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Maine CCAP and
NH CAW
symposium

May 30, 2019

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

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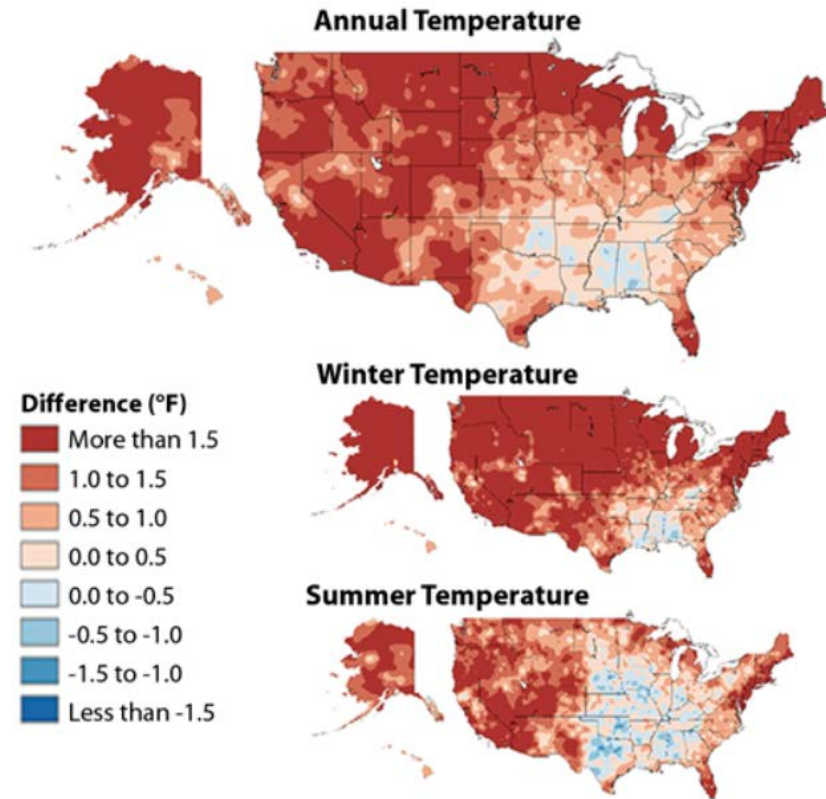
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Foreseeability of Climate Impacts

FROM THE 2017 CLIMATE SCIENCE SPECIAL REPORT

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



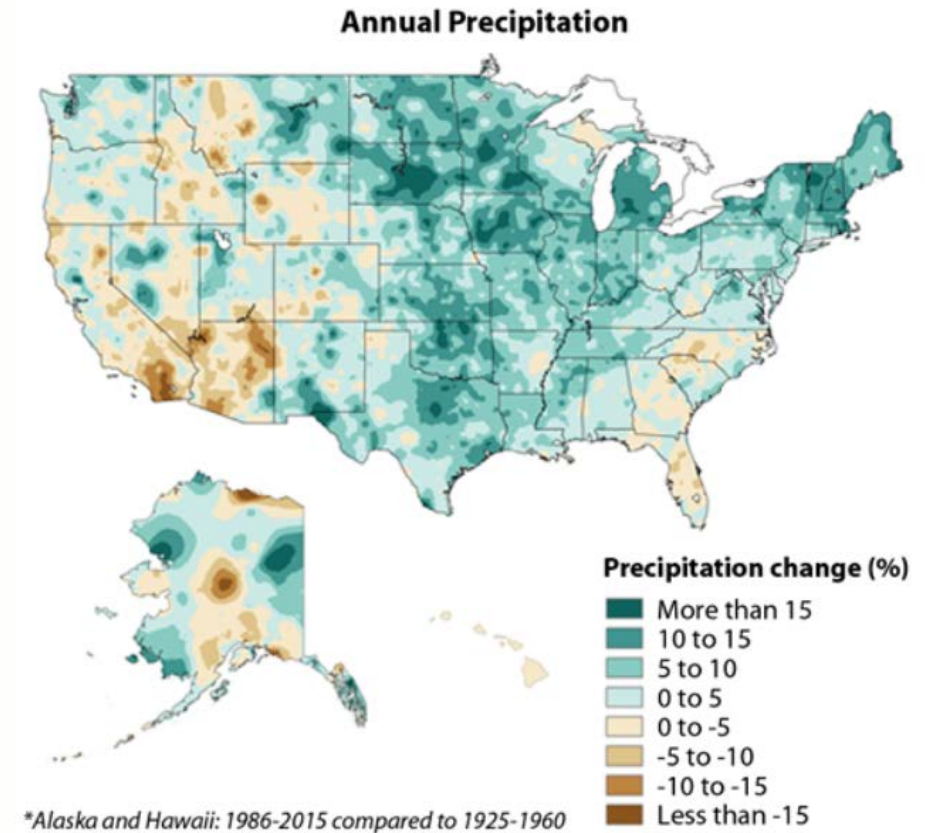
*Alaska and Hawaii: 1986-2016 compared to 1925-1960

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

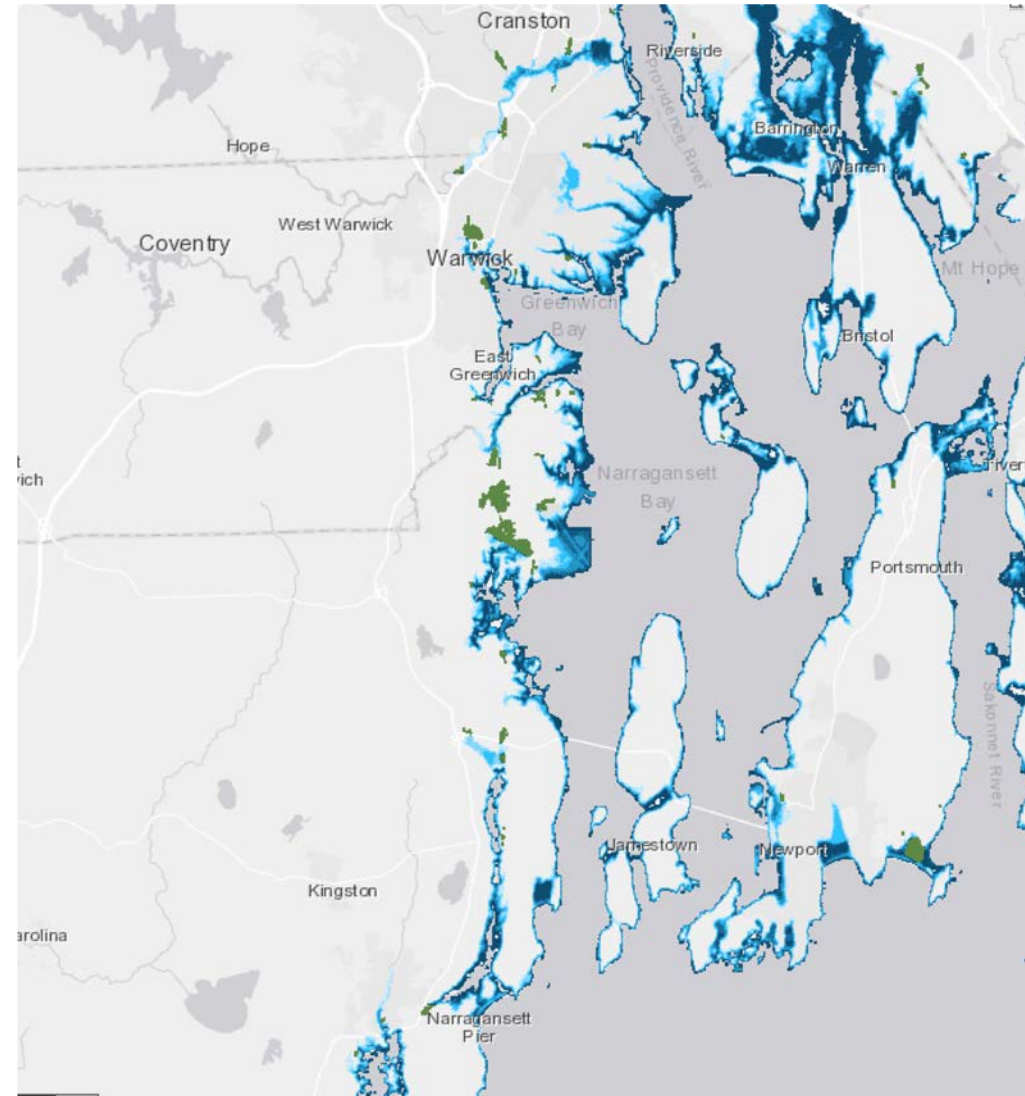
City of Boston
Mayor Martin J. Walsh

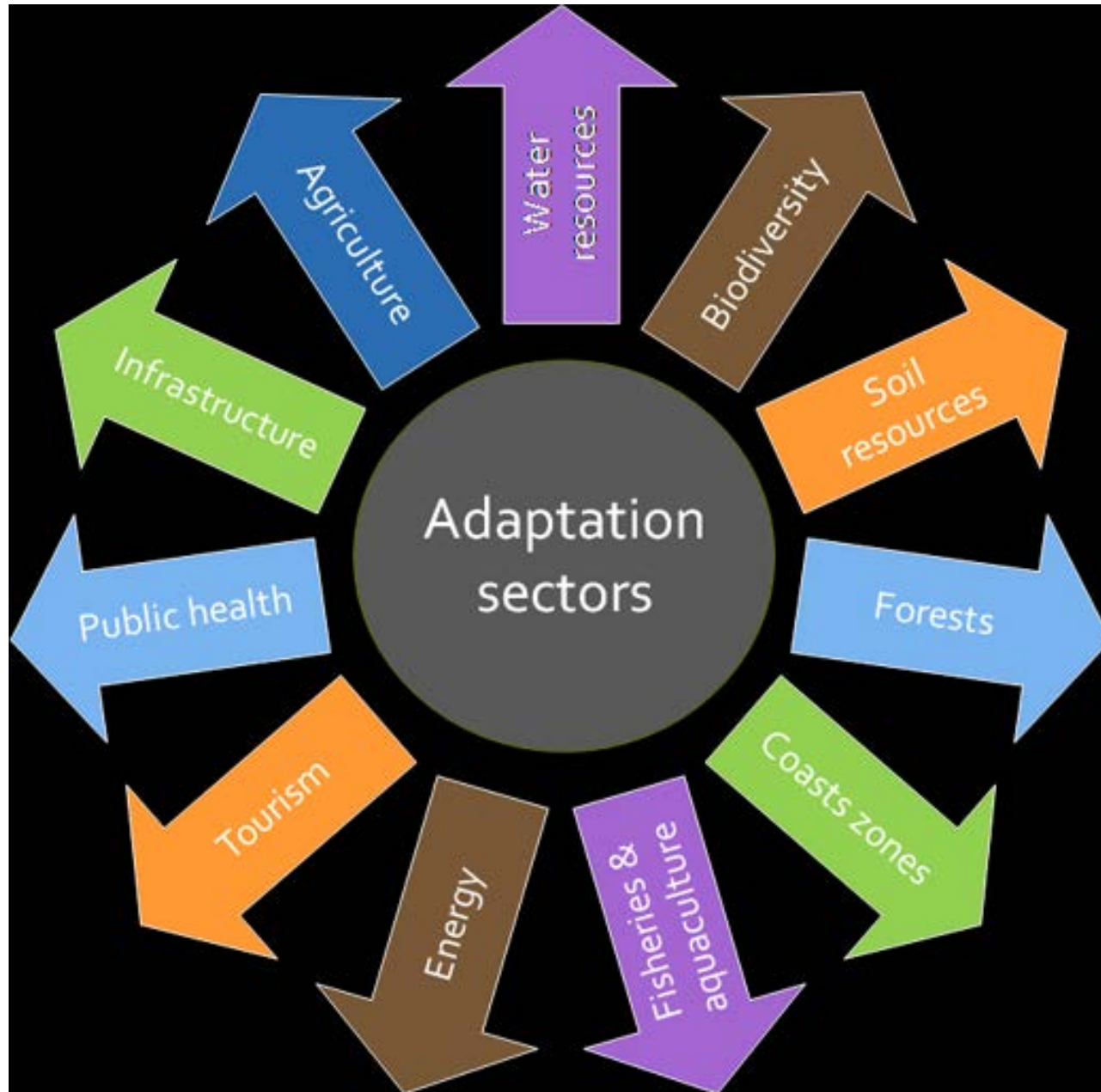
BOSTON
Green Ribbon
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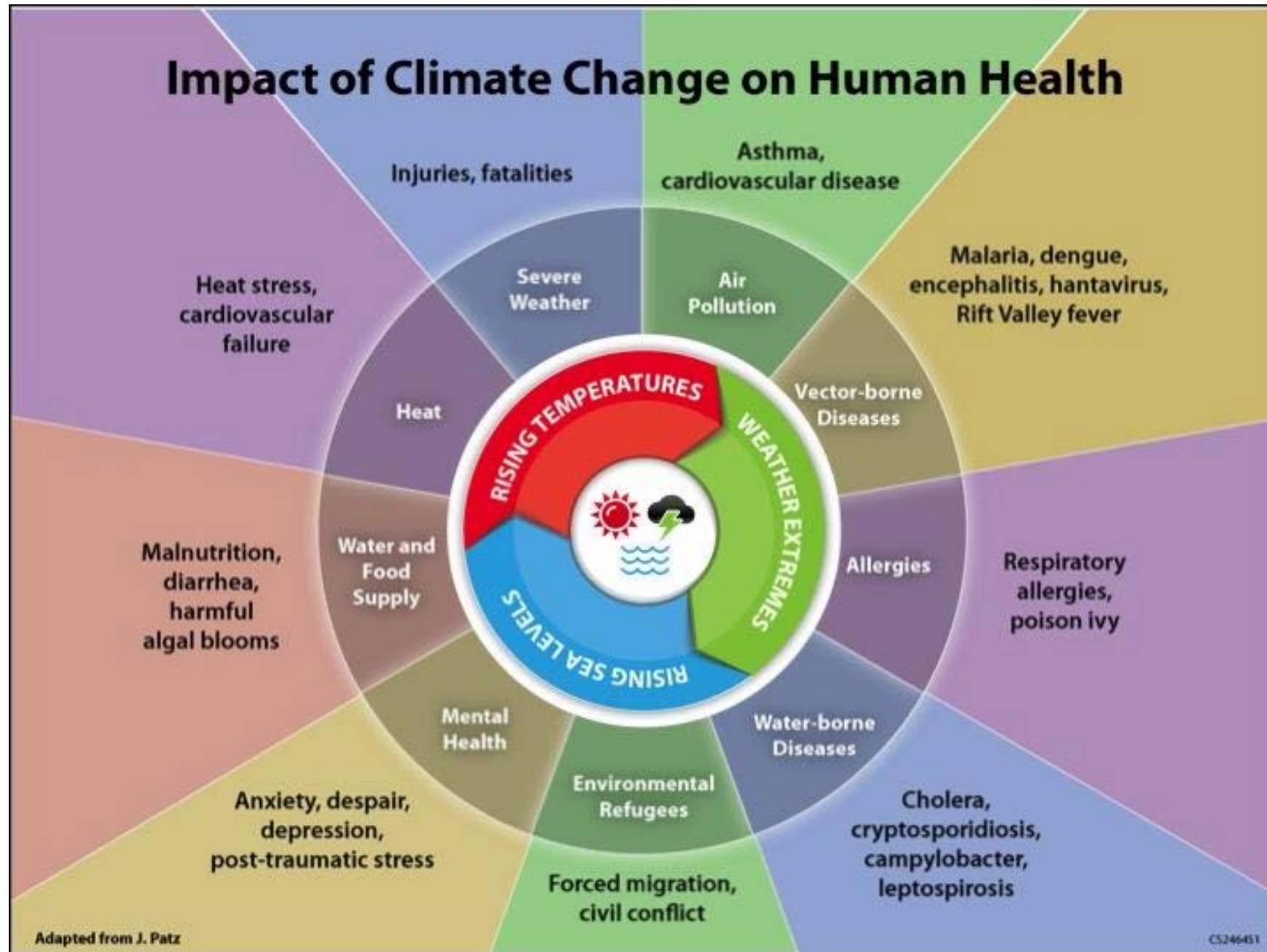


RI COASTAL RESOURCES MANAGEMENT COUNCIL SEA LEVEL RISE & STORM MAPS





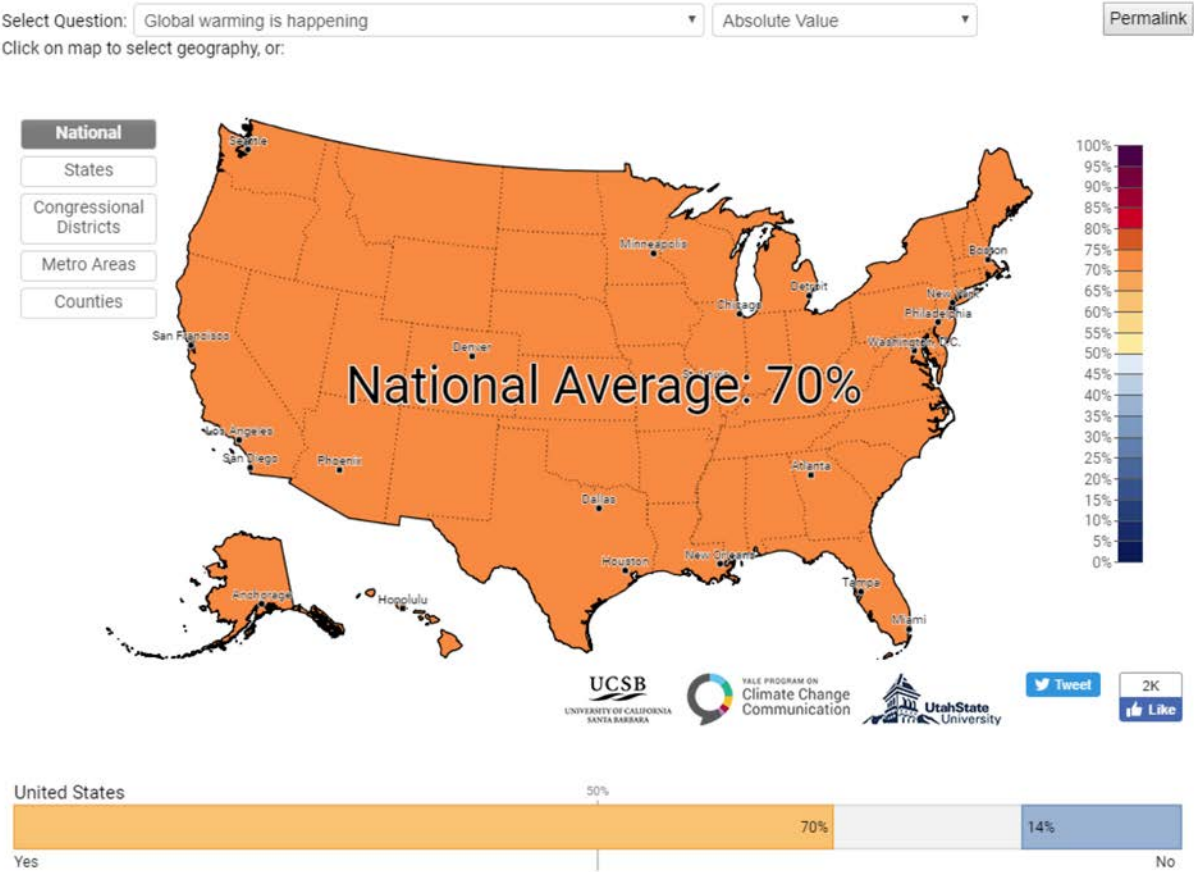
Impact of Climate Change on Human Health



Increasing Public Discourse



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

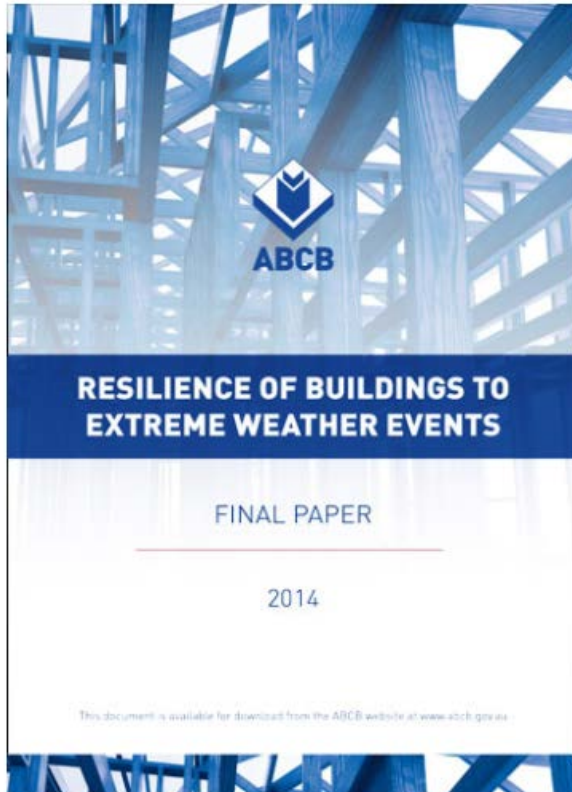




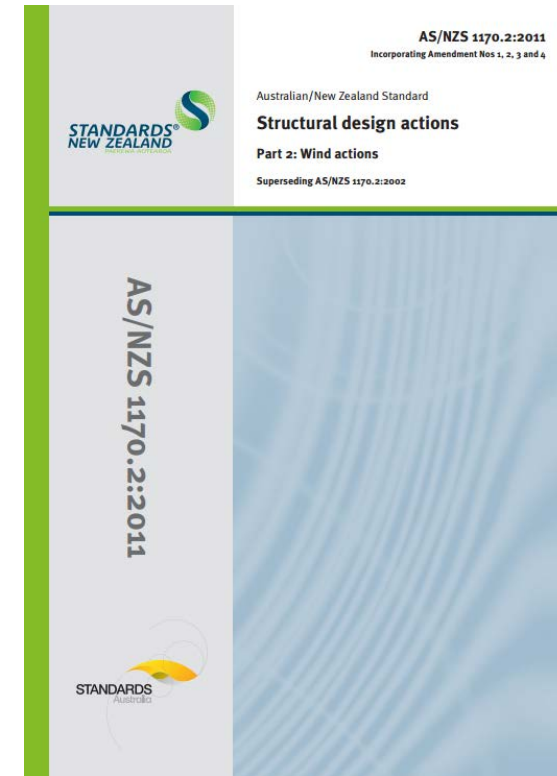
TIME TO

ADAPT

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.”

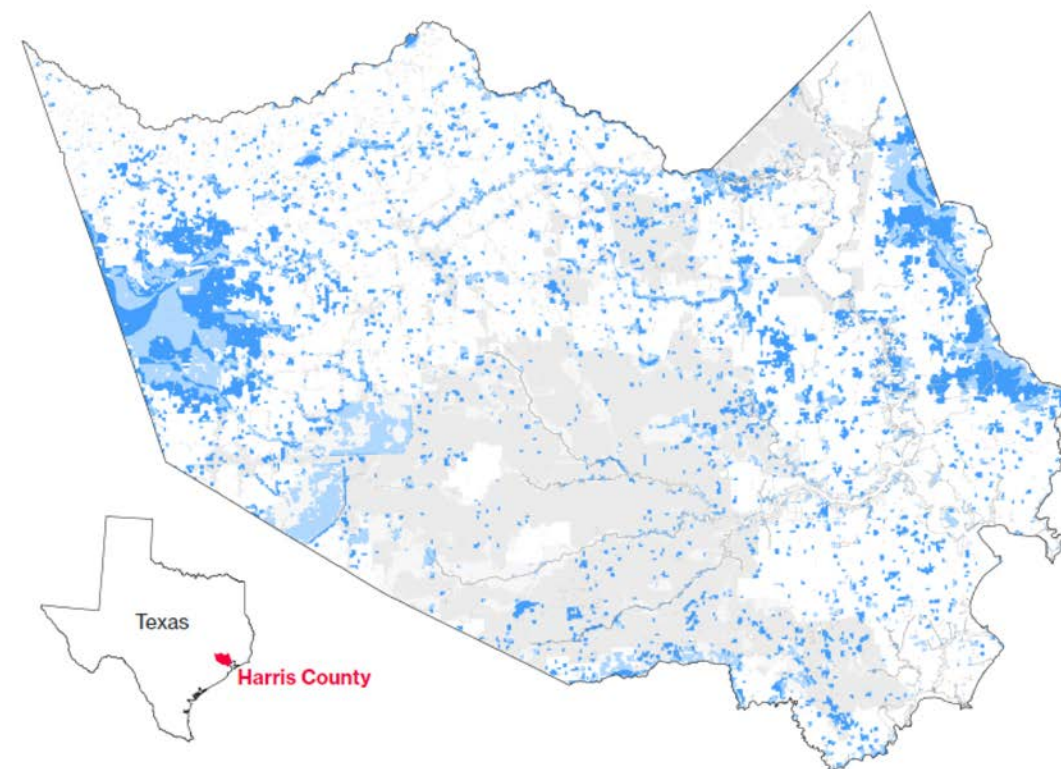


The Joint Standards Australia/Standards New Zealand Committee: “The wind speeds provided are based on analysis of existing data. No account has been taken of any possible future trend in wind speeds due to climatic change”

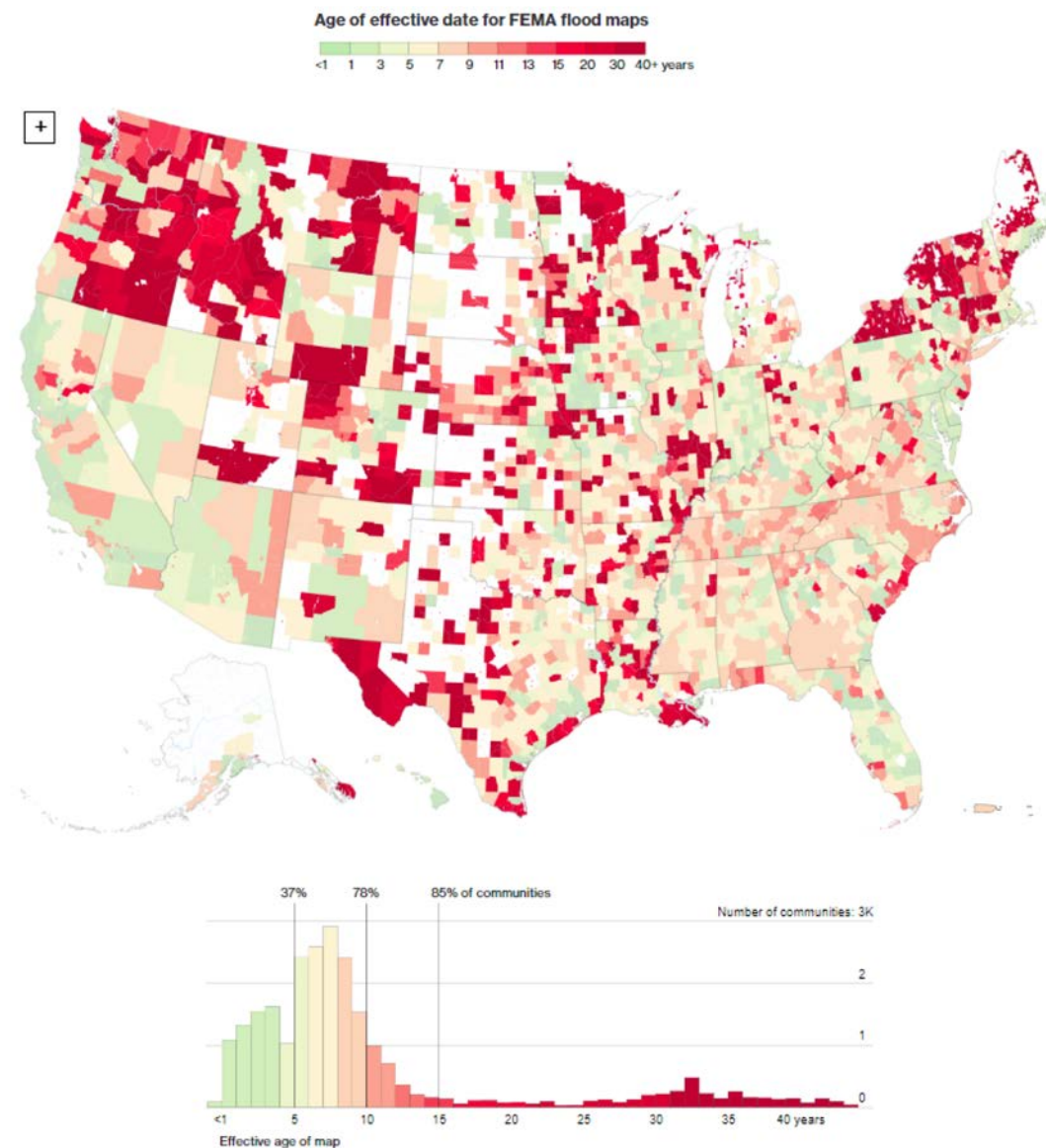
Static & Outdated Regulatory Framework

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.

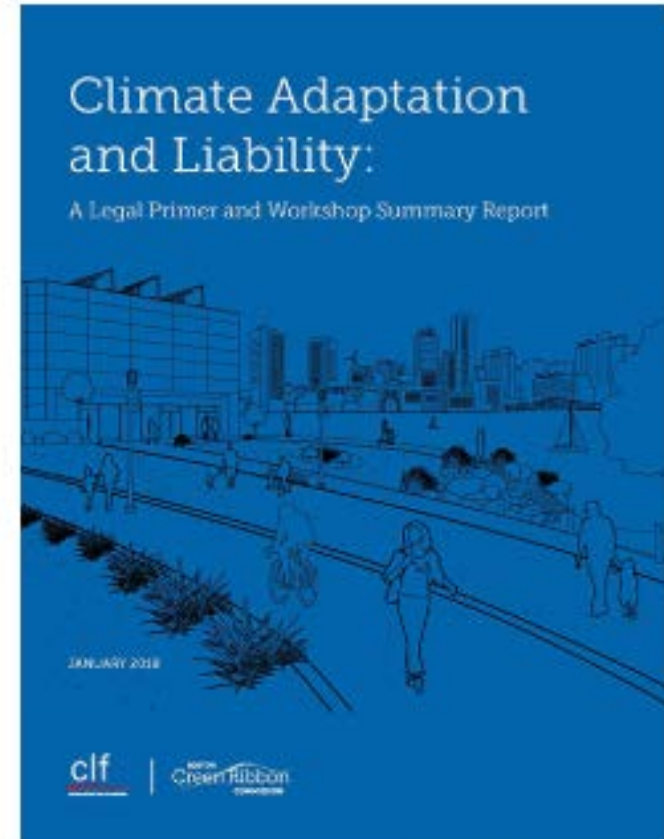


An aerial photograph showing a residential neighborhood completely inundated with floodwater. Numerous houses with various roof colors (brown, grey, white) are visible, partially submerged. Trees and some utility poles also stand in the water. The scene depicts the aftermath of a major flood event.

What does this mean for governments?

Legal Disclaimer 😊

- Not an exhaustive presentation on liability.
- This is not legal advice.
- Check out CLF's report, *Climate Adaptation and Liability*.



DOWNLOAD

Overview of Legal Claims

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

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

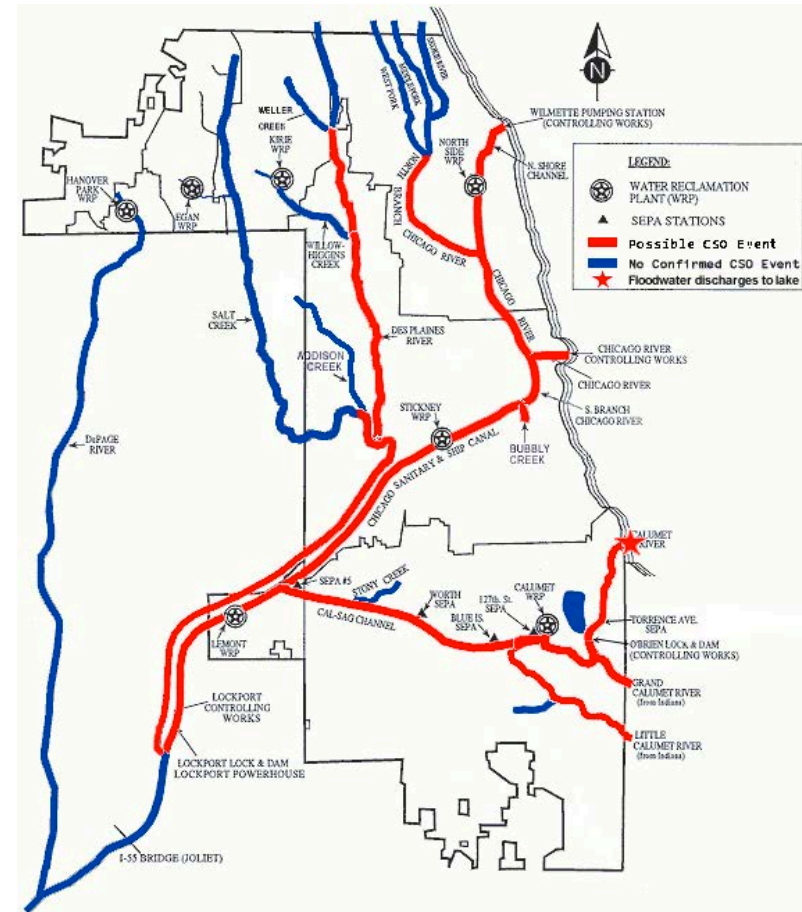


Illinois Farmers Ins. V. Metro. Water Reclamation Dist. Of Greater Chicago (2014)

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 withdrawn.



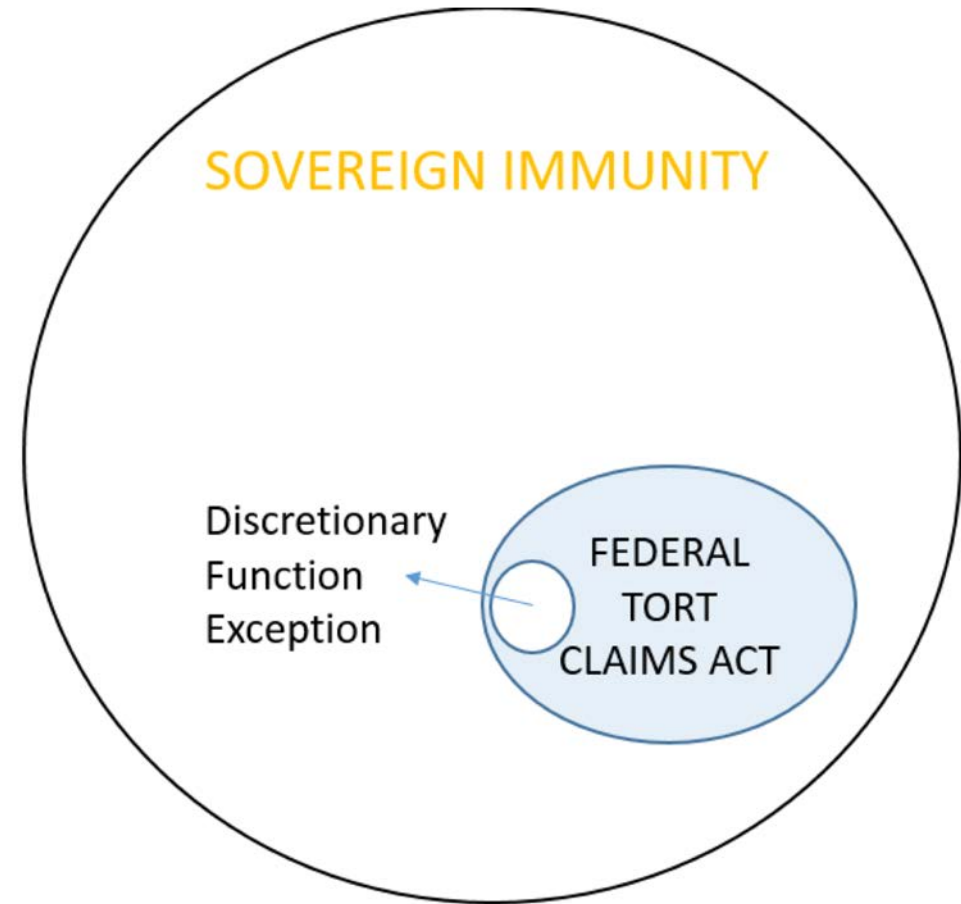
Sovereign Immunity

- 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 Tort Claims Act

- 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.

In re Katrina Canal Breaches, 696 F.3d 436 (5th Cir. 2012)


- **ISSUE:** Was ACOE immune to damages from negligence claim for mismanaging maintenance of MR-GO under DFE?
- **OUTCOME:** Yes.
- **REASONING:** All of decisions around design, construction, and maintenance were judgment calls that required public policy considerations.



Maine – “Tort Claims Act”

LEGAL AUTHORITY	CLAIMS/ACTIONS ALLOWED	COMMENTS/EXCEPTIONS	DAMAGE CAPS
<p>Maine Tort Claims Act. M.R.S.A., Tit. 14, §§ 8101 – 8118 (1977). Except as otherwise provided in the statutes, all governmental entities are immune from suit on any and all tort claims seeking recovery of damages. If immunity is removed by the Tort Claims Act, a claim for damages must be brought subject to the limitations contained in the Act. M.R.S.A., Tit. 14, § 8103.</p>	<p>A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or operation of:</p> <ul style="list-style-type: none"> (1) Motorized equipment; (2) Construction, cleaning, repair of sidewalk, bridge, etc.; (3) Discharge of pollutants (4) Construction, maint, ownership of land, buildings, structures, facilities or equipment designed for use primarily by the public. <p>See M.R.S.A., Tit. 14, § 8104-A</p>	<p>A gov entity is not liable for any claim which results from:</p> <ul style="list-style-type: none"> (1) legislative acts; (2) judicial acts; (3) discretionary acts <p>See M.R.S.A., Tit. 14, § 8104-B for more exceptions.</p> <p>Four-part test for discretionary act:</p> <ul style="list-style-type: none"> (1) Does it involve policy? (2) Is it essential to the realization that policy? (3) Does act require basic policy evaluation, judgment, and expertise? (4) Does municipality possess the lawful authority and duty to do or make the decision? Darling v. Augusta Mental Health Inst., 535 A.2d 421 (Me. 1987). 	<p>\$400,000 per single occurrence. M.R.S.A., Tit. 14, § 8105.</p> <p>No judgment against governmental entity shall include punitive damages. M.R.S.A., Tit. 14, § 8105.</p>

New Hampshire – “Claims Against the State”

LEGAL AUTHORITY	CLAIMS/ACTIONS ALLOWED	COMMENTS/EXCEPTIONS	DAMAGE CAPS
<p>State sovereign immunity is core value. N.H. Rev. Stat. §§ 541-B:1 to 541-B:23 (1985). State sovereign immunity is core value.</p> <p>Bodily Injury Actions Against Governmental Units. N.H. Rev. Stat. §§ 507-B:1 to 541-B:11. Municipal and county common law immunity abolished in <i>Merrill v. City of Manchester</i>, 332 A.2d 378 (N.H. 1974) (liability same as that of private corporation).</p>	<p>State generally waives its immunity to tort liability. N.H. Rev. Stat. § 541-B:2, § 541-B:9, § 541-B:9-a. Immunity also waived as to contract liability. N.H. Rev. Stat. § 491:8.</p> <p>No “governmental unit” liable except as provided in Chapter 507-B. N.H. Rev. Stat. § 507-B:5.</p> <p> *No gov’t unit liability for snow, ice, or other weather hazards on premises owned, occupied, maintained, or operated, unless gross negligence. N.H. Rev. Stat. § 507-B2-b.</p>	<p>State does not waive its immunity for claims involving:</p> <ul style="list-style-type: none"> (1) the exercise of a legislative or judicial function; (2) an act or omission of a State employee, or official when exercising due care in the execution of any statute; (3) discretionary function (involves executive or planning function); and (4) an intentional tort, assault, libel, slander, misrepresentation. N.H. Rev. Stat. § 541-B:19. 	<p>All claims arising out of single incident shall be limited to an award not to exceed \$475,000 per claimant (\$275K for gov’t unit) and \$3,750,000 per any single incident (\$925K for gov’t unit), or the proceeds from any insurance policy, whichever amount is greater. The State will not pay punitive damages. N.H. Rev. Stat. § 541-B:14; N.H. Rev. Stat. § 507-B:4.</p>

Discretionary function exception not impossible to overcome

AP

Judge says US government can be sued for Flint water crisis

April 19, 2019



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FLINT, Mich. (AP) — A judge says the federal government can be sued by Flint residents who blame the Environmental Protection Agency for waiting too long to intervene in the city's water crisis.

Federal Judge Linda Parker didn't determine whether EPA employees were negligent when Flint's water system [became contaminated with lead in 2014 and 2015](#). The decision at this stage is more narrow, with the judge saying Thursday that the government isn't immune to a lawsuit.

Parker says EPA employees knew lead was leaching from old pipes because Flint's water wasn't being properly treated. She says the EPA also knew that Michigan regulators were misleading residents about the quality of the water.

The judge says the "lies went on for months."

Takeaways from Negligence

- Negligence claims are being brought against the government in relation to climate change events or decisions...these suits will likely keep coming.
- Discretionary-Function Exception to Tort Claims Acts is a difficult hurdle to overcome, but not impossible.
- Will depend on specific facts and if applicable, the relevant state tort claims statute

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 private 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 ... have seen a few takings claims arise out gov’t inaction.

Jordan 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

E.g., 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).

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)

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.

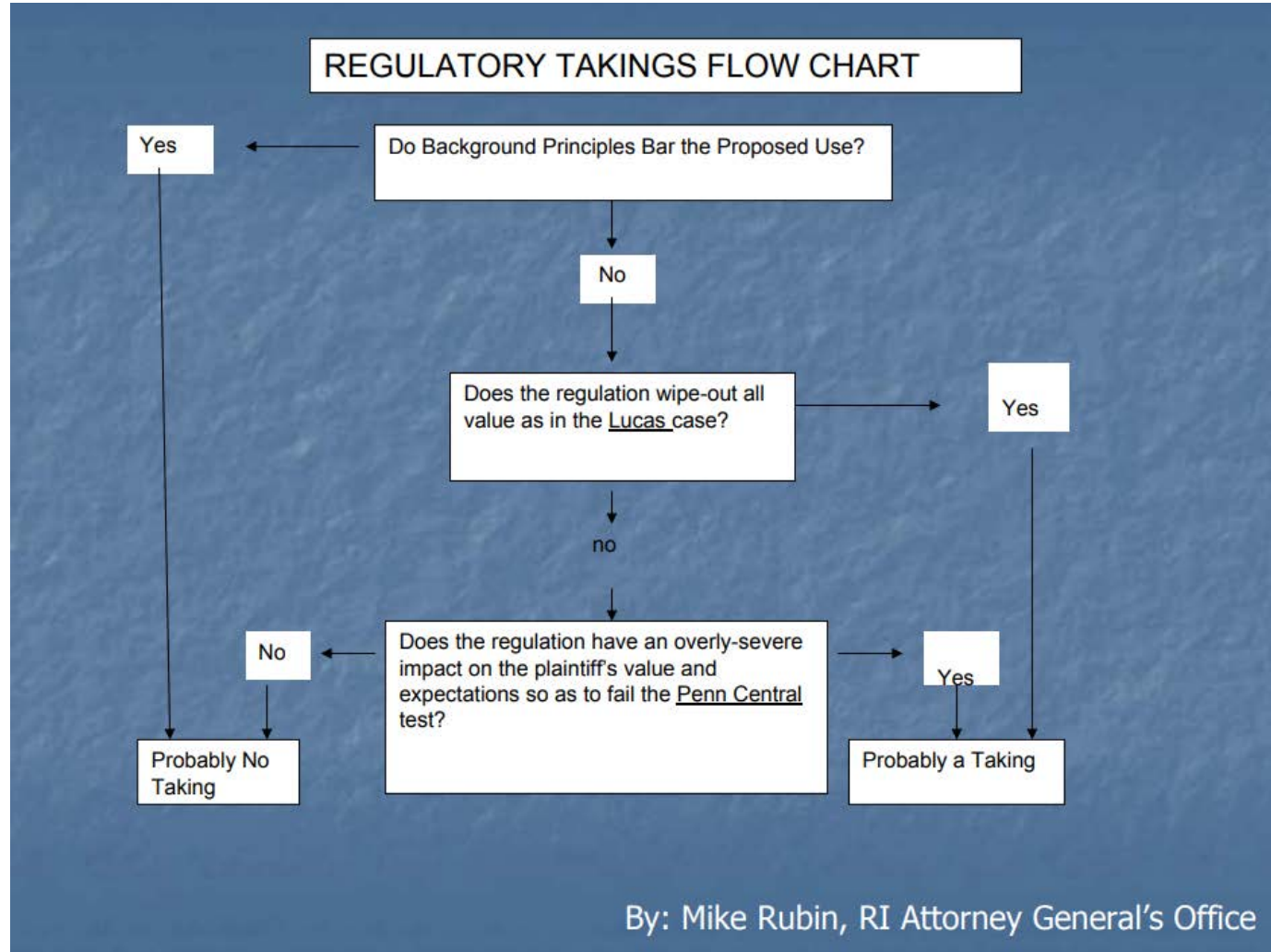
A. Physical Taking - from Gov't Action

In re Upstream & Downstream Addicks and Barker Flood-Control Reservoirs (Fed. Cl.) (2017)



- **FACTS:** During Hurricane Harvey, Army Corps chose to release water from reservoir that flooded thousands of downstream homes to safeguard integrity of stream. Meanwhile, upstream homes flooded when reservoir topped its banks.
- **ISSUE:** Did Army Corp “take” downstream private property when opened dams? Did Army Corps knowingly use upstream plaintiffs’ private property as flood storage during Harvey, therefore requiring compensation?
- **STATUS:** Testimony and evidence now complete for upstream case, closing args in September. Downstream case pending.

B. Regulatory Taking from Gov't Action



***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).



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: Challenge to denial of application dismissed. Court order not yet available.



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 sets good precedent to empower other cities to require developers to incorporate foreseeable future climate impacts in permit applications.



Thank you. Questions?

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