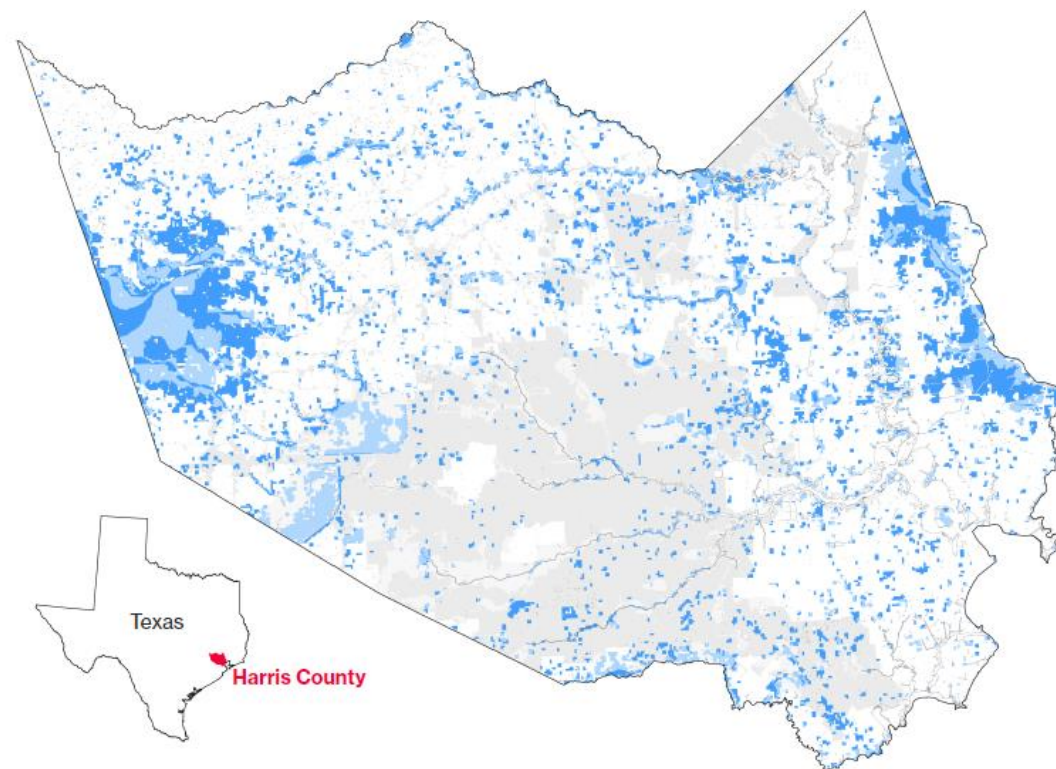


The Joint Standards Australia/Standards New Zealand Committee: “The wind speeds provided are based on analysis of existing data. No account has been taken of any possible future trend in wind speeds due to climatic change”

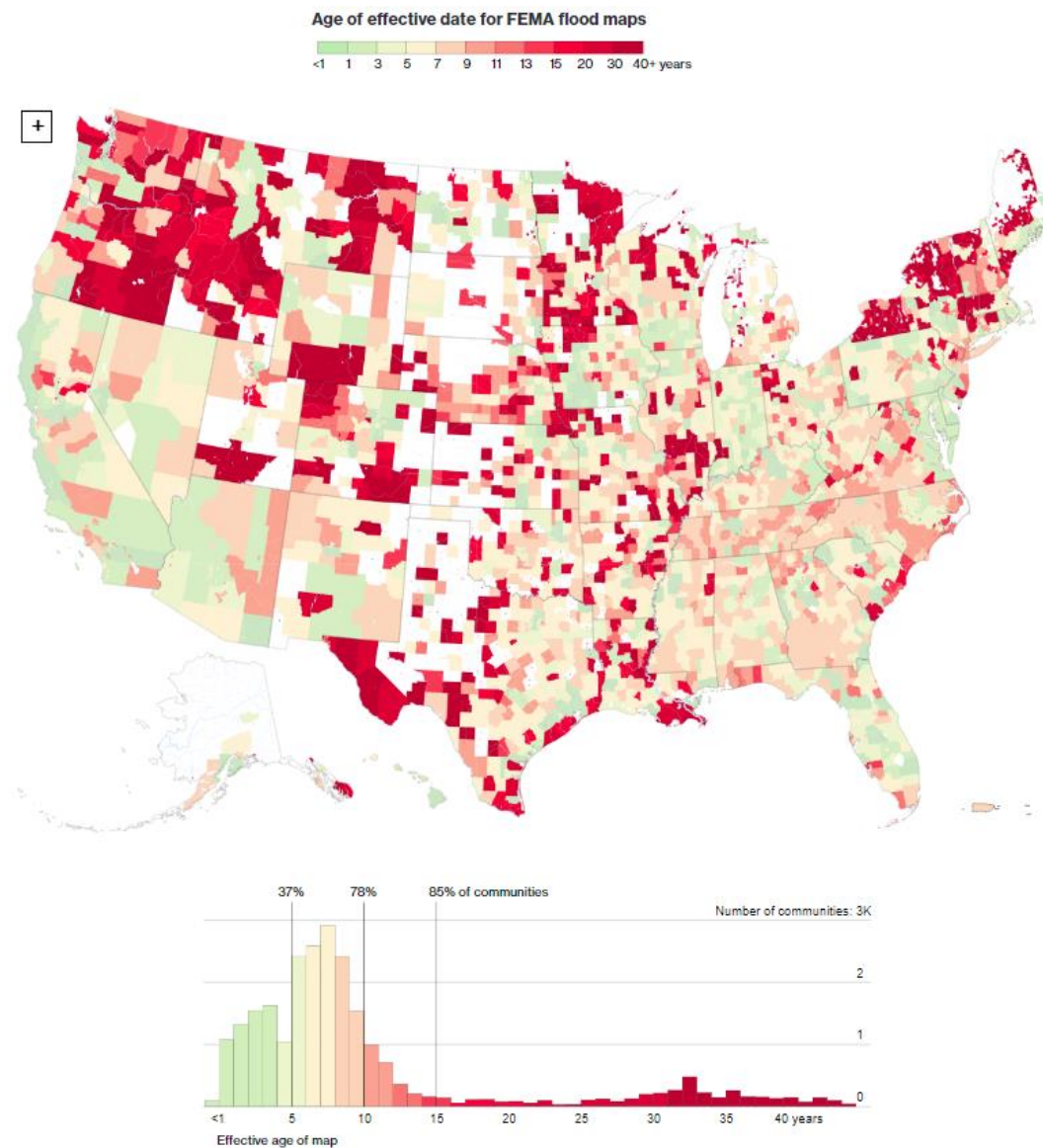
Static & Outdated Regulatory Framework

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.



An aerial photograph showing a residential neighborhood completely inundated with floodwater. Numerous houses with various roof colors (brown, grey, red) are visible, surrounded by water. Trees and some utility poles are also partially submerged. The water is a dark, murky blue-grey color. The text "What does this mean for governments?" is overlaid in white, bold, sans-serif font across the center of the image.

What does this mean for governments?

Overview

PART I: Claims arising from Gov't INACTION against climate change

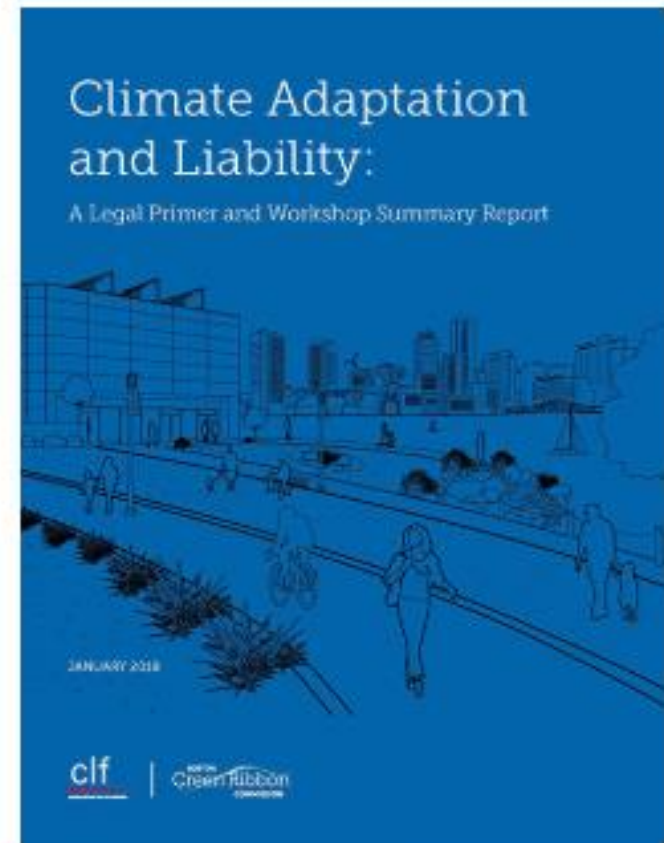
- Negligence claim
- Takings claim
- Statutory claim

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*.



DOWNLOAD

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

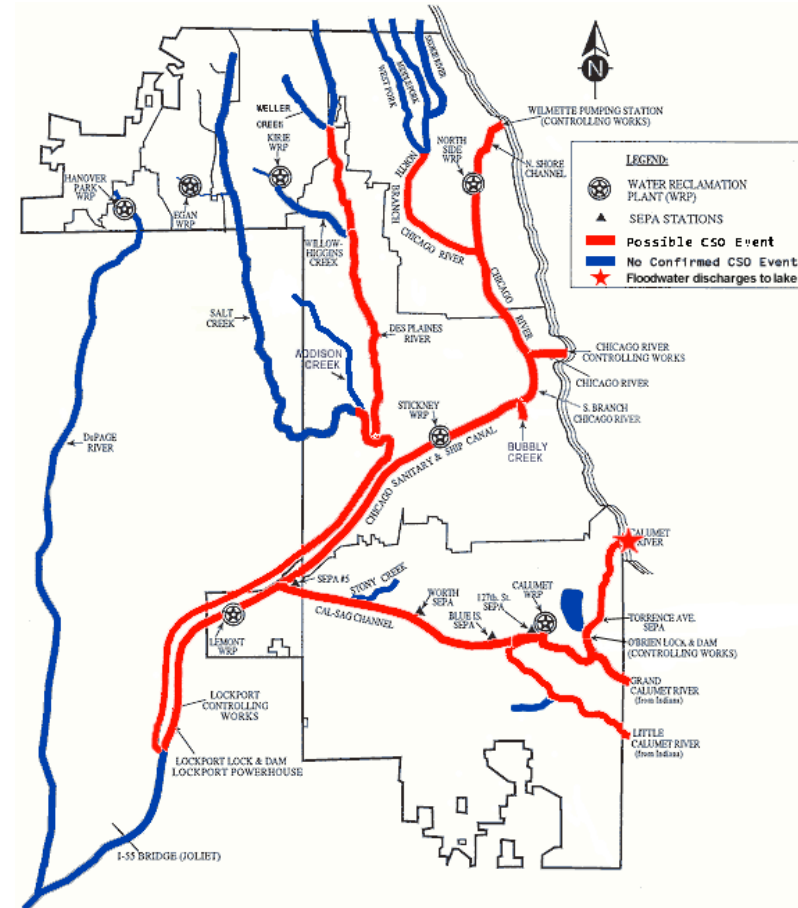


Illinois Farmers Ins. V. Metro. Water Reclamation Dist. Of Greater Chicago (2014)

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

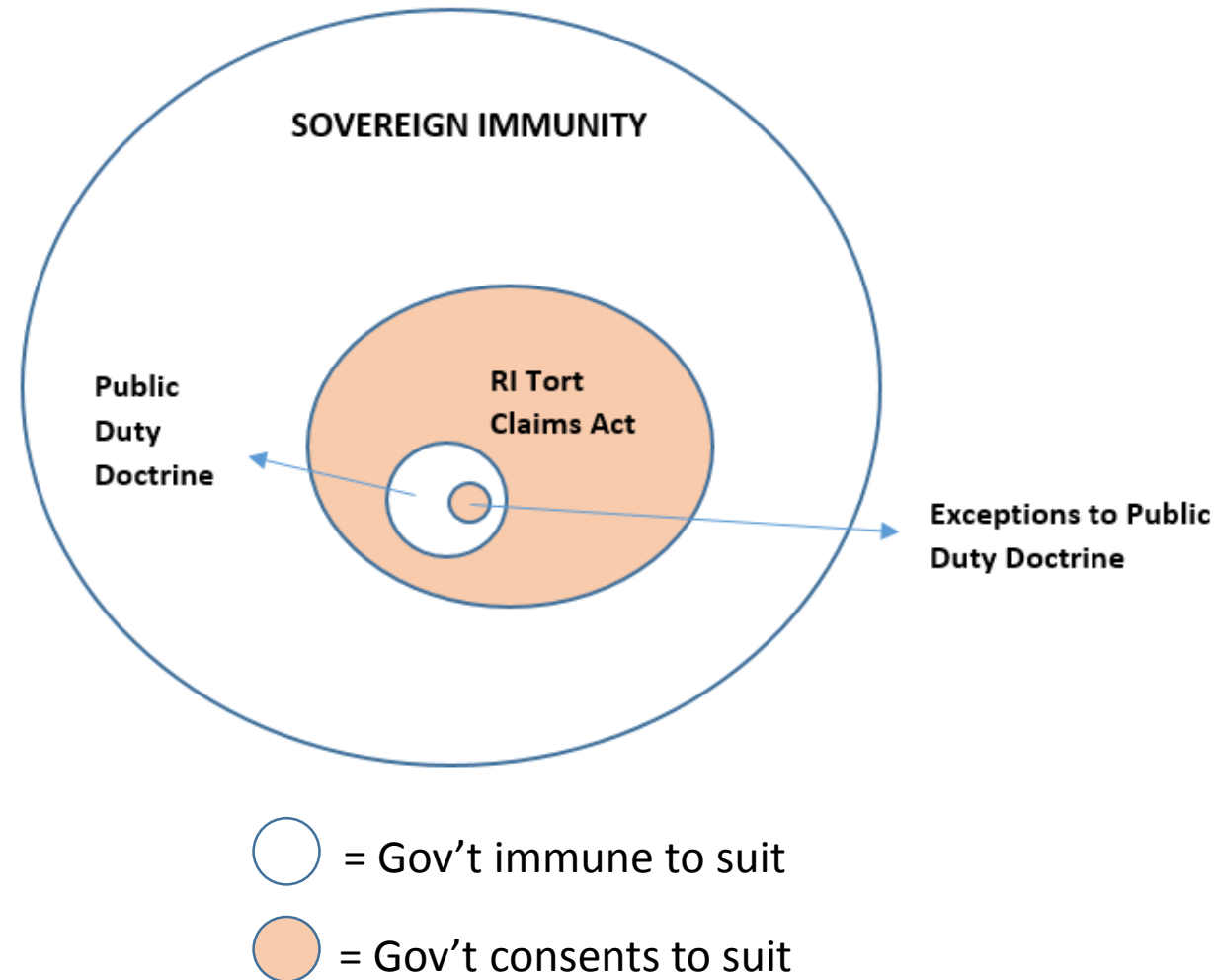
- A sovereign (or a government) is immune from lawsuits or other legal actions except when it consents to them.
- Extends to states and state officials acting in their official capacity
- Different governments have waived immunity (i.e., consented to being sued) in differing degrees under different circumstances.



Rhode Island Tort Claims Act

(R.I. Gen. Laws Ann. § 9-31-1)

- “RI and any political subdivision thereof, including all cities and towns, shall...be **liable in all actions of tort** in the same manner as a private individual or corporation...”
- **BUT**, “public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions...not ordinarily performed by private persons.” *Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992).

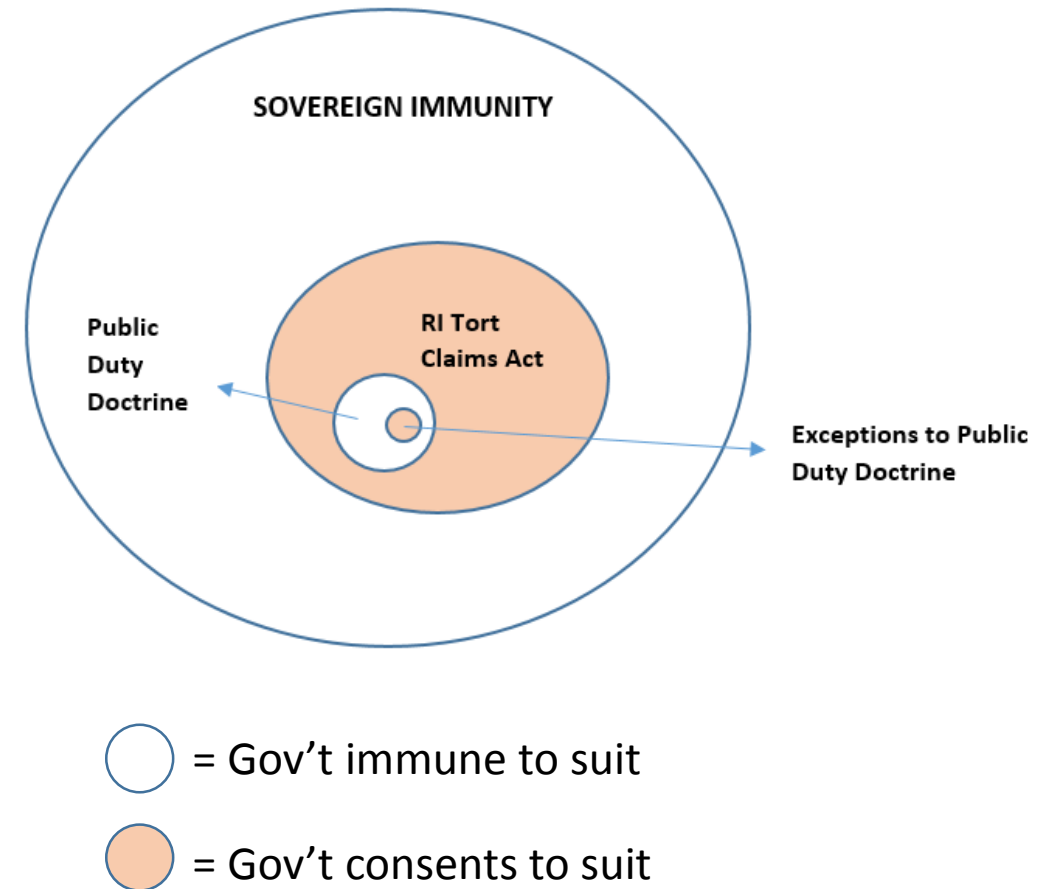


Public Duty Doctrine

- **Defense to negligence claim:** If harm arising out of a public duty (obligation owed to general public) vs. duty owed to particular person, then gov't immune.
 - E.g., *Ryan v. State DOT*, 420 A.2d 841 (R.I. 1980) (Court held harmless registrar of motor vehicles for restoring license of suspended driver who was then involved in collision that seriously injured plaintiffs).
- **Intended to encourage the effective administration of governmental operations** by removing the threat of potential litigation.
 - See *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989) (“The state would be unable to function if liability [were] imposed each time an individual was deleteriously effected by such activities. We shall therefore continue to immunize the government for harm resulting from discretionary acts.”).

1st Exception to Public Duty Doctrine: Special Duty

- ***Knudson v. Hall*, 490 A.2d 976, 978 (R.I. 1985)**
(state duty to maintain roads “in good repair” extends to motoring public *in general*; no evidence that plaintiffs could have been foreseen by state as “*specific, identifiable*” victims of the state's negligence).
- ***Quality Court Condo Ass’n v. Quality Hill Dev. Corp.*, 641 A.2d 746, 751 (R.I. 1994)** (“A municipality should not be the general insurer of every construction project within its limits. However, in this instance the actions of the city brought [plaintiff] into the realm of its specific knowledge and thereby created a special duty.”)



2nd Exception to Public Duty Doctrine: **Egregious Conduct**

1. The **state**, in undertaking a discretionary action or in maintaining or failing to maintain the product of a discretionary action, **created** circumstances that forced a reasonably prudent person into a position of **extreme peril**;
2. The state, through its employees or agents capable of abating the danger, had **actual or constructive knowledge** or the perilous circumstances; and
3. The state, having been afforded a reasonable amount of time to eliminate the dangerous condition, **failed to do so**.

Haley v. Town of Lincoln, 611 A.2d 845, 849 (R.I. 1992)

Example of egregious conduct exception

- *E.g. Verity v. Danti*, 585 A.2d 65, 65-66 (R.I. 1991) (plaintiff struck by car when she was forced to step off sidewalk into the road because it was blocked by large tree. City knew of the danger caused by the tree and did nothing to alleviate the risk).



Review of Public Duty Defense & Exceptions:

Haworth v. Lannon, 813 A.2d 62, 64–65 (R.I. 2003)

FACTS: Two couples sued town of Warren for issuing building permits and certs of occupancy for newly built homes that routinely flooded.

OUTCOME: Town action protected by public duty doctrine because:

- **No special duty** –Town had no specific knowledge of these particular plaintiffs so no special duty. Court even rejected theory that it could have known of generalized group of potential buyers, saying group too large and difficult to ID.
- **No egregious conduct** – no extreme peril created by approving design plans.

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
- Gov'ts in RI are protected by the public duty doctrine, but as the RI Supreme Court noted, the doctrine “verges on the brink of being a legal enigma because of its many exceptions.”
- 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.

Jordan et al. v. St. Johns County, 63 So. 3d 835 (Fla. 5th DCA 2011)
example of state takings claim arising out of inaction

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."



St. Bernard Parish Government v. US (2018)

example of federal takings claim arising out of 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).

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
- *Argos Properties II, LLC v. City Council for Virginia Beach* (Va. Cir. Ct. 2018)
 - Administrative Procedures Act claim
 - Equal Protection Clause (constitutional claim)
 - *Ultra vires* (beyond one's legal authority)

Takings

- 5th Amendment of Federal Constitution prohibits “taking” private property for public use without “just compensation”
- Rhode Island Constitution (art. I, § 16) limits state takings liability related to the state’s power to “regulate and control the use of land and waters,” but more restrictive language cannot “defeat mandates” of 5th Am.

Two Types of Gov't “Condemnation”

- I. Direct condemnation (“eminent domain”)
- II. Inverse condemnation
 - A. Physical Taking (e.g., flooding, *Addicks v. Barker*)
 - 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.

A. Physical Taking - from Gov't Action

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

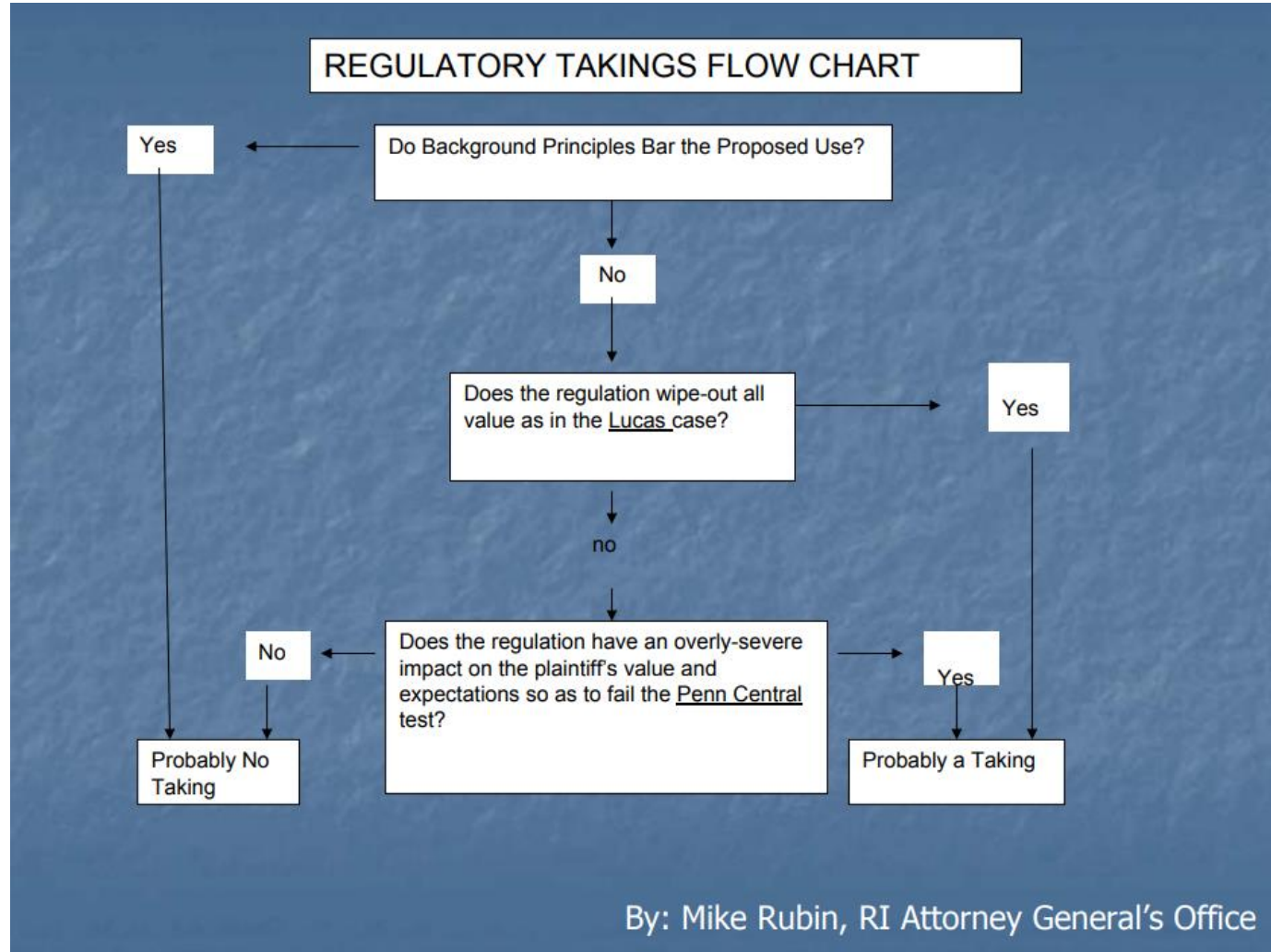
FACTS: During Hurricane Harvey, Army Corps chose to release water from reservoir that flooded thousands of downstream homes to safeguard integrity of dam; according to Corps analysis, dam breach could have resulted in thousands dead and dozens of neighborhoods, downtown Houston, and Texas Medical Center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

B. Regulatory Taking from Gov't Action



Annicelli v. Town of S. Kingstown, 463 A.2d 133 (R.I. 1983)

Regulation = taking

ISSUE: Did town's zoning ordinance creating "High Flood Danger" districts (HFD zone) precluding plaintiff from constructing single-family dwelling on land, result in inverse condemnation?

OUTCOME: Yes, b/c reg rendered land "useless"; plaintiff must be compensated for constructive "taking" of her property. "Preserving barrier beaches is a worthy environmental goal that the town may lawfully pursue," but in doing so, town must compensate landowner. Public good (taking) v. preventing public harm (police powers)



Gove v. ZBA of Chatham, 444 Mass. 754 (2005)

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 reg rooted in legitimate state interests (reduce risk to people and property from extreme high tides and the rising sea level).



See *Alegria v. Keeney*, 687 A.2d 1249 (R.I. 1997) (fair exercise of police power to protect wetlands; *Milardo v. CRMC*, 434 A.2d 266 (R.I. 1981) (fair exercise of police power to protect water quality).

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).

Argos Properties II, LLC v. City Council for Virginia Beach (Va. Cir. Ct. 2018)

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



Oct. 2016, Princess Ann Road

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



Thank you. Questions?

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