

LEGAL QUESTIONS:

GOVERNMENT LIABILITY

and

NO ADVERSE IMPACT

FLOODPLAIN MANAGEMENT

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for the
Association of State Floodplain Managers**

Preface

This question and answer summary concerning legal issues associated with no adverse impact floodplain management was prepared for the Association of State Floodplain Managers (ASFPM) by Jon Kusler, Esq., Associate Director of the Association of State Wetland Managers. It is based upon a larger paper with extensive case law citations, also prepared by Jon Kusler for the Association: No Adverse Impact Floodplain Management and the Courts. The summary and the larger paper are based upon review of the legal literature as well as Federal and state case law concerning floodplain regulations.

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COMMON LEGAL QUESTIONS

INTRODUCTION

What is no adverse impact floodplain management?

In 2000, the Association of State Floodplain Managers recommended a “no adverse impact” approach or goal for local government, state, and federal floodplain management to help control spiraling flood and erosion losses, new development which increases flood risks, and then additional flood losses. With such an approach, future land and water uses are not permitted which will flood new areas, increase flood heights, increase erosion or otherwise increase flood and erosion damages to public and private property. The no adverse impact goal could also potentially be applied to environmental and other impacts, if a community chooses to do so. The “no adverse impact” goal is not intended as a rigid rule of conduct. Rather it has been suggested as a general guide for landowner and community actions in the watersheds and the floodplains which may adversely impact other properties or communities. It could also be incorporated as an overall performance standard into community and state floodplain regulations.

What major legal issues are raised by no adverse impact floodplain management?

Two major sets of legal issues arise with no adverse impact floodplain management.

- 1) Is no adverse impact floodplain management consistent with common law rights and duties? Can no adverse impact floodplain management reduce community liability for flooding and erosion problems?
- 2) Will community adopting floodplain regulations incorporating a no adverse impact standard be subject to liability for taking private property without payment of just compensation or be subject to other successful legal challenges?

These questions will be discussed individually.

1) IS A NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT CONSISTENT WITH TRADITIONAL LANDOWNER RIGHTS AND DUTIES? CAN NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT REDUCE COMMUNITY LEGAL LIABILITY FOR FUTURE FLOOD AND EROSION LOSSES?

More specifically:

Is a no adverse impact approach consistent with common law rights and duties?

From a common law perspective, a no adverse impact approach for floodplain management coincides, overall, with traditional, common law public and private landowner rights and duties with regard to the use of lands and waters. Courts have followed the maxim "Sic utere tuo ut alienum non laedas," or "so use your own property that you do not injure another's property." See *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987) and many cases cited therein. See, for example, *Hagge v. Kansas City S. Ry Co.*, 104 F. 391 (W.D. Mo., 1900) (Court held that damage done to land by occasional overflow of a stream caused by a railroad was a nuisance.) This maxim characterizes overall landowner rights and duties pursuant to common law nuisance, trespass, strict liability, negligence, riparian rights, surface water law rights and duties (many jurisdictions), and statutory liability. At common law, no landowner (public or private) has a right to use his or her land in a manner that substantially increases flood or erosion damages on adjacent lands except in dwindling number of jurisdictions applying the “common enemy” doctrine to diffused surface or flood waters.

Are communities increasingly held liable for increasing flood and erosion losses?

When individuals are damaged by flooding or erosion they often file law suits against governments or other individuals, claiming that the governments have caused the damages, contributed to the damages, or (in some instances) failed to prevent or provide adequate warnings of natural hazards. Successful liability suits based upon government acts which increase natural hazards have become increasingly expensive to governments not only because of the increasing damage awards but because of the attorney and expert witness fees which may exceed the damage award.

Successful liability suits of all types have increased in the last two decades for several reasons:

- A growing propensity of individuals damaged by flooding or erosion to sue. Historically, members of society were more willing to accept losses from a broad range of causes.
- Large damage awards and the willingness of lawyers to initiate suits on a contingent fee basis
- Propensity of juries to view governments as having "deep pockets".
- Expanded concepts of liability.
- Uncertainties with regard to the legal rules of liability and defenses (e.g. “act of god”) due to the evolving nature of the body of law and the site specific nature of many tort actions.
- Abrogation or modification of sovereign immunity in most jurisdictions.

- Increased predictability and foreseeability of hazards. Hazards are now (to a greater or lesser extent) "foreseeable" and failing to take such hazards into account may constitute negligence.
- Limitation of the "Act of God" defense because most hazards are now foreseeable.
- Advances in the techniques for reducing hazard losses. Advances in hazard loss reduction measures (e.g. warning systems or elevating structures) create an increasingly high standard of care for reasonable conduct.
- Advances in natural hazard computer modeling techniques which can be used to establish causation.
- Reduction in the defenses of contributory negligence and assumption of risk.

All levels of government--the federal government, states, and local governments--may now be sued for negligence, nuisance, breach of contract, or the "taking" of private property without payment of just compensation under certain circumstances although vulnerability to suit varies.

In what situations are governmental units most likely to be held liable for increasing flood or erosion damages on private lands?

Courts have commonly held governments liable for increasing flood and erosion damages on private property by blocking natural drainage through grading, culverts, bridges, fills or structures, by increasing the location and amount of runoff through channelization or drainage works, or by constructing flood control works such as levees and dams which may actually increase flood damages on some lands. Courts have often held governmental units liable for inadequately maintaining or operating culverts, bridge crossings, channelization projects, and dams. Some courts have also held local governments liable for issuing permits and approving subdivisions which increase flood damages on other lands and for inadequate inspections. Courts have held government units liable under a variety of legal theories including riparian rights, nuisance, trespass, negligence, strict liability, and "taking" private property without payment of just compensation.

Can a governmental unit protect itself from liability by arguing "sovereign immunity"?

The sovereign immunity defense has been dramatically reduced by the courts and legislatures in most states. In addition, sovereign immunity is not a defense to a "takings" claim.

Can a government unit protect itself from liability by arguing "act of God"?

Increasingly, no. To successfully establish an "act of God" defense a government unit must prove that a hazard event is both large and unpredictable. This is increasingly difficult because hazard events are at least partially foreseeable.

Will a governmental unit be protected from liability by following regulatory guidelines or using "standard" engineering approaches for flood and erosion control?

These measures will help. But a court may hold that a "standard" approach is not reasonable in the circumstances as technologies improve and the standard of care in floodplain management increases.

May a governmental unit be held liable for failing to reasonably operate and maintain flood loss reduction measures such as channels, levees, dikes and warning systems.

Yes. Courts often hold governmental units liable for inadequate operation or maintenance.

May a governmental unit be held liable for issuing permits for development or approving a subdivision which increases flood or erosion damages on other lands?

Yes, in some but not all states.

May a governmental unit be held liable for failing to remedy a natural hazard on public lands which damages adjacent private lands?

Courts have, with only a few exceptions, held that governmental units and private individuals are not responsible for naturally occurring hazards on public lands such as stream flooding or bank erosion which damages adjacent lands. However, they are held liable if they increase the hazards.

Do governmental units have discretion in determining the degree of flood and erosion protection provided by flood and erosion reduction works.

Yes. Courts have held that the degree of protection provided by hazard reduction measures is discretionary and not subject to liability. However, courts have held governmental units responsible for lack of care in implementing hazard reduction measures once a decision has been made to provide a particular degree of protection.

2. WILL FLOODPLAIN REGULATIONS INCORPORATING A NO ADVERSE IMPACT STANDARD PERFORMANCE STANDARD BE SUSCEPTIBLE TO A "TAKINGS" OR OTHER CONSTITUTIONAL CHALLENGES?

No, courts are likely to provide strong support for a no adverse impact regulatory performance standard approach. However, no adverse impact regulations are subject to the same overall US Constitution requirements as other

regulations. These include the requirements that regulations be adopted to serve valid goals, be reasonable, not discriminate, and not take private property without payment of just compensation. No adverse impact regulations are particularly likely to be supported by courts because they apply a regulatory goal which is, overall, consistent with common law rights and duties.

Will courts support a no adverse impact standard?

Very likely, yes. Courts have broadly endorsed flood loss reduction goals and standards. No adverse impact codifies the common law maximum which has been broadly endorsed by courts "Sic utere tuo ut alienum non laedas," or "so use your own property that you do not injure another's property." See *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987) and many cases cited therein. See, for example, *Hagge v. Kansas City S. Ry Co.*, 104 F. 391 (W.D. Mo., 1900) (Court held that damage done to land by occasional overflow of a stream caused by a railroad was a nuisance.)

May a local government adopt floodplain regulations which exceed state or federal (FEMA) minimum standards.

Yes. Local governments regulations may exceed both state and federal regulations. There is no preemption issue. The FEMA program encourages state and local regulations exceeding federal standards through the Community Rating System.

May government units be held liable for uncompensated "takings" if they require that new private development be elevated or floodproofed?

No. Courts have broadly and universally supported elevation and floodproofing requirements against takings challenges. Courts have broadly held that regulations may substantially reduce property values without "taking" private property.

May government units be held liable for refusing to issue permits in floodway or high risk erosion areas because proposed activities will damage other lands?

In general, no, because landowners have no right to make a "nuisance" of themselves. Courts have broadly and consistently upheld regulations which prevent one landowner from causing a nuisance or threatening public safety.

What can governments do to reduce the possibility of a successful "takings" challenge to regulations?

Local governments can help avoid successful taking challenges in a variety of ways:

1. Apply a no adverse impact floodplain overall performance standard fairly and uniformly to all properties.
2. Include special exception and variance provisions in regulations which allow the regulatory agency to issue a permit where denial will deny a landowner all economic use of his or her entire parcel and the proposed activity will not have nuisance impacts.
3. Adopt large lot zoning for floodplain areas which permits some economic use (e.g. residential use) on the upland portion of each lot.
4. Allow for the transfer of development rights from floodplain to non floodplain parcels.
5. Reduce property taxes and sewer and water levees on regulated floodplains.