Adaptation Strategies
Legal Overview

Environmental Law Institute
September 7, 2017
Today’s Discussion

- Quick Intro to ELI
- Important considerations
- Legal Principles
- Risk Summaries
- No Action
Intro to ELI

• Research and education organization focused on making laws work for people and the planet

• Non-partisan, non-advocacy

• Completed coastal resilience projects all around the US and world

eli-ocean.org
Important Consideration 1: Facts

- Lawsuits will always be highly fact- and site- specific, especially when “takings” are involved
  
  - EXAMPLE: “pooling” caused by unique geography leads to takings lawsuit after beach nourishment

- A similar scenario can play out completely differently with a different plaintiff

  - EXAMPLE: Two long-term residents build seawall OR developer builds seawall
Important Consideration 2: Risk

• Different municipalities will have different tolerance for risk

• Some with legal staff may primarily be concerned with losing lawsuits

• Others with limited capacity may be just as concerned with contesting lawsuits, along with administrative hurdles of long permitting processes

• EXAMPLE: “Takings” lawsuit from denying armoring CDP
Important Consideration 3: SLR Law

- For the most part, the legal framework did not develop with sea level rise in mind

- EXAMPLE: Someone builds next to coast and property floods
Legal Principles: Takings

• Takings Clause

• Clear cut: occupy or build on private property without compensation

• Regulatory taking: deprive owner of all economically beneficial use OR partial diminution in value, balancing: (1) economic impact of the regulation; (2) reasonable investment-backed expectations of the property owner; and (3) character of the regulation (i.e. whether is applies generally for the public good)

• Permit Conditions: Nexus and rough proportionality
Legal Principles: Public Trust

- Public Trust Doctrine
  - all navigable waterways and submerged tidelands are held in trust by states
  - the public trust theoretically moves with the rising seas and the public trust is particularly strong in California due to state law and precedent in past cases.
The California Coastal Act details permitting, planning, and regulatory requirements for the coastal zone, generally extending 1000 yards inland from the high tide line to three miles offshore.

Local governments (cities and counties which lie in the coastal zone) implement the Coastal Act through Local Coastal Programs consisting of a Land Use Plan and a Local Implementation Plan.

Most development (broadly construed under the Act) in the coastal zone requires a Coastal Development Permit (CDP).
Legal Principles: CEQA

- California Environmental Quality Act

- CEQA requires state and local agencies to analyze whether discretionary actions (including carrying out projects, planning actions, granting permits, and approving private actions) have a significant effect on the environment, often through Environmental Impact Reports.
Summarizing Risk

• General question: How much risk does taking action (or deciding not to take action) have?

• Methods:

Legal risk and administrative difficulties were summarized based on three sources of information: court documents like cases, briefs, and judgments; secondary legal materials like law reviews and guidance documents; and interviews with lawyers and planners familiar with sea level rise adaptation. From these materials, we developed risk summaries designed for a practitioner that may not have a legal background or is not familiar with legal issues in this area.
## Issue One: Beach Nourishment

<table>
<thead>
<tr>
<th>Legal Risk</th>
<th>Low-moderate, depending on scope of the project.</th>
</tr>
</thead>
</table>
| **Discussion Points** | • Generally, regional projects have higher legal risk due to the difficulty of achieving buy-in from numerous stakeholders with varying perspectives  
• Risks before construction: permitting and environmental review  
• Risks after construction: takings from unintended consequences |
| **Scenarios** | Small opportunistic use projects. Legal risk: low.  
Large, regional projects. Legal risk: moderate-high.  
Sand sourced from or placed in environmentally-sensitive or habitat area. Legal risk: moderate-high.  
Sand placed near lagoon or rivermouth. Legal risk: moderate. |
## Issue Two: Dune Restoration & Enhancement

<table>
<thead>
<tr>
<th>Legal Risk</th>
<th>Low, but with variation depending on the location.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discussion Points</td>
<td>• The legal risk analysis for dune projects is similar to beach nourishment, but with less precedent for lawsuits.</td>
</tr>
<tr>
<td></td>
<td>• Risks before construction: permitting and environmental review</td>
</tr>
<tr>
<td></td>
<td>• Risks after construction: takings from unintended consequences or possibly view obstruction</td>
</tr>
</tbody>
</table>
### Issue Three: Offshore Protections

<table>
<thead>
<tr>
<th>Legal Risk</th>
<th>Low-moderate, depending on the impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Discussion Points</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Offshore protection projects must go through a complex permitting process, involving state and federal agencies. These projects may also be subject to litigation from environmental and user groups, depending on anticipated impacts.</td>
</tr>
<tr>
<td></td>
<td>• Risks before construction: permitting and environmental review</td>
</tr>
<tr>
<td></td>
<td>• Risks after construction: takings from unintended consequences or possibly under Endangered Species Act or Clean Water Act</td>
</tr>
<tr>
<td><strong>Scenarios</strong></td>
<td></td>
</tr>
<tr>
<td>Sand retention breakwater. Legal risk: low-moderate</td>
<td></td>
</tr>
<tr>
<td>Multi-use sites (e.g., artificial reefs that also serve as breakwaters). Legal risk: low-moderate.</td>
<td></td>
</tr>
<tr>
<td>Offshore protection in a surf-break area. Legal risk: high.</td>
<td></td>
</tr>
<tr>
<td>Offshore protection near an MPA. Legal risk: moderate.</td>
<td></td>
</tr>
<tr>
<td>Offshore protection causes coastal erosion. Legal risk: moderate.</td>
<td></td>
</tr>
</tbody>
</table>
## Issue Four: Hard Armoring

<table>
<thead>
<tr>
<th><strong>Legal Risk</strong></th>
<th><strong>Moderate to High</strong></th>
</tr>
</thead>
</table>
| **Discussion Points** | • Permits for hard armoring projects can face challenges from environmental NGOs, coastal residents, or the Coastal Commission if these groups believe sufficient conditions are not in place to address impacts like erosion of adjacent property or loss of public beach. On the other hand, private property owners and property-rights NGOs may file complaints if permits are not granted or if these groups believe that attached conditions are too onerous.  
• Meaning of “existing”?  
• Connection to the public trust doctrine |
| **Scenarios** | Private property owners challenge conditions put on their permits. Legal risk: low to moderate.  
Refusing permit for private property owners. Legal risk: Moderate/High.  
Issuing permit without conditions. Legal risk: High  
Municipalities construct seawall to protect public property: risk depends on emergency status |
## Issue Five: Land Use and Zoning

<table>
<thead>
<tr>
<th>Legal Risk</th>
<th>Low to high, depending on the extent of regulation</th>
</tr>
</thead>
</table>
| Discussion Points | • Municipalities have broad discretion to exercise zoning and land use authority, but certain decisions carry more legal risk than others.  
• LCP provisions are reviewed by courts for abuse of discretion, so it is important that they tie closely to the goals of the Coastal Act and the principles of the public trust doctrine without directly contravening any statutory provisions |
| Scenarios | Triggered setbacks or other policies tied to erosion rates. Legal risk: low.  
No new seawall requirement in LCP. Legal risk: high for pre-1976 structures, moderate-high for structures built after.  
No new armoring provisions in CDPs. Legal risk: low.  
Removal/abandonment requirements for properties subject to sea level rise. Legal risk: high. |
SCENARIO 1: A local government fails to act, leading to flooding of private homes and property. Would the local government be liable for the damage?

Answer: Tricky and uncertain. As sea level rise results in more fact patterns being tried, lack of action could lead to liability.
SCENARIO 2: In the face of climate change, a city’s stormwater drainage system can no longer keep up with the stormwater, leading to flooding of private property. Would the city be liable for the damage?

Answer: To the extent adaptation measures would be considered an upgrade to, as opposed to maintenance of, the current system, it is unlikely a local government would be found liable for a takings claim. But maybe a court could say it is maintenance?
SCENARIO 3: The government has negotiated easements with private property owners for public access to the beach. Due to sea level rise, the easements become submerged. What happens to the easements?

**Answer:** The cases suggest that the easements will not “migrate” with the land, but will be lost to the sea.
Takeaways

• Sea level rise adaptation requires acting in the face of uncertainty

• Legal uncertainty exists within a basic framework of what increases or decreases risk

• Keys: tie actions to public trust and science-based assessments, achieve stakeholder buy-in through outreach, evaluate own risk tolerance
Discussion
Thank you!

David Roche, Attorney, Environmental Law Institute
202-939-3804 / roche@eli.org

Project Staff:

Teresa Chan, Senior Attorney, chan@eli.org
Rebecca Kihslinger, Senior Scientist, kihslinger@eli.org