

Why Else Should Government Do Something About This?

- In a Word:

Liability

How Can You Best Avoid These Friendly Lawyer Folks?



Floods and Litigation

- **When Someone Is Damaged by the Actions of Others Who Pays?**
- **This is a Fundamental Question of Law.**

There Are Only Three Ways For Someone To Rebuild Following Damage

- **Self Help – Loans-Savings-Charity Neighbors**
- **Insurance- Disaster Relief Is usually a Combination of Social Insurance and Self Help**
- **Litigation**

Grounds For Suit

- **Standard of Care for Professionals Is Increasingly High As Professionals Develop Increasingly Sophisticated Design Methods**
- **Previously Accepted Defenses Such As the Common Enemy Doctrine for Flood Fighting is Increasingly Replaced By “Rule of Reasonable Person”**
- **The “Reasonable Person” is Expected To Be An Expert When We Are Discussing Something Land Use**

Proof of Causation of Harm Is Easier Now Than In Past Times

- **Forensic Hydrologists**
- **Forensic Hydraulic Engineers**

Legal Issues: Professional Liability For Construction in Hazardous Areas

- **Excellent Paper By Jon Kusler, PhD, Esq.
Is Now Available**
 - www.floods.org
 - www.floods.org/PDF/ASFPM_Professional_Liability_Construction.pdf
 - **Prepared For The Association Of State Floodplain Managers Foundation**

Web Cast on Professional Liability

- **Next Web-Cast TBD**
- **Sponsored by American Council of Engineering Companies (ACEC)**
- **Presented by Dr. Jon Kusler, Esq. and Edward A. Thomas, Esq.**

Flooded Homes May Cost City Millions City Held Liable – Damages Still To Be Determined



Photo: Lincoln Star Journal

From California January 2008

- **Lawsuit seeks \$1 billion in Marin flood damage** The plaintiffs – 265 individuals and businesses – are each seeking \$4.25 million in damages
- **Lawyers representing the victims could collect more than \$66 million in fees**

Lawsuit seeks \$1 billion for Marin flood damage

Government agencies blamed for failing to prevent disaster

By Tad Whitaker
IJ reporter

Victims of last winter's devastating flood in Marin are seeking more than \$1 billion in damages from a laundry list of government agencies that they say share blame for the destruction.

The plaintiffs — 265 individuals and businesses — are each seeking \$4 million in damages and another \$250,000 in legal fees, according to lawyer Herb Rowland, who is defending San Anselmo. Lawyers representing the victims could collect more than \$66 million in fees.

The scope of the lawsuit, first filed last fall, and the cost to fight it have rankled some officials who believe the flood — which began on Dec. 31, 2005 — was the result of unique circumstances. The storm damaged about 1,200

LAWSUIT

The suit resulted from the Dec. 31, 2005, flood that damaged about 1,200 homes and 200 businesses in Marin.

PLAINTIFFS

A total of 265 residents and businesses.

DEFENDANTS

Those being sued include: San Anselmo, Mill Valley, Ross, Fairfax, Corte Madera, Larkspur, Marin County, the Marin Municipal Water District, the state of California, the Ross Valley Sanitary District, Tamalpais Union High School District and the Marin County Flood Control and Water Conservation District.

homes and 200 businesses.

Lawrence Mann, one of the attorneys representing the

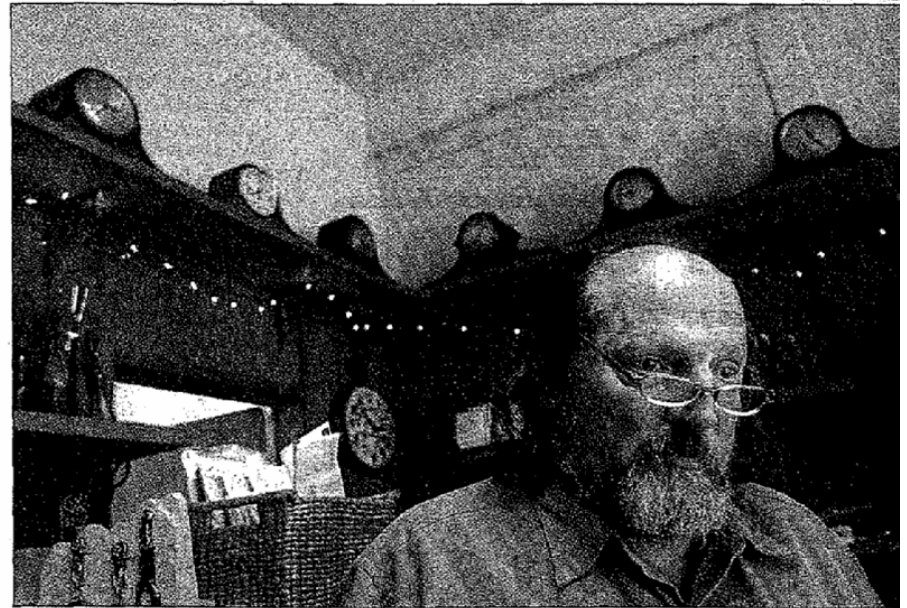
plaintiffs, said the goal is to win the maximum allowed by each entity's insurance policy so the settlement does not affect municipal budgets. Officials have estimated that total damage exceeded \$110 million, although Mann puts it above \$300 million. He said some of his clients have expressed interest in directing at least a portion of the proceeds toward flood solutions.

"Most people would like to see some of the money used to prevent flooding," he said.

Supervisor Hal Brown, whose district covers much of the flooded area, laughed when asked about people donating settlement money toward flood repairs.

"That to me isn't human nature," he said. "I think there are more positive directions to go in."

See Lawsuit, page A7



IJ photo/Alan

SUES: Drew McEachern of San Anselmo, owner of Antique Timepieces, is among those merchants joining a class-action lawsuit against numerous public agencies over the flood on Dec. 31, 2005. McEachern said 'it's negligence' that agencies didn't do enough to prevent a recurrence of the 1982 flood that also damaged his property.

City Of Half Moon Bay, California November, 2007

- **City Liable for Nearly \$37,000,000 Under the Federal and State Takings Clauses, as Well as the Common Law Doctrines of Nuisance and Trespass, for Constructing a Storm Water Drainage System Which Flooded Someone**

- **“Class-action lawsuit updated in Fernley flood case”**
- **“The lawsuit names the Truckee-Carson Irrigation District, Lyon County, the city of Fernley, and companies that built and sold homes in the area flooded when a storm-swollen irrigation canal ruptured”
Nevada Appeal, 1/26/08**

California Law Changes

1986 Sacramento River Flood

- 1 levee rupture
- + 50,000 people evacuated
- + 9,000 families left homeless
- + 29 counties declared
- + \$532 million in damages
- + almost 2 decades of

= **litigation** Paterno, A landmark court decision in 2003

Damages \$464 Million



Photographer: Geoff Fricker

Lawsuits Are Being Filed Following Hurricane Katrina

- **Defendants:**
 - A) **Corps of Engineers;**
 - B) **Local Levee Boards;**
 - C) **Oil and Gas Companies;**
 - D) **State Government, Public Officials (As Individuals); Construction Companies, Architects, or Design Firms; and Maintenance Entities.**
- **\$278 Billion In Claims For:**
 - A) **loss of life;**
 - B) **injury;**
 - C) **insurable risks: commercial losses, property damage, business interruption, jobs lost, repair costs, disability claims; and**
 - D) **virtually every type action allowed by our legal system.**

Katrina Legal Situation

- **Katrina Lawsuits**
- **500,000 Plaintiffs**
- **\$278 Billion in Damages Requested**
- **Approximately 1,000 Plaintiffs Attorneys Involved-Learning About Levees, Floods, and Liability**
- **A Copy of an Article on This Topic Appeared in the National Wetlands Newsletter and is available at:**
www.floods.org/PDF/ET_Katrina_Insurance_082907.pdf
- **For The First Time In Many Years, Lenders Will Lose Considerable Money on Mortgages in A**

How Can The Federal Government Be Liable?

- **Numerous Legal Arguments Including:**
 - A) Violation of Constitutional Protections:**
 - 1) Fifth Amendment “Taking,”
 - 2) Violation of Due Process,
 - 3) Violation of Equal Protection of Law.
 - B) 42 USC Section 1983 Claims against Individuals**
 - C) "malfeasance, misfeasance and nonfeasance" in ensuring the competent design, construction, inspection, maintenance, and operation of an entire navigable waterway system.” *From Insurance Journal, June 6, 2005***
 - D) 33 USC 702 (c) does not apply to Navigation and other non-flood Control Projects.**

Irony A 'Plenty In The Katrina Litigation

- **The Folks Who Have Land Use Authority and Are Also Responsible For Many Of the Steps For Reducing Levee Residual Risk: Lawsuits Against Them Are Being Dismissed**
- **They Were Not Responsible For the Levees**
- **Just Responsible for Much of The Increase in Consequences**

- **John Fitzgerald Kennedy and Jack Pardee Both Offer Us Guidance on That Topic**
- **Most of You Know of JFK**
- **Jack Pardee Is the Former State Flood Insurance Coordinator in California**

The Impediments To Proper Floodplain Management

- **Concerns About A “Taking”**

The Constitution of the United States

- **Fifth Amendment to the Constitution:**
“... nor shall private property be taken for public use without just compensation.”
- **Was this Some Theoretical Thought, or Passing Fancy?**
- **Which Part of this Directly Mentions Regulation?**
- ***Pennsylvania Coal Company vs. Mahon 260 US 293 (1922). But See, Keystone Coal 480 US 470, 1987.***

Increase in Cases Involving Land Use

- **There Has Been a Huge Increase in Taking Issue Cases, and Related Controversies Involving Development.**
- **Thousands of Cases Reviewed by Jon Kusler, Me and Others.**
- **Common thread? Courts Have Modified Common Law to Require an **Increased Standard of Care** as the State of the Art of Hazard Management Has Improved.**

Taking Lawsuit Results

- **Regulations Clearly Based on Hazard Prevention and Fairly applied To All: Successfully Held to be a Taking – Almost None!**
- **Many, Many Cases where Communities and Landowners Held Liable for Harming Others**

Examples of Situations Where Governments May Be Held Liable

- **Construction of a Road Blocks Drainage**
- **Stormwater System Increases Flows**
- **Structure Blocks Watercourse**
- **Bridge Without Adequate Opening**
- **Grading Land Increases Runoff**
- **Flood Control Structure Causes Damage**
- **Filling Wetland Causes Damage**
- **Issuing Permits for Development Which Causes Harm to a Third Party**

New Trend In The Law

- **Increasingly States Are Allowing Lawsuits Against Communities for Alleged Goofs in Permitting Construction OR in Conducting Inspections**
- **Excellent Paper By Attorney Jon Kusler PhD For The Association of State Floodplain Managers Foundation Available On Line at**

REFORMATTED - Legal Issues

Recent Legal Research by Ed Thomas

- **Many Cases Where Communities Try to Prevent Building in a Hazardous Area**
- **Refuse the Requested Permit Based on Nebulous Environmental or Aesthetic Concerns**
- **And They Lose**
- **If they Clearly Related Permit Refusal to Harm Prevention-Very Likely a**

Can Government Adopt Higher Standards Than FEMA Minimums?

- **FEMA Regulations Encourage Adoption of Higher Standards-**”... **any floodplain** management regulations adopted by a State or a community which are **more restrictive** than (the FEMA Regulations) **are encouraged** and shall take precedence.” 44CFR section 60.1(d). (emphasis added)

Governmental Rights and Duties to Manage Development

- **Does Government Have a Right to Regulate to Prevent Harm?**

- **Does Government Have an Affirmative Duty to Regulate to Prevent Harm?**

Could One Argue That Higher Regulatory Standards Are Appropriate For Our Nation?

- **Consider:**

- A) **Uncertainties in Flood Elevations**

- B) **Plasencia-Larson Paper On Flood Height Increases Due To Future Watershed Development**

- C) **Consequences If Levee Is Overtopped**

- D) **Height of Freeboard**

- E) **50% Chance That 1% Flood Will be Exceeded Within 70 Years –**

- **No Adverse Impact Hazards Management Is:**
 - A) Legal**
 - B) Equitable**
 - C) Practical**

Hazard Based Regulation And The Constitution

- Hazard Based Regulation Generally Sustained Against Constitutional Challenges
- Goal of Protecting the Public Accorded **ENORMOUS DEFERENCE** by the Courts

Avoiding A Taking

- Avoid Interfering with the Owners Right to **Exclude Others.** (Loretto)
- Avoid Denial of All Economic Use. (Lucas)
- In Highly Regulated Areas Consider **Transferable Development Rights** or Similar Residual Right so the Land Has Appropriate Value. (Penn Central)
- **Clearly Relate Regulation to Preventing a Hazard.** See, Different results in *Gove v. Zoning Board of Appeals*, 444 Mass.754 (2005) and *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); and *Lopes v. Peabody*.
- Further Details on Massachusetts Coastal Zone Management's StormSmart Coasts web-site:
<http://www.mass.gov/czm/stormsmart/>
- Establish a Fair Variance Procedure

No Adverse Impact Hazard Regulation Is A Winning Concept

- **So How Do We Proceed?**
- **Planning**
- **Partnerships**
- **Planning**
- **Multi-Use Mapping and Engineering**
- **Planning**
- **Fair Regulation to Prevent Harm**

Courts Give Floodplain Managers An Opportunity To Partner

- **Rapanos et ux., et al. v. United States, U.S. (2006) Nos. 04-1034 and 04-1384, 2006 WL 1667087 (U.S.)**
- **Involving the geographic extent of the area that the federal government may regulate as “wetlands” under the Clean Water Act of 1972**
- **Courts Want a Link Between the Wetland Regulated and Waters of the United States**
- **One Link is Through Floodplain Management**
- **Further Information-ASFPM News and Views of August 2006; National Wetlands**

Implementing NAI in the Real World

- **Comprehensive Watershed Future Conditions Water Resources Mapping Looking At Water Supply-Water Quality-Stormwater Management And Flooding.**
- **Interim Measure**
 - **Require A Demonstration That All Development Does Not Change The Hydrograph For The 1-10-50-100-500 Year BOTH Flood And Storm**
- **If Time Permitted We Would Have Some Engineers Discuss Exactly How To do These Steps: Low Impact**

Closing Comments

- **Summary Comments**
- **Talking Points**
- **Your Questions And Comments**

- **Is NAI a Silver Bullet?**
- **Use of NAI Will Significantly Reduce the Probability of a Loss in Court!**
- **Even Better Odds if there is A Good, Fair Variance Procedure + Flexibility in the Regulation + Community Applies the Principle to their Own Activities.**

Water Resource Managers

- **Should Be Both Fair and Confident!**
- **Should Be Assertive Protecting Both the Public and the Landowner!**
- **Should Be There To Help Make Community Development and Housing Decisions**
- **Should Develop Messages Specialized To Various Interest Groups**

Prevention

- **We Throw Money At Problems After They Occur**
- **You Can Pay A Little Now Or Lots Later**
- **The Legal System Is Ready To Help You Now**

Take Away Message

- **Responsible For A Levee?**

Realize That:

A) Levees Can Fail Or Be Overtopped;

B) Uninsured Victims Will Likely Sue;

C) Flood Insurance For All Affected By Levee Failure Helps Everyone.

What Do Folks Protected By A Levee Need?

- **Clear Communication of Risk/Consequences**
- **Orderly Steps to Buy Down Risk- Especially an Effective System of Warning and Evacuation**
- **An Efficient System of Indemnification**

Take Away Message

- **Responsible For Community Development?**
 - **Many Areas Can Flood**
 - **Uninsured Victims Will Likely Sue-If They Can Find Someone to Blame**
 - **Fair Harm Prevention
Regulation Helps Everyone**

Message For All Involved In Community Development

- **The Fundamental Rules of Development Articulated, By Federal Law, Envision Housing and Development Which Is:**
 - **Decent**
 - **Safe**
 - **Sanitary**
 - **Affordable**

- **Housing And Development Which Flood Are:**
 - **Indecent**
 - **Unsafe**
 - **Unsanitary**
 - **Unaffordable- by the Flood Victims, By Their Community, By The State, and By Our Nation!**



Floodplain Management and Sustainable Development: Looking at Total Water Resources

On Behalf Of:

**The State of New York
Commissioner's Summit**

October 16, 2008

Kingston, New York

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