

Legal Risk Analysis for Sea Level Rise Adaptation Strategies in San Diego

EXECUTIVE SUMMARY



Photo Credit: NOAA

Environmental Law Institute
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Sea level rise raises significant legal questions for local governments, especially in California. On the one hand, taking action could decrease risk to the community, but increase litigation risk from aggrieved property owners or public interest groups, depending on the nature of the action. On the other hand, a local government could decide not to act, exposing people and infrastructure to excess risk, while potentially exposing itself to litigation if the lack of action causes harm to individuals or public trust property. Risk is thus unavoidable. However, different adaptation strategies (including deciding not to take action) carry different risk profiles. This Executive Summary breaks down the findings of a full report,¹ which concisely summarizes the legal risks and administrative hurdles associated with different adaptation strategies in order to facilitate informed decision-making.

The information provided in this document is not legal advice, but designed to be a primer on multiple types of legal risk and administrative hurdles associated with sea level rise adaptation for Southern California municipalities.

Background

In 2015, several local governments in San Diego County began to evaluate sea level rise vulnerabilities, and embarked on updating their Local Coastal Plans (LCPs) to reflect planned adaptations to these risks. Through a coordinated effort led by the San Diego Regional Climate Collaborative, these local governments identified several challenges they expected to face in undertaking the LCP updates. This included a lack of expertise and knowledge about the legal liabilities associated with sea level rise adaptation strategies. With funding from the National Oceanic and Atmospheric Administration's Regional Coastal Resilience Grant program, this report is intended to address that knowledge gap, and provide the local jurisdictions within the area encompassed by The Resilient Coastlines Project of Greater San Diego an easy-to-understand legal guide to inform their decision-making.



Photo Credit: K. Mengerink

¹ The Full Report is available here: <https://www.eli.org/research-report/legal-risk-analysis-sea-level-rise-adaptation-strategies-san-diego>

Overarching Legal Principles

Certain laws, legal doctrines, and policies are important for California-based sea-level rise adaptation strategies. The principles are expanded in the full report.

Legal Principle	Summary
Public Trust Doctrine	The public trust doctrine provides that all navigable waterways and land below the mean high tideline are held in trust by states for public commerce, navigation, and fishing. In other words, states effectively own trust lands, including coastal areas expected to be impacted by sea level rise. It is important to note that 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.
Takings Clause	The Takings Clause of the Fifth Amendment of the U.S. Constitution states that the government cannot “take” private property without providing just compensation. A taking without just compensation is sometimes called “inverse condemnation.” The clearest case of a taking is direct appropriation of property , or “physical” taking. A regulation or other government action can be a taking if it “goes too far” by depriving an owner of all economically beneficial use of the property. If there is only a partial diminution in property value three factors are balanced: (1) economic impact of the regulation; (2) reasonable investment-backed expectations of the property owner; and (3) character of the regulation (i.e. whether it applies generally for the public good). Permit exactions (conditions that require certain actions to receive a permit) are subject to the Nolan-Dollan test: they must have a nexus and rough proportionality to the impact of the permitted activity. In other words, requiring a property owner to do something in a permit is not a taking as long as it is of the same general nature and extent as the development’s impact.
Coastal Act	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) from municipalities with certified Local Coastal Programs and the California Coastal Commission in certain instances. Local governments may attach “reasonable terms and conditions” to CDPs to further local policies.
California Environmental Quality Act	The 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.
Endangered Species Act	The Endangered Species Act seeks to minimize harm to protected species and protect the ecosystems on which they depend.
Clean Water Act	The Clean Water Act forbids discharge of pollutants into navigable waters of the U.S without a permit. Point-source discharges require a National Pollutant Discharge Elimination System permit under section 402 of the CWA (administered by the EPA and states). Permits are also required for dredging-and-filling of navigable waters under section 404 (administered by the U.S. Army Corps of Engineers). Many projects in or around coastal areas that involve dredging or filling also require a permit under section 10 of the Rivers and Harbors Act, also administered by the Corps.

Adaptation Strategies Analysis

Municipalities have three over-arching options to adapt to sea level rise.

- Protection: hard armoring (i.e. seawalls and revetments) and soft armoring (i.e. beach nourishment, dune restoration, and offshore protections)
- Accommodation: zoning and land use tools to increase resilience (i.e. preventing armoring in certain areas)
- Retreat: strategically moving away from rising seas and preventing further at-risk development

In practice, every Local Coastal Program reviewed uses some combination of these three strategies, which determines whether resilience goals are met, the costs and benefits of coastal management, and the legal risks involved. The first two outcomes—whether resilience goals are met and the costs and benefits of coastal management—are the focus of other parts of the Resilient Coastlines Project of Greater San Diego. Here, we summarize legal risk, including administrative hurdles.

It is important to note that different municipalities will have different tolerances for risk. Localities with legal staff may primarily be concerned with losing lawsuits. Others, with limited capacity for hiring legal experts, may be just as concerned with contesting lawsuits, along with the administrative hurdles associated with long permitting processes. It is essential for local government staff to review the justifications for the following risk summaries and adjust accordingly for specific risk tolerances.

Considering both legal risk and administrative difficulty, we summarized risk as follows:

- Low risk (all of the following elements applicable): no major hurdles from CEQA or the Coastal Act beyond obtaining permits, takings lawsuit unlikely, no major legal uncertainty about application of Coastal Act or takings law, no other clear legal issues;
- Moderate risk (at least two applicable): some CEQA hurdles depending on resources impacted, Coastal Act ambiguous on permitting, moderate probability of takings lawsuit but low probability of local government losing case, other possible legal issues (i.e. ESA);
- High risk (at least two applicable): difficult CEQA process (depending on the location and nature of the project), Coastal Act provision at issue is involved in litigation or uncertain in application, high probability of takings lawsuit and uncertain risk of local government losing case, other major legal issues (i.e. ESA).

Some adaptation strategies fall in between the risk categorizations (i.e. “low-moderate” or “moderate-high”). Methodology and complete analysis are in the full report.



Photo Credit: David Roche

Strategy #1: Beach Nourishment

General Legal Risk	Low-moderate , depending on scope of the project. Generally, regional projects present a higher legal risk, due to the difficulty of attaining buy-in from numerous stakeholders with varying perspectives.
Overview of Legal Context	Beach nourishment projects occur mostly on public trust lands or have substantial impacts on public trust lands. Thus, they are carried out by trustees (usually the local governments themselves in conjunction with federal and/or state agencies). In deciding to undertake beach nourishment, trustees face a lengthy permitting process. This makes the administrative difficulty somewhat high—it may be difficult to obtain the necessary permits to move projects forward. However, the legal risk is reduced if there is buy-in from affected stakeholders, including NGOs and homeowners, during the permitting process. In bigger projects, where it is difficult to ensure buy-in due to numerous stakeholders, both administrative hurdles and legal risks are higher. But, as always, legal risk and administrative hurdles are site- and project- specific.
Discussion	Beach nourishment and associated dredging projects require hefty environmental analysis under CEQA to even get off the ground. That CEQA review must be robust and thorough. Controversial projects could face lawsuits from public interest organizations or others during this process. During the CEQA review, there will be considerations taken under other statutes as well, like the Endangered Species Act, which could add time to the permitting process. Consequentially, it is often essential to justify projects with a public trust purpose, such as land preservation and habitat protection. A beach nourishment permit is not particularly likely to face substantive challenges outside of CEQA unless there are site-specific impacts. One example is polluting navigable waters without a permit, which would implicate the Clean Water Act. However, it is possible that private property owners could make an inverse condemnation or takings claim if periodic flooding or other harm occurs as a result of the project.
Scenarios	<ul style="list-style-type: none"> • Small opportunistic use projects. Legal risk: low. Smaller projects will usually have reduced scope and have less chance of raising a takings claim or CEQA lawsuit, depending on site-specific factors. • Large, regional projects. Legal risk: moderate-high. Larger projects can result in increased environmental impacts and more potential to lead to a takings lawsuit, depending on site-specific factors. It may be important to consider insurance and bonding for these types of projects. • Sand sourced from or placed in environmentally-sensitive or habitat area. Legal risk: moderate-high. Proximity to marine protected areas and designated habitat under the Endangered Species Act could influence litigation risk from NGOs under CEQA or other statutes. • Sand placed near lagoon or river mouth. Legal risk: moderate. Projects near water bodies and wetlands have potentially greater habitat impacts and could result in litigation under CEQA, the Clean Water Act, or in tort claims. A possibility of disrupting water flow will increase litigation risk.

Strategy #2: Dune Restoration and Enhancement

<p>General Legal Risk</p>	<p>Low, but with possible variation depending on the location. The legal risk analysis for dune projects is similar to beach nourishment, but with less precedent in regards to lawsuits.</p>
<p>Overview of Legal Context</p>	<p>Most of the time, dune restoration and enhancement projects are undertaken on public trust lands below the mean high tideline or public lands above the mean high tideline. In some instances, dune projects cross private land, requiring the project applicant to obtain an easement from the landowner. These projects are usually initiated by a public entity in accordance with permits under the Coastal Act and a CEQA analysis. Dunes are often environmentally sensitive habitats. Where dune project areas include habitat for protected species, the CEQA analysis for these projects usually includes consideration of the Endangered Species Act. Often, these projects co-occur with beach nourishment projects, and in those instances (and any others where there are other projects in close vicinity) it is important to consider cumulative impacts under CEQA. If a dune requires an easement or obstructs ocean views, it could be challenged as a taking without just compensation.</p>
<p>Discussion</p>	<p>Coastal dune restoration and enhancement projects require permits (i.e., CDP) and often environmental analysis (CEQA), but they have not been subject to many lawsuits in California. This is probably due to stakeholder outreach and involvement in the project. A takings lawsuit could be brought by a private property owner who does not want to grant an easement for a dune project on his or her land, or who objects to obstructed views or secondary flooding. On the whole, though, dune projects seem relatively low risk when they are implemented strategically.</p>
<p>Scenarios</p>	<ul style="list-style-type: none"> • Small habitat-oriented projects. Legal risk: low. Smaller habitat projects could be exempt from CEQA, would involve a less burdensome permitting process, and are unlikely to result in a takings claim if they do not require an easement across private property. • Large projects to prevent flooding of private and public property. Legal risk: moderate. Larger projects focused on flood protection likely involve significant dune enhancement, which would require CEQA review and could face legal and permitting hurdles if the project includes threatened or endangered species habitat. The substantive risk of a takings claim is likely low since flood protection benefits would offset compensation required for an easement or loss of ocean views. But with big projects, the risk of a lawsuit being brought is ever-present, even if unlikely to succeed on the merits.

Strategy #3: Offshore Protections

General Legal Risk	<p>Low-Moderate to High, depending on the location of the project. Offshore protection projects undergo a complex permitting process for approval, involving state and federal agencies. These projects also may also be subject to litigation from environmental and user groups, depending on anticipated impacts.</p>
Overview of Legal Context	<p>Offshore protections (like breakwaters) avoid most of the thorny takings issues raised by projects on private property. However, these projects raise potential permitting issues related to the interplay of multiple permitting entities and stakeholders. Breakwater projects minimize legal risk when their purpose is to protect the coastline from erosion, they do not cause adverse environmental impacts (such as disturbing benthic habitat), and they do not result in impacts to established surf breaks or shipping lanes.</p>
Discussion	<p>Offshore protections are major projects that likely require allocating a significant amount of time to move through the permitting process. This introduces administrative hurdles. Legal risk for applicants could derive from cases filed by NGOs concerned about environmental or recreation impacts. The types of impacts that result from offshore protection projects need to be considered thoroughly in the CEQA process. Some legal risk arises after construction from flooding or avulsion events that result from the construction of a breakwater. However, normal erosion over time is unlikely to support a takings claim.</p>
Scenarios	<ul style="list-style-type: none"> • Sand retention breakwater. Legal risk: low-moderate Permitting may be time-consuming due to CEQA analysis and the multiple federal and state agencies involved in the permitting process. However, lawsuits (such as a takings claim) from private landowners are unlikely and any land that accretes due to the sand retention belongs to the state. • Multi-use sites (e.g., artificial reefs that also serve as breakwaters). Legal risk: low-moderate. If the breakwater has multiple uses, it is unlikely to change legal risk, though it could affect some CEQA analysis due to different environmental impacts. • Offshore protection in a surf-break area. Legal risk: high. Surf breaks are vigorously protected by citizens and NGOs, and any new breakwater construction that may affect surf breaks is likely to be challenged. • Offshore protection near an MPA. Legal risk: moderate. Breakwaters and other protections affect water and sediment transport over large areas. Thus, proximity to an MPA could introduce higher hurdles to mitigating adverse impacts. • Offshore protection causes coastal erosion. Legal risk: moderate. Gradual erosion over time is unlikely to support a successful takings claim based on current precedent. However, given the state of flux of takings law across the United States, such a lawsuit could be successful depending on the fact pattern (e.g. landowners prove that damage to their land amounted to permanent physical invasion or encroachment).

Strategy #4: Hard Armoring (Seawalls or Revetments)

General Legal Risk	<p>Moderate to High</p> <p>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, such as 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.</p>
Overview of Legal Context	<p>Seawalls and revetments are typically constructed and maintained to protect private and public property. LCPs often outline permitting requirements and policies on seawalls. This removes some discretion held by the permitting entity (see the section on Land Use and Zoning below). The primary legal issues raised by these projects include takings, Coastal Act compliance, and CEQA compliance. Seawalls constructed by municipalities and the Coastal Commission are often controversial, creating potentially high legal risk and administrative burden.</p>
Discussion	<p>When making seawall and revetment permitting decisions, the analysis hinges on two elements:</p> <ol style="list-style-type: none"> (1) Whether the Coastal Act allows seawalls for existing structures. Most courts have held that the purpose of the Coastal Act must be read broadly, and that there is no absolute right to a seawall being built to protect existing structures constructed <i>after</i> the passage of the Coastal Act. However, because the Supreme Court of California is currently reviewing this issue, their decision could result in substantial implications for future legal risk, depending on its scope. In addition, AB 1129 was introduced in the 2017 legislative session; if passed, it would define “existing structure” to mean existing at the time of the Coastal Act passage in 1976. (2) Whether the permit decision or conditions can be closely tied to the public trust. This will involve an individualized determination based on the priorities outlined in the Coastal Act. Permit conditions are less likely to be challenged successfully if they are directly tied to the impacts from the individual seawall or revetment (to ensure nexus and rough proportionality), and also reference Coastal Act and public trust priorities like public access, recreation, and environmental protection. When a municipality denies a permit due to its public trust responsibilities, it can justify its decision on the grounds that reasonable, investment-backed expectations should include sea level rise. In litigation, a strong defense for a municipality is that the public trust doctrine is a background principle of property law that overrides the landowner’s interest in armoring. <p>Litigation could also arise under CEQA prior to seawall construction or expansion during the project review phase. Environmental impacts must be considered, focusing on localized erosion and flooding. Parties could bring inverse condemnation claims after seawall construction if damage is caused to private property, with a similar analysis as in the beach nourishment section.</p>
Scenarios	<ul style="list-style-type: none"> • Private property owners whose homes or businesses are endangered by sea-level rise challenge conditions placed on their permits. Legal risk: low to moderate

depending on condition.

Permit conditions could constitute a taking if they do not pass the Nollan-Dolan takings test of nexus and rough proportionality. Some argue that Coastal Act Section 30235 allows, without qualification, seawalls to protect current structures. It is essential to make individualized determinations, ensuring that the conditions are tied to potential impacts and the priorities of the Coastal Act, including the public trust doctrine.

- **Refusing permit for private property owners. Legal risk: Moderate to High.**

An aggrieved property owner could argue that he or she bears a disproportionately high burden of property loss relative to the impact of a seawall construction project on her property, and that refusing the permit violates both the Coastal Act and the Takings Clause. The public trust provides a strong legal basis to defend against the claim.

- **Issuing permit without conditions. Legal risk: High.**

A blanket issuance would placate property owners, but would likely violate Coastal Commission policy and result in challenges from environmental NGOs.

- **Municipality constructs seawall to protect public works, utilities, or services in imminent danger. Legal risk: low to moderate.**

Coastal Act Section 30611 allows for the construction of emergency seawalls in some instances when there is imminent danger (this could apply to a rail line potentially threatened by the next storm cycle). CEQA would also not apply in this instance. However, if a seawall fails or causes flooding on an adjacent property, the municipality could face an inverse condemnation claim. The outcome would depend on the specific facts of the case.

- **Municipality constructs seawall to protect public works, utilities, or services in non-imminent danger. Legal risk: moderate to high.**

Coastal Act Section 30611 would not apply if the danger was not imminent (i.e. in the next storm cycle). The permitting process would be burdensome, requiring a balancing of the public good and potential harms. If the seawall caused damage, it could be subject to a takings lawsuit. The outcome would depend on the specific facts of the case.

Strategy #5: Zoning and Land Use

General Legal Risk	<p>Low to high, depending on the extent of regulation. Municipalities have broad discretion to exercise zoning and land use authority, but certain decisions carry more legal risk than others.</p>
Overview of Legal Context	<p>Local Coastal Programs set out zoning and land use policies that determine how municipalities will implement the Coastal Act. LCPs are where the rubber meets the road in coastal planning—many of the strategies described above are pre-determined by LCP guidelines. While undertaking a specific strategy like beach nourishment is subject to legal risk, the LCPs themselves (and decisions made under them, such as those related to armoring permits) are also subject to legal risk.</p>
Discussion	<p>For example, if LCPs attempt to restrict private property development, they could be subject to litigation initiated by private property owners alleging a taking or violation of the Coastal Act. If LCPs do not adequately address sea level rise, they may be rejected or modified by the Coastal Commission and/or challenged by environmental groups as violating the Coastal Act or environmental statutes like CEQA.</p> <p>Some property owners and property-rights organizations interpret the Coastal Act as providing a nearly unqualified mandate for issuing armoring permits for all structures. Meanwhile, many legal scholars and environmental groups argue that, under the Coastal Act, the right to seawall permits for “existing structures” only applies to structures built before the Act was passed in 1976. That issue has yet to be resolved by the courts. Municipalities are less vulnerable to challenge if their decisions are guided by scientific determinations in vulnerability assessments and an explicit discussion of how the LCP policies are supported by the public trust doctrine.</p> <p>Municipalities retain broad discretion to regulate zoning in environmentally sensitive habitat areas, establish setbacks and overlays, and to generally establish a comprehensive zoning scheme. LCP provisions are reviewed by courts for an abuse of discretion, so it is important that they closely relate to the goals of the Coastal Act and the principles of the public trust doctrine, without directly contravening any statutory provisions. In addition, any setback or overlay district could face a takings lawsuit as a regulatory taking, meaning that courts will balance the public good against economic impact and any reasonable investment-backed expectations.</p>
Scenarios	<ul style="list-style-type: none"> <p>• Triggered setbacks or other policies short of removal tied to erosion rates. Legal risk: low.</p> <p>Establishing a trigger is likely not an action that is “ripe” to be tried. Since the trigger has not occurred, no harm has occurred. Theoretically, a property owner could argue that the mere presence of a trigger causes a partial diminution in property value, constituting a taking. However, that argument would likely fail since sea level rise adaptation is a public good that applies generally. In addition, triggers could make municipalities less vulnerable to future takings lawsuits by establishing reasonable investment-backed expectations for property owners based on sea level rise.</p> <p>• Trigger policy tied to removal. Legal risk: moderate-high.</p> <p>Triggers tied to removal requirements could be at greater risk due to the extent of the property value at issue. While the law is currently unsettled, a property owner could argue that such a trigger reduces property values, counter to reasonable</p>

investment-backed expectations.

- **LCP requirement forbidding construction of seawalls. Legal risk: high for pre-1976 structures, moderate-high for structures built post-1976.**

The debate about the meaning of “existing structures” has yet to be resolved. Forbidding armoring will likely subject a municipality to legal risk until the California Supreme Court releases its decision in the *Lynch* case (or legislation is passed clarifying the meaning of the phrase).

- **No new armoring provisions in CDPs. Legal risk: low.**

Since the 1980s, many CDPs have included these conditions, and they are unlikely to face a credible legal challenge.

- **Lateral conservation easements in CDPs. Legal risk: low to moderate.**

The Public Trust Doctrine and public access priorities of the Coastal Act provide support for easements. However, an individualized determination must be made that ties the easement conditions to the proposed development.

- **Removal/abandonment requirements for properties subject to sea level rise. Legal risk: high.**

While the Public Trust Doctrine theoretically provides a hook for removal requirements as a background principle of law, such requirements would likely be subject to litigation, since they involve an important property interest. The outcome would depend on the specific facts of the case. Legal risk would be reduced if there were fair compensation, though that would raise financial issues in highly developed areas.

Liability for Failing to Take Action

Another question that may arise is whether local governments may be liable for failing to act in the face of climate change (e.g. failing to use some of the adaptation strategies we identified above to adapt to sea level rise). The answer to that question will largely depend on the facts at issue. Below we lay out three potential scenarios, and outline some general principles regarding a local government's liability for failing to act.

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?

SHORT ANSWER: Under current law, it is unlikely that a local government's failure to act in and of itself will give rise to takings liability. It is important to keep in mind, however, that the law continues to evolve. In addition, by failing to adapt local governments may be more vulnerable to other takings claims (e.g. where a public improvement like a levee damages private property, which may occur more frequently with climate change).

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?

SHORT 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.

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?

SHORT ANSWER: The cases suggest that the easements will not "migrate" with the land, but will be lost to the sea. Note that the question addressed in this scenario is different from the discussion above related to the migration of public trust lands inland as sea level rises. This scenario involves easements on private property (i.e. the government has negotiated an easement with a private property owner for an easement over that owner's land so that the public can access public trust resources).

Conclusion

Sea level rise adaptation requires acting in the face of uncertainty. Part of that uncertainty derives from the impacts of sea level rise—it is difficult to know exactly when various actions are required to avoid substantially harming the public good. But perhaps even more of the uncertainty involves how to balance the environmental, economic, and legal implications of acting on behalf of the public good.

This report summarizes some of the legal considerations of sea level rise adaptation in San Diego. The most important takeaway is that legal risk is highly fact-specific. In many instances, there is no easy answer as to how much risk an action carries, or how that risk should be balanced against the risk of inaction. This report, rather than providing answers to site-specific questions, serves as a reference document for planners to understand why, when, and how legal risk may arise.

The sea is rising. With the rising tides comes the need for strategic adaptation. While legal risk can never be completely averted, it can be minimized by focusing on stakeholder buy-in before taking large-scale actions, combining the entire land use and planning toolkit with public outreach. Through long-term, strategic adaptation planning, the public good and private interests can be both achieved.



Photo Credit: NOAA Coastal Resilience