**Suits Could Target Officials Over Lack Of Climate Adaptation, Paper Warns**

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A new paper by the Sabin Center for Climate Change Law at Columbia University is warning that state and local governments might be increasingly vulnerable to new legal arguments that they failed to take steps to adapt to climate change, including lawsuits based on negligence, fraud and unlawful takings.

The [Aug. 27 paper](http://insideepaclimate.com/sites/insideepaclimate.com/files/documents/sep2015/epa2015_1859.pdf), “Potential Liability of Governments for Failure to Prepare for Climate Change,” outlines three broad categories of suits: constitutional takings claims, which the center says is a promising strategy; efforts to overcome a government's sovereign immunity claim for negligence; and suits bringing fraud claims, including proving intent.

“If claims under any of these theories are successful, such litigation could be used to promote climate change adaptation by encouraging governments to weigh the costs and benefits of both action and inaction in the face of the increasing risk of natural disasters,” the center says [in a blog post](http://blogs.law.columbia.edu/climatechange/2015/08/27/potential-liability-of-governments-for-failure-to-prepare-for-climate-change).

The paper's author, Jennifer Klein, tells *InsideEPA/climate* in a Sept. 1 interview that the cases she examined -- in Illinois, Louisiana and Florida -- show that growing knowledge of climate-related impacts makes these types of claims more likely to be brought, increasing government obligations to adapt and prepare.

“We've seen a few of these cases, and I think there is reason to suspect there will be more . . . because we are seeing more and more serious natural disasters causing property damage and injury,” she says. “As these things happen, if there are instances where the damage is made worse because of city- or state-owned infrastructure like levees and sewer systems I would expect people might try to sue for compensation.”

Klein notes that the cases would not require reductions in greenhouse gas (GHG) emissions, as other types of recent suits have sought.

For example, youth plaintiffs are pursuing a new case in federal district court in Oregon arguing the government has [a constitutional duty to limit GHGs](http://insideepaclimate.com/node/178295) by restricting use of fossil fuels. The case was filed last month after they lost their novel effort to force governments to regulate GHGs based on atmospheric public trust claims late last year.

Also, a Dutch court ruled June 24 that the Netherlands has not done enough to protect its citizens from the effects of climate change.

Instead, the cases cited by Klein are focused on improving infrastructure to protect against climate change impacts, and litigants could seek injunctive relief along those lines in addition to monetary damages. Such an approach could make sovereign immunity claims less onerous for plaintiffs since those are more daunting for monetary relief rather than injunctive, she says.

**Post-Katrina Suits**

One case in particular, a federal takings claim brought under the Constitution's Fifth Amendment against the U.S. Army Corps of Engineers after Hurricane Katrina, was successful at the trial level but is expected to be appealed, Klein says. In that case, *Saint Bernard Parish Government v. United State*s, U.S. Court of Federal Claims Judge Susan Braden ruled May 1 that the Corps' negligent design and failure to maintain the Mississippi River-Gulf Outlet (MRGO) canal exacerbated flood damage in parts of New Orleans.

“The increased flooding, although temporary, wrongfully deprived landowners of the use of their property, requiring compensation,” the Sabin Center paper says. “Judge Braden's decision relied heavily on a 2012 Supreme Court case, *Arkansas Game & Fish Commission v. United States*, which held that temporary flooding caused by government action is not categorically exempt from Takings Clause liability.”

The court said the poorly maintained MRGO caused subsequent storm damage exacerbated by a “funnel effect” during the 2005 hurricane that was a temporary taking under the Fifth Amendment because the property owners held protectable interests and had reasonable investment-backed expectations.

The property owners also demonstrated that it was foreseeable to the Corps that its treatment of the MRGO channel would substantially increase storm surge during hurricanes. Judge Braden rejected all of the government's arguments, including that sea-level rise and land loss were not the cause of flooding.

Lawsuits seeking mitigation efforts such as decreased emissions or compensation for emissions have not been successful largely because it is impossible to prove causation, Klein says. However, “If you are New Orleans and the U.S. Army Corps of Engineers has not properly maintained the levees, and the flooding can be directly traced to your action, causation is easier in this adaptation context,” she explains.

The paper also notes that a series of post-Katrina cases brought under the Federal Tort Claims Act were unsuccessful because the government was found to be immune.

But the takings decision, if it stands, “is significant in light of the increasing risk of such events due to climate change” because it “expands government liability from situations in which the government deliberately causes flooding . . . to include situations in which inaction by the government exacerbates flooding from severe weather,” the paper says.

The paper also cites Vanderbilt University's Christopher Serkin, who has argued the Takings Clause can serve as a basis for affirmative government obligations to protect private property and has cited sea level rise as “an ideal illustration” of an environmental shift that could require governments to act.

“While governments obviously do not have an obligation to protect all property from all intrusions, a duty arises . . . where the state is complicit in creating the conditions,” the paper says.

**Negligence Claims**

The paper also cites climate class action negligence suits brought in Illinois in response to extensive flooding in the Chicago area in 2013, where insurance companies argued local governments were negligent in failing to prepare for climate impacts and sought to be reimbursed for claims.

Those cases were quickly withdrawn, but the paper explores the immunity defense that will “inevitably be raised against a failure to adapt claim.” It also notes that many immunity claims have an exception for “dangerous conditions” where climate claims could find traction.

The paper also looks at fraud claims as another potential litigation strategy to hold governments accountable for not preparing for climate impacts. “State officials who knowingly misrepresent or obscure information about climate change may impede state residents from acting to protect themselves,” it says.

Possible examples include a 2012 North Carolina law that delays the use of sea-level rise projections in development of coastal policies until 2016, a directive from Florida Gov. Rick Scott (R) banning employees from discussing climate change or sea level rise or incorporating those concerns into strategic planning, and an effort by Wisconsin Gov. Scott Walker (R) appointees to silence discussion of climate change by state employees.

The paper also notes that the consequences of ignoring the threat of climate change may be compounded by the Federal Emergency Management Agency's [recent policy](http://insideepaclimate.com/node/177241) requiring states to plan for climate change in order to be eligible for disaster preparation funding.

“As the potential costs of climate change mount, litigation can impose liability on governments that do not take action to prevent the damage,” the paper warns. -- *Dawn Reeves* ([dreeves@iwpnews.com](mailto:dreeves@iwpnews.com))

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