

ENVIRONMENTAL LAW

Expert Analysis

Governmental and Private Liability for Flooding

In recent years the frequency and severity of heavy precipitation and floods in parts of the United States, including the Northeast, have been increasing to a statistically significant degree, and this trend is expected to worsen.¹ Events such as last August's Hurricane Irene have caused widespread loss of life and property damage.

This article summarizes some of the liability issues that result from floods, and efforts to control them.

Governmental Liability

Sovereign Immunity. When governments take regulatory measures, they are generally deemed to be acting in their governmental capacity and enjoy a measure of sovereign immunity. However, when governments construct structures or take similar physical acts, this is often deemed to be a proprietary function and the government will not enjoy immunity if negligence is found. The Federal Tort Claims Act (FTCA) waives sovereign immunity under many circumstances, subject to a number of exceptions, notably including one for discretionary functions.² However, certain specific statutory protections apply. For example, the Flood Control Act of 1928 protects the federal government from certain kinds of liability in connection with the construction and operation of flood control works; the scope of this exclusion has been much litigated.³

Discretionary acts enjoy a greater measure of immunity than ministerial acts, but the line between them is often difficult to draw.

Structural Measures. Governments are under no basic obligation to protect citizens and property from flooding or to build drainage systems. However, if construction work undertaken by or

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for the government worsens flooding conditions, there may be liability. For example, if a dam collapses due to inadequate design, construction or operation, the government may be strictly liable. There may also be liability if water-control measures such as levees, groins, sea walls, and drainage structures are negligently designed, built or operated.⁴

If government action results in flooding of land that destroys the value of property, that may amount to a compensable taking as an inverse condemnation.⁵

The government has no general duty to provide emergency services unless a statute otherwise requires, but when it does provide such services, it must exercise reasonable care.

Nonstructural Measures. The government generally has no liability for issuing erroneous weather forecasts, but the legal implications of disseminating misleading information about hazards can be more complicated, such as when the government has undertaken a special duty to warn certain classes of persons.⁶

Likewise, the government has no general duty to provide emergency services unless a statute otherwise requires, but when it does provide such services, it must exercise reasonable care. Courts often take emergency situations into account in excusing liability, and some state statutes exempt government entities from many kinds of liability for emergency response measures. For example, New York has the State and Local Natural and

Man-Made Disaster Preparedness Law, which provides immunity to government officials performing discretionary functions in response to emergencies.⁷

Flood-Related Regulations. Unless a statute provides otherwise, governments do not have a duty to adopt regulations restricting development in flood hazard areas.⁸

When the government does restrict such development, the property owners whose ability to build is restricted will often assert that they are entitled to compensation for a taking. Few such cases have succeeded; those that have tend to involve a complete or nearly complete prohibition on building, often coupled with an inadequate showing by the government that the land involved actually presented a particular hazard. Most government actions in mapping floodplains have been upheld.⁹

Land Use Regulation. When the government has issued environmental, zoning or building permits for developments in areas vulnerable to flood hazards, and damage ensues, the judicial decisions vary widely as to whether the government may be liable.¹⁰ Some jurisdictions apply some form of statutory, constitutional, or common law sovereign immunity; others treat governments more like private parties in imposing liability for foreseeable injury.¹¹

As the New York Appellate Division found last month, a municipality may not deny a land use application based on public concerns about runoff unless there is engineering evidence that these concerns are valid.¹²

Private Liability

Neighboring Property Owners. A landowner is not liable for damages caused by the flooding of a stream that runs through his property unless the plaintiff proves that the landowner acted negligently and that the landowner's action or inaction was the proximate cause of the flooding.¹³ To establish negligence, a plaintiff would have to prove that the landowner breached a duty owed

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to the downstream property owners and failed to exercise the care that a reasonably prudent person would exercise in similar circumstances.

Landowners generally have no duty to inspect, maintain, or remedy conditions of purely natural origin.¹⁴ Landowners also have no duty to protect against unforeseeable and unexpected injuries.¹⁵

Dams and Other Obstructions. If a dam, embankment or other artificial work causes a stream to overflow and result in damage, the owner of the work may be liable, unless the owner has obtained an easement allowing overflow.¹⁶ One who obstructs or redirects a watercourse and causes flooding may also be liable.¹⁷ However, liability may be escaped if the flooding resulted from unprecedented rainfall that could not have been anticipated.¹⁸

Overflow. If a privately owned reservoir, pond, ditch or the like overflows and damages another's property, the owner may be liable. This may fall under strict liability or it may require proof of negligence, depending on the jurisdiction and the circumstance.¹⁹

Insurance. Whenever a flood loss occurs, one of a property owner's first acts is naturally to file an insurance claim. Some property policies cover all risks, except for those specifically excluded; others cover only enumerated risks. Many property policies specifically exclude damage caused by floods, but include damage caused by winds; after an event such as a hurricane, litigation often ensues over whether certain damage resulted from wind or flood.²⁰ Because the private market often excludes flood hazards, the National Flood Insurance Act was enacted in 1968 to provide federally subsidized coverage.²¹ It is available only in communities that have adopted certain measures to reduce flood losses. This program is expiring, and Congress is currently considering its future.

Utilities. Extreme weather events are often accompanied by disruptions in electricity service, which in turn may cause damages (such as spoilage of refrigerated or frozen food). Disputes then often arise as to whether service should have been interrupted, or was restored quickly enough. Electric utilities are generally not liable for interruption of service due to the ordinary negligence of their employees, but may remain liable for gross negligence.²²

Professionals. Architects, engineers and other design professionals have sometimes been held liable if structures built to their designs did not withstand foreseeable floods.²³ For example, the Arizona Supreme Court sustained a jury verdict finding a contractor negligent in failing to design adequate dikes and culverts for a bridge, and

that this failure was the proximate cause of the destruction of a building on plaintiffs' property during a 100-year flood event. The Court held that there was sufficient evidence to find that without culverts on the bridge, there was a reasonable probability that the plaintiffs' property would be flooded.²⁴

The Iowa Supreme Court upheld a jury verdict finding an engineering firm negligent in designing a sewage treatment facility which included a dike that surrounded the facility. The facility was constructed on a flood plain and the dike was insufficient to keep out floodwaters that ultimately damaged the facility.²⁵

Hurricane Katrina Case

On Nov. 9, 2011, the U.S. Court of Appeals for the Fifth Circuit heard oral argument in an important case on flood liability. In an action brought under the Federal Tort Claims Act, the district court held the United States liable for flood damage during Hurricane Katrina caused by the "gross negligence" of the U.S. Army Corps of Engineers for failing to operate and maintain safely the Mississippi River-Gulf Outlet (MRGO), an artificial canal built to allow ship passage between the Gulf of Mexico and the Port of New Orleans. After a 19-day bench trial, the district court awarded five plaintiffs a total of \$720,000 in damages.²⁶ In its appeal, the Corps is relying heavily on the discretionary function exception to the FTCA and on the above-cited provision of the Flood Control Act.

Landowners generally have no duty to inspect, maintain, or remedy conditions of purely natural origin. Landowners also have no duty to protect against unforeseeable and unexpected injuries.

If the Fifth Circuit affirms the district court, many plaintiffs beyond the five whose damages were the subject of the bench trial will presumably assert similar claims, and the resulting damage award could be extraordinarily large.

1. U.S. Global Change Research Program, *Global Climate Change Impacts in the United States* (2009), pp. 45-50; Meghan Walter & Richard M. Vogel, "Increasing Trends in Peak Flows in the Northeastern United States and Their Impacts on Design," 2nd Joint Federal Interagency Conference, Las Vegas, NV, June 27-July 1, 2010; Stanley A. Changnon, "Assessment of Flood Losses in the United States," 138 J. Contemp. Water Research & Educ. 38 (April 2008).

2. 28 USC §1346(b).

3. 33 USC §702c. See *Central Green Co. v. United States*, 531 US 425 (2001); Annot., "Liability of United States under Federal Tort Claims Act for damage from flooding," 4 ALR Fed. 723; Cynthia Brougher, "Federal Liability for Flood Damage Related to Army Corps of Engineers Projects," Congressional Research Service, Sept. 4, 2008.

4. See Jon A. Kusler, *A Comparative Look at Public Liability for Flood Hazard Mitigation*, Association of State Floodplain Managers Foundation (undated-apparently 2008); David M.

Stein, "Flood of Litigation: Theories of Liability of Government Entities for Damages Resulting From Levee Breaches," 52 Loy. L. Rev. 1335 (2006); Annot., "Liability of municipality or other governmental subdivision in connection with flood-protection measures," 5 ALR2d 57; *Paterno v. State*, 113 Cal.App. 4th 998 (2003), review denied (2004).

5. *United States v. Kansas City Life Insurance Co.*, 339 US 799 (1950). See also *Hauselt v. County of Butte*, 172 Cal.App. 4th 550 (2009), review denied (2009).

6. *Kusler*, supra note 4, pp. 24-29; *Indian Towing Co. v. United States*, 350 US 61 (1955). See also *Litchhult v. Reiss*, 583 N.Y.S.2d 671 (3d Dept. 1992), leave to appeal dismissed, 81 NY2d 737 (1992) (county was immune from liability for death of children killed by tornado that struck school; decision not to warn school about tornado watch pursuant to county's emergency plan was a discretionary act).

7. N.Y. Exec. L. §25.

8. *Kusler*, supra note 4, p. 41.

9. Edward A. Thomas & Sam Riley Medlock, "Mitigating Misery: Land Use and Protection of Property Rights Before the Next Flood," 9 Vt. J. Envtl. L. 155 (2008).

10. E.g. *Hurst v. United States*, 739 F.Supp. 1377 (D. SD 1990) (Corps of Engineers liable for allowing construction of jetty that damaged plaintiff's property); Annot., "Liability of Governmental Entity for Issuance of Permit for Construction Which Caused or Accelerated Flooding," 62 ALR 3d 514.

11. Steven Frederic Lachman, "Should Municipalities Be Liable for Development-Related Flooding?" 41 Natural Resources J. 945 (2001).

12. *Kinderhook Development, LLC v. City of Gloversville Planning Board*, 2011 NY Slip Op 07550, ___A.D.2d___ (3d Dept. Oct. 27, 2011).

13. *Cooper v. Sharon Springs Central School Dist.*, 777 NYS2d 564, 566 (3d Dept. 2004) ("[a]n upper owner on a waterway may incur liability for negligently permitting such a quantity of debris to enter a watercourse from that owner's property that it causes damage to a lower owner").

14. *Frank v. Garrison*, 584 NYS2d 217, 218 (3d Dept. 1992); *Lichtman v. Nadler*, 426 NYS2d 628 (4th Dept. 1980), appeal dismissed, 53 NY2d 704 (1981).

15. *Lazar v. TTX Companies Inc.*, 767 NYS2d 52, 53-54 (2d Dept. 2003).

16. *Cooley v. Clifton Power Corp.*, 747 F.2d 258 (4th Cir. 1984).

17. *Campion v. Simpson*, 659 P.2d 766 (Idaho 1983).

18. *Key Sales Co. v. South Carolina Electric and Gas Co.*, 290 F.Supp. 8 (D.S.C. 1968), aff'd, 422 F.2d 389 (4th Cir. 1970).

19. Annot., "Liability for overflow or escape of water from reservoir, ditch, or artificial pond," 169 ALR 517.

20. James A. Knox Jr., "Causation, the Flood Exclusion, and Katrina," 41 Tort Trial & Ins. Prac. L.J. 901 (2006); *Bayle v. Allstate Insurance Co.*, 615 F.3d 350 (5th Cir. 2010).

21. 42 USC §§4001 et seq.

22. *Flood Pageant Inc. v. Consolidated Edison Co.*, 54 NY2d 167 (1981).

23. Jon Kusler, *Professional Liability for Construction in Flood Hazard Areas*, Association of State Floodplain Managers (2007).

24. *L.H. Bell & Assoc. Inc. v. Granger*, 543 P.2d 428 (Ariz. 1975).

25. *Schiltz v. Cullen-Schiltz & Associates Inc.*, 228 N.W.2d 10 (Iowa 1975).

26. *In re Katrina Canal Breaches Consolidated Litigation*, 647 F.Supp.2d 644, 732 (E.D. La. 2009).