

THE GEORGE WASHINGTON JOURNAL OF ENERGY AND ENVIRONMENTAL LAW

CONTENTS

ARTICLES

- See, Hear and Speak No Sea Level?
The Elusive Ethics of the Coastal
Property Professional *Keith W. Rizzardi* 1
- Buyer Beware: Sea Level Rise and
Real Estate Disclosure *Joel Scata and Zoe Vogel* 27
- Sea Level Rise and Takings Liability *Robin Willscheidt and
Robin Kundis Craig* 47

NOTES

- Private Sector Carbon Offset Greenwashing
and Texas: The Lone Star State
Can (and Should) Do More *Meera Aiyer* 73
- Slavery in the Seafood Supply Chain:
Using the Trafficking Victims Protection
Act to Combat Labor Abuses in the
Seafood Industry *Caroline Bronstein* 99
- Ensuring “Just and Reasonable” Rates in
the District: Why D.C.’s Renewable
Portfolio Standard Must be Replaced
with a Clean Energy Standard *Max Galatas* 125

VOLUME 16

NUMBER 1

FALL 2024

Buyer Beware: Sea Level Rise and Real Estate Disclosure

By Joel Scata* and Zoe Vogel¹

Climate change is increasingly turning the American dream of owning a home into a nightmare. Extreme storms, floods, and wildfires cause billions of dollars in damage every year.² In response, homeowner's insurance is not only becoming unaffordable, but unavailable in many locations.³ For coastal communities, rising seas are threatening the tranquil life many have sought when moving to the shore. From coastal storms to tidal flooding, sea level rise will increasingly burden homeowners with costly maintenance and repair bills and the rising threat that their home could simply wash away,⁴ making a life on the shore untenable for many, absent actions to adapt. Coastal communities

* Joel Scata is the Senior Attorney for the Natural Resources Defense Council's (NRDC) Climate Adaptation Division. At NRDC, Scata focuses on issues related to preparing the United States for water-related impacts of climate change, including federal flood policy reform and adapting to sea-level rise. Prior to joining NRDC in 2014, Scata served as a Peace Corps volunteer in Mali, working to conserve land threatened by desertification. He holds a bachelor's degree from Connecticut College and a dual JD from American University Washington College of Law and Monash University Law School.

¹ Zoe Vogel is an attorney at FishmanHaygood. Zoe's practice primarily focuses on environmental law. Prior to joining Fishman Haygood, Zoe was a legal fellow with the Environmental Law Institute in Washington, D.C. In this role, she conducted legal research and writing to fulfill publication deliverables across a wide range of project topics including coastal resilience, hazard mitigation, nature-based infrastructure, sea level rise, offshore wind, Tribal consultation, and hardrock mining. She holds a B.S.B from the University of Minnesota Carlson School of Management and a J.D. from Tulane University Law School.

Editor's Note: This Article was originally presented at the symposium *Science and the Law of Sea Level Rise: Reducing Legal Obstacles to Managing Rising Seas*, hosted by the Environmental Law Institute and Nova Southeastern University's Shepard Broad College of Law on March 21-22, 2024. The symposium was supported by the National Science Foundation Paleoclimate Office, Award Number 2330829.

² Liz Farmer, *State Fiscal Debates to Watch in 2024: Natural Disaster Risk*, PEW (Feb. 1, 2024), <https://www.pewtrusts.org/en/research-and-analysis/articles/2024/02/02/state-fiscal-debates-to-watch-in-2024-natural-disaster-risk> [https://perma.cc/DDA6-HKR7].

³ Christopher Flavelle, *Home Insurance Rates in America Are Wildly Distorted. Here's Why.*, N.Y. TIMES (July 8, 2024), <https://www.nytimes.com/interactive/2024/07/08/climate/home-insurance-climate-change.html?searchResultPosition=10> [https://perma.cc/3WRQ-HSPD]; Alice Hill, *Climate Change and U.S. Property Insurance: A Stormy Mix*, COUNCIL ON FOREIGN REL. (Aug. 17, 2023), <https://www.cfr.org/article/climate-change-and-us-property-insurance-stormy-mix> [https://perma.cc/BAQ2-PM2F].

⁴ Kate Selig, *Another Outer Banks Home Collapses Into Ocean, a Stark Reminder of Climate Change*, N.Y. TIMES (Aug. 17, 2024), <https://www.nytimes.com/2024/08/17/us/north-carolina-house-collapse-ernesto.html> [https://perma.cc/UB52-QR76].

Fall 2024 Vol. 16 No. 1

are home to nearly 40 percent of the U.S. population,⁵ and that number is projected to grow in the coming decades.⁶ Communicating the growing threats from sea level rise is essential to ensuring more people are not unknowingly moving into harm's way. Absent effective risk communication, people cannot make an informed decision about reducing said risk, such as choosing another place to live or better protecting the place they do decide to call home. Mandatory real estate disclosure policies that explicitly inform buyers about the potential impacts of sea level rise could be an important policy tool for not only addressing this information gap but reducing the associated risks. However, most states' lack of robust disclosure laws keeps home buyers in the dark about the short- and long-term threats from sea level rise. Mandating a federal sea level rise hazard disclosure would give home buyers a fuller picture of the potential impacts *before* making a life-altering decision.

This article will examine whether sellers have a duty to disclose to buyers the potential impacts of sea level rise to their property. First, this article highlights the potential impacts of sea level rise, with a focus on coastal flooding. Next, this article outlines the general approach to real estate disclosure in the United States. Then, the article analyzes whether the potential impacts of sea level rise are required to be disclosed in select coastal states. This article concludes by recommending a mandated approach to disclosure of sea level rise impacts at the federal level.

I. IMPACTS OF SEA LEVEL RISE TO PRIVATE PROPERTY

Human-caused emissions of greenhouse gases are the primary driver of climate change.⁷ The extent to which the climate will change depends on the amount of greenhouse gas emissions already released into the atmosphere and those yet to be emitted in the future.⁸ Global temperatures have already increased by about 2°F (1.1°C) beyond preindustrial levels and could hit 5.4°F (3°C) by 2100 under the current emissions trajectory.⁹ Rising temperatures also cause sea levels to rise

⁵ *Climate Change Impacts on Coasts*, ENV'T PROT. AGENCY, <https://www.epa.gov/climateimpacts/climate-change-impacts-coasts> [<https://perma.cc/YZ3Z-UVAR>]; see also Heather Dadashi, *Strengthening California's Hazard Disclosure Laws to Address Sea Level Rise Risks*, 17 PRITZKER ENV'T L. & POL'Y BRIEF 2 (2023).

⁶ *Coastal Population*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://ecowatch.noaa.gov/thematic/coastal-population#:~:text=Description%20of%20Coastal%20Population:&text=In%20the%20U.S.%20coastal%20counties,of%20residents%20within%20all%20regions> [<https://perma.cc/3FDU-LCHA>].

⁷ *The Causes of Climate Change*, NAT'L AERONAUTICS & SPACE ADMIN., <https://science.nasa.gov/climate-change/causes/> [<https://perma.cc/J52T-EDTP>].

⁸ *Id.*

⁹ U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 9-7 (2023) [hereinafter FIFTH NATIONAL CLIMATE ASSESSMENT].

as glaciers and ice sheets melt and waters expand as they become warmer.¹⁰ Thus, sea level rise is not a question of if, but of how much and when. Along the contiguous U.S. coasts, sea levels have risen by 11 inches over the last 100 years, and that rate is accelerating.¹¹ Over the course of the next 30 years, which is the length of a typical mortgage, sea levels along the U.S. coasts are expected to rise, on average, by nearly one foot.¹² However, sea level rise rates vary across different U.S. geographies. Sea levels are rising higher along the Atlantic and Gulf Coasts than the Pacific Coast.¹³ Beyond 2050, the extent of future global greenhouse gas emissions will determine the amount of future sea level rise.¹⁴ Rising sea levels are already exacerbating threats to coastal communities. Flooding, shoreline erosion, and groundwater rise are and will continue to negatively affect the millions of people living and working near the shore. As sea level rise continues to accelerate, such impacts are expected to worsen.¹⁵

A. Coastal Flooding

Sea level rise is amplifying the severity of coastal flooding, from extreme storm surges to more frequent high tide flooding.¹⁶

1. Extreme Storms

Sea level rise amplifies the destructive potential of storm surge, which occurs during extreme weather events such as hurricanes or cyclones.¹⁷ Storm surge is characterized by a rapid increase in water level, often caused by strong winds and low atmospheric pressure, leading to flooding of coastal areas.¹⁸ When combined with elevated sea levels due to climate change, storm surges can inundate coastal regions more extensively and severely, causing widespread damage to infrastructure, homes, and ecosystems, and posing grave risks to human lives.

¹⁰ Rebecca Lindsey, *Climate Change: Global Sea Level*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level#:~:text=Global%20warming%20is%20causing%20global,to%20people%20depleting%20ground%20water> [https://perma.cc/K782-6HXN].

¹¹ FIFTH NATIONAL CLIMATE ASSESSMENT, *supra* note 9, at 9-5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 9-7.

¹⁵ *Id.* at 9-4.

¹⁶ *Id.* at 9-8.

¹⁷ *How Does Sea Level Rise and Storm Surge Interact?*, RUTGERS SCH. OF ENV'T & BIOLOGICAL SCI., https://crssa.rutgers.edu/projects/njfloodmapper/about_2b.html [https://perma.cc/V2C7-T8ES].

¹⁸ *Storm Surge Overview*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.weather.gov/phi/stormSurge#:~:text=Storm%20surge%20is%20an%20abnormal,surge%20and%20the%20astronomical%20tide> [https://perma.cc/8ZY7-6WVC].

2. Tidal Flooding

The increasing frequency, depth, and extent of tidal flooding due to sea level rise threatens coastal properties and public infrastructure.¹⁹ As sea levels have risen, the number of tidal floods each year that cause minor damage (i.e., “nuisance levels” of about 1-2 feet) have increased 5- to 10-fold since the 1960s in multiple U.S. coastal cities.²⁰ Atlantic City and Sandy Hook, NJ; Philadelphia, PA; Baltimore and Annapolis, MD; Norfolk, VA; Wilmington, NC; Charleston, SC; Savannah, Georgia; Mayport, Key West, and Port Isabel, FL are all experiencing such trends.²¹ In fact, tidal flood rates have been accelerating in more than 25 East and Gulf Coast cities over the last several decades.²²

The annual number of tidal floods is projected to increase as sea levels continue to rise.²³ Under the Intermediate Low and Intermediate scenarios for Global Mean Sea Level (“GMSL”), by 2050, high tide flooding could occur on average about:

- 45 and 130 days/year (30 and 45% from tidal forcing alone) along the Northeast Atlantic and 25 and 85 days/year (35 and 65% from tides) along the Southeast Atlantic, respectively; and
- 25 and 80 days/year (0 and 55% from tides) along the Eastern Gulf and 80 and 185 days/year (45 and 80% from tides) along the Western Gulf, respectively.²⁴

By 2100, high tide flooding could occur the equivalent of every other day (182 days/year) or more under the Intermediate Low Scenario within the Northeast and Southeast Atlantic, the Eastern and Western Gulf, and the Pacific Islands.²⁵

These more frequent flood events are also expected to impose significant socioeconomic costs, including property damage, long term effects on crucial infrastructure, and negative impacts on public health.²⁶

¹⁹ WILLIAM V. SWEET ET AL., CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I 333, 363 (Donald Wuebbles et al., eds., 2017).

²⁰ *Id.* at 347.

²¹ *Id.*

²² *Id.*

²³ See generally WILLIAM V. SWEET ET AL., NOAA TECHNICAL REPORT NOS CO-OPS 086, PATTERNS AND PROJECTIONS OF HIGH TIDE FLOODING ALONG THE U.S. COASTLINE USING A COMMON IMPACT THRESHOLD (2018) (finding that with continued sea level rise, high tide flood frequencies will continue to increase rapidly).

²⁴ *Id.* at 32.

²⁵ *Id.* at ix.

²⁶ Maya K. Buchanan et al., *Amplification of flood frequencies with local sea level rise and emerging flood regimes*, 12 ENV'T RSCH. LETTERS 1, 1 (2017); see also Hamed Moftakhari et al., *Increased nuisance flooding along the coasts of the United States due to sea level rise: Past and future*, 42 GEOPHYSICAL RSCH. LETTERS 9846, 9847 (2015).

In the next 30 years, nearly 300,000 of today's residential and commercial properties could be at risk of chronic coastal flooding – flooding that occurs 26 times per year or more.²⁷ By the end of the 21st century, nearly 2.5 million properties may be at risk.²⁸ Millions of Americans living in these areas will be negatively impacted as their homes and businesses become untenable due to persistent, high-tide flooding. These economic losses are exacerbated by increased exposure from continued development in coastal areas.²⁹

B. Shoreline erosion

Rising seas are eroding shorelines, directly threatening the homes and infrastructure built along the coast. Higher sea levels exacerbate wave action, leading to more powerful storm surges and tidal forces that erode shorelines.³⁰ The loss of protective barriers, such as dunes and mangroves, further accelerates erosion rates.³¹ Additionally, rising sea levels contribute to increased saltwater intrusion into coastal aquifers, which weakens soil stability and exacerbates erosion processes.³² Coastal erosion jeopardizes infrastructure, including homes, roads, and utilities.³³ In the United States, coastal erosion already causes \$500 million per year in property loss.³⁴

Sea level rise is raising the groundwater table in coastal areas, threatening homes, critical infrastructure, and freshwater aquifers. As sea levels rise, saltwater infiltrates coastal aquifers and groundwater systems, leading to the contamination of freshwater sources.³⁵ This intrusion not only compromises the quality of drinking water but also corrodes infrastructure and damages the foundations of homes.³⁶ Prolonged exposure to saltwater can deteriorate building materials,

²⁷ UNION OF CONCERNED SCIENTISTS, UNDERWATER: RISING SEAS, CHRONIC FLOODS, AND THE IMPLICATIONS FOR US COASTAL REAL ESTATE 1 (2018).

²⁸ *Id.*

²⁹ ELIZABETH FLEMING ET AL., IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II 332, 333 (David Reidmiller et al., eds., 2018).

³⁰ *Coastal Erosion*, U.S. CLIMATE RESILIENCE TOOLKIT, <https://toolkit.climate.gov/topics/coastal-flood-risk/coastal-erosion> [<https://perma.cc/8KG2-YG4U>].

³¹ *Id.*

³² Robert W. Brown et al., *Saltwater Intrusion Induces Shifts in Soil Microbial Diversity and Carbon Use Efficiency in a Coastal Grassland Ecosystem*, 170 SOIL BIOLOGY & BIOCHEMISTRY 108700 (2022) (mentioning the impacts of saltwater intrusion on physical structure of soil).

³³ *Id.*

³⁴ *Id.*

³⁵ See generally Amandine L. Bosserelle et al., *Groundwater Rise and Associated Flooding in Coastal Settlements Due To Sea-Level Rise: A Review of Processes and Methods*, 10 EARTH'S FUTURE (2022), <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2021EF002580> [<https://perma.cc/LHB5-HWAH>].

³⁶ *Id.*

such as wood, concrete, and metal, increasing maintenance costs and decreasing property values.³⁷ Overall, the impacts of saltwater intrusion due to sea level rise pose serious challenges to the resilience and habitability of coastal homes, necessitating proactive measures to mitigate risks and adapt to changing environmental conditions.

II. OVERVIEW OF DISCLOSURE LAWS

Easily accessible and digestible information is central to informed decision-making about risk. Robust real estate disclosure laws provide an effective means for such risk communication.³⁸ These laws require sellers to disclose certain information about the property that they are selling, such as known defects, environmental hazards, or any other material facts that could affect the value or desirability of the property. For buyers, this means they can make more informed decisions about whether to proceed with a purchase and negotiate terms accordingly. By having access to relevant information upfront, buyers can avoid unpleasant surprises after closing, potentially saving them from costly repairs. Given purchasing a home is typically the biggest financial investment a person will make in their lifetime, it is critical that home buyers know of any conditions that could affect the longevity of their homes.³⁹

Concerning natural hazards, strong real estate disclosure laws enable buyers to assess both past damages and the potential for future damages. For example, disclosing flood risk holds immense benefits. Transparency about flood risk enables informed decision-making, empowering individuals to take proactive measures to mitigate potential damages. By understanding the flood risk in a particular area, homeowners can make informed choices about property investments, insurance coverage, and disaster preparedness plans. Studies have shown robust flood risk disclosure requirements can affect property valuation, indicating buyers are receiving the correct market signal about risk and are acting accordingly.⁴⁰ Further, real estate disclosures

³⁷ See generally Mohamed A. Abdelhafez, Bruce Ellingwood & Hussam Mahmoud, *Hidden Costs to Building Foundations Due to Sea Level Rise in a Changing Climate*, 12(1) SCIENTIFIC REPORTS 14020 (2022) (discussing the impacts and potential costs of saltwater intrusion to coastal infrastructure).

³⁸ Rebecca Marx et al., *Without Robust Requirements That Sellers Disclose a Home's Flooding History, Buyers Are More At Risk*, URBAN INST. (July 21, 2020), <https://www.urban.org/urban-wire/without-robust-requirements-sellers-disclose-homes-flooding-history-buyers-are-more-risk> [https://perma.cc/EVA9-PHPV].

³⁹ EMILY SNYDER & CLAY KULESZA, LET THE BUYER BEWARE: A COMPARISON OF FLOOD-RELATED REAL ESTATE DISCLOSURE LAWS OF VIRGINIA AND OTHER STATES 3 (2020), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1043&context=vcplclinic> [https://perma.cc/D8QK-3CGE].

⁴⁰ WILLIAM MCCLAIN & NUNO MOTA, THE IMPACT OF 2019 CHANGES TO TEXAS' FLOOD DISCLOSURE REQUIREMENTS ON HOUSE PRICES 2, 3 (2024); see also Seunghoon Lee, *Adapting to Natural*

are beneficial because home inspections do not fully inform a buyer about all the risks associated with a property. Home inspections can only reveal readily accessible and visible defects. If the defects are not accessible or have been repaired, then a home inspection is likely not to reveal them. However, a seller may know of the defect, such as if they suffered through a flood, and thus, should be required to disclose those defects to a potential buyer.

Unfortunately, real estate disclosure requirements are not universal. Some states have specific laws that require a seller to disclose certain defects to a buyer. However, in other states, without the aid of such disclosures, buyers are forced to learn about a property's defects under the common law principle of *caveat emptor*, or "let the buyer beware."⁴¹ Historically, *caveat emptor* has been the dominant legal standard in the United States. Courts presumed buyers were equally capable as sellers in identifying any defects with the property.⁴² Buyers were responsible for "examining and determining the suitability of a property before purchase."⁴³ Adherence to *caveat emptor* meant any defects discovered after the sale were the responsibility of the buyer.⁴⁴ In the mid-20th century, with the rise of consumer protection law, courts began to shift some of the onus onto the seller, requiring disclosure of latent property defects not reasonably discoverable by a buyer.⁴⁵ In most states, sellers are now expected to provide buyers an accounting of known defects, with two-thirds of states having enacted statutory disclosure requirements.⁴⁶ However, real estate disclosure laws are not all created equal. The breadth of what must be disclosed varies by state. Disclosure of flood risk is a prime example. Numerous states have no statutory or regulatory requirement that a seller must disclose a property's flood risks or past flood damages to a potential buyer.⁴⁷ The other states have varying degrees of disclosure requirements.⁴⁸

Disasters through Better Information: Evidence from the Home Seller Disclosure Requirement 30 (MIT Ctr. for Real Est. Rsch. Paper No. 21/17) (finding disclosure policy is an effective risk management tool).

⁴¹ Synder, *supra* note 39, at 3.

⁴² Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 390 (1996).

⁴³ David P. Hendricks, *Silence Is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina*, 25 N.C. CENT. L. REV. 96, 100 (2002).

⁴⁴ *Id.*; see also George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All"*, 39 REAL PROP. PROB. & TR. J. 193, 198 (2004).

⁴⁵ Lefcoe, *supra* note 44, at 198-99.

⁴⁶ *Id.* at 195-96.

⁴⁷ *How States Stack Up on Flood Disclosure*, NAT. RES. DEF. COUNCIL (Aug. 19, 2024), <https://www.nrdc.org/resources/how-states-stack-flood-disclosure> [<https://perma.cc/27H9-YCS8>].

⁴⁸ *Id.*

Before May 2024, Florida had no statutory or regulatory mandate that required a seller to disclose a property's flood risks or past flood damages to a potential buyer.⁴⁹ Under the common law, Florida courts have held, with some exceptions, that a home seller must disclose any conditions about a property that could have a substantial impact on its value or desirability and that others cannot easily see for themselves.⁵⁰ However, what constitutes a latent defect that would have a substantial impact on value is a heavily fact dependent inquiry. In *Nelson v. Wiggs*, the court held the seller had no duty to disclose the flood-prone nature of the property to the buyers because the property was in an area covered by county regulations enacted to protect homes from flooding, and a buyer could learn about the regulations through public records.⁵¹

In contrast, Texas and Louisiana have robust flood risk disclosure requirements. For example, Texas Property Code § 5.008 requires sellers to provide written disclosure to buyers on a range of flood risk factors, including whether the property is in a flood hazard area, the existence past flood damages and associated insurance claims, and whether flood insurance is mandatory at the property.⁵² Louisiana law requires a seller of residential real property to make written disclosure of all known defects in a property to be sold.⁵³ For flooding, a seller must disclose whether “any flooding, water intrusion, accumulation, or drainage problem” occurred on the land both prior to and during the time the seller owned the property, whether “any structure on the property [has] ever flooded, by rising water, water intrusion or otherwise” both during and prior to the seller's ownership, the property's flood zone classification, and specify the source and date of their information; whether the property is located within a “designated special flood hazard area” as determined by FEMA,⁵⁴ whether there is flood insurance on the property, and whether federal flood disaster assistance has been previously received with regards to the property.⁵⁵

⁴⁹ *Id.*; see also *New Florida Law Requires Mandatory Flood Disclosure, Helping Homebuyers Understand Their Risks*, ENV'T. DEF. FUND (May 30, 2024), <https://www.edf.org/media/new-florida-law-requires-mandatory-flood-disclosure-helping-homebuyers-understand-their-risks> [https://perma.cc/SD63-T9WC].

⁵⁰ *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985).

⁵¹ 699 So. 2d 258 (Fla. Dist. Ct. App. 1997), *reh'g denied* (Oct. 8, 1997), *review denied* 705 So. 2d 570 (Fla. 1998).

⁵² *How States Stack Up on Flood Disclosure*, NAT. RES. DEF. COUNCIL (Aug. 19, 2024), <https://www.nrdc.org/resources/how-states-stack-flood-disclosure> [https://perma.cc/7S5B-X87P]; see also FED. EMERGENCY MGMT. AGENCY, FLOOD RISK DISCLOSURES: MODEL STATE REQUIREMENTS FOR DISCLOSING FLOOD RISK DURING REAL ESTATE TRANSACTIONS 6-7 (2022).

⁵³ LA. STAT. ANN. § 9:3198(A)(1) (2023).

⁵⁴ FED. EMERGENCY MGMT. AGENCY, *supra* note 52, at 6 (“The federal law (42 U.S.C. § 4104a, et seq.), mandates that prospective purchasers be advised that flood insurance may be required as a condition of obtaining financing.”).

⁵⁵ LA. REAL EST. COMM'N, PROPERTY DISCLOSURE DOCUMENT 5-6 (2023), <https://eforms.com/images/2018/08/Louisiana-Residential-Property-Disclosure-Legal.pdf> [https://perma.cc/K6QC-HVGA].

This disparity in flood risk disclosure laws has significant consequences, which can be financially ruinous to those who unwittingly purchase a flood-prone home. *Estimating Undisclosed Flood Risk in Real Estate Transactions* examines three states (New Jersey, New York, and North Carolina) with inadequate disclosure requirements at the time of the study.⁵⁶ That report found that thousands of people likely bought a previously flooded home without ever being told that information. On average, those unsuspecting home buyers could incur tens of thousands of dollars in unexpected damage. Strong real estate disclosure laws that require a seller to inform a buyer about a property's flood history and risk would help address this problem. As sea levels rise, tens of thousands of communities can expect increasing vulnerability to flooding. Homebuyers should not be kept in the dark about this risk when choosing where their family will call home. However, whether sellers are currently required to disclose the potential flooding impacts of sea level rise depends on each coastal state's real estate disclosure framework.

III. WHETHER DISCLOSURE REQUIREMENTS OF SEA LEVEL RISE RISK EXIST

While statutory disclosure mandates do exist for sea level rise-related risks in Hawaii and New Jersey, the remaining coastal states have no explicit sea level rise disclosure requirements. Without statutory requirements for disclosure, common law is the only mechanism by which a seller could be required to disclose these potential risks. This section briefly describes the statutory requirements in Hawaii and New Jersey, and then analyses the common law framework in select coastal states to determine whether a seller would be required to disclose the potential impacts of sea level rise.

A. Statutory

Both Hawai'i and New Jersey have statutory disclosure mandates for sea level rise. Hawaii is the first state in the U.S. to pass a law requiring explicit sea level rise disclosures in a real estate transaction.⁵⁷ The state's disclosure law now requires sellers to disclose the risks from sea

⁵⁶ David D. Evans & Larry Baeder, *Estimating undisclosed flood risk in real estate transactions*, MILLIMAN (Aug. 1, 2022), <https://www.milliman.com/en/insight/Estimating-undisclosed-flood-risk-in-real-estate-transactions> [https://perma.cc/77MD-Y2DK].

⁵⁷ Brittany Lyte, *Hawaii Homeowners Must Tell Prospective Buyers If Sea Level Rise Threatens Their Property*, HONOLULU CIV. BEAT (May 3, 2022), <https://www.civilbeat.org/2022/05/hawaii-homeowners-must-tell-prospective-buyers-if-sea-level-rise-threatens-their-property/> [https://perma.cc/X7ST-JWDQ].

level rise to potential buyers.⁵⁸ Per statute, sellers must disclose whether the property lies within the Sea Level Rise Exposure Area, which is the area of shoreline that could be impacted by 3.2 feet of sea level rise.⁵⁹ To identify a property's location relative to a sea level rise exposure area, sellers are required to consult the Hawai'i Sea Level Rise Viewer.⁶⁰

New Jersey's recently updated disclosure law now requires purchasers to be warned about the impacts of sea level rise.⁶¹ As of March 2024, every seller of real property must disclose specific flood risk information via a property condition disclosure statement before the purchaser becomes obligated under any property purchase contract.⁶² The disclosure statement section on flood risk contains the following warning:

Flood risks in New Jersey are growing due to the effects of climate change. Coastal and inland areas may experience significant flooding now and in the near future, including in places that were not previously known to flood. For example, by 2050, it is likely that sea-level rise will meet or exceed 2.1 feet above 2000 levels, placing over 40,000 New Jersey properties at risk of permanent coastal flooding.... To learn more about these impacts, including the flood risk to your property, visit flooddisclosure.nj.gov.⁶³

The disclosure statement also warns buyers of the following:

Also note that properties in coastal and riverine areas may be subject to increased risk of flooding over time due to projected sea level rise and increased extreme storms caused by climate change which may not be reflected in current flood insurance rate maps.⁶⁴

B. Common Law

Absent an explicit statutory mandate like those discussed above, the common law is the only mechanism by which a seller could be required to disclose these potential risks. Below is an analysis of the common law concerning real estate disclosure in select coastal states.

⁵⁸ HAW. REV. STAT. ANN. § 508D-15 (LexisNexis 2024).

⁵⁹ *Id.*; see HAW. CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, HAWAII'S SEA LEVEL RISE VULNERABILITY AND ADAPTATION REPORT 12 (2017).

⁶⁰ Pacific Islands Ocean Observing System, *Sea Level Rise: State of Hawai'i Sea Level Rise Viewer*, <https://www.pacioos.hawaii.edu/shoreline/slr-hawaii/> [<https://perma.cc/8S5L-967W>] (last updated Nov. 15, 2024).

⁶¹ N.J. REV. STAT. § 56:8-19.2 (2023).

⁶² *Id.*

⁶³ N.J. DIV. OF CONSUMER AFFS., SELLER'S PROPERTY CONDITION DISCLOSURE STATEMENT 18 (2023).

⁶⁴ *Id.*

The selected states represent a sampling of West, Gulf, and East Coast states.

1. California

California has both statutory and common law disclosure requirements for home sales.⁶⁵ Per California's statutorily created disclosure statement, home sellers are required to inform a buyer about natural hazards, such as: flooding problems; major damage to the property from fires, earthquakes, floods, or landslides; and settling or other soil problems.⁶⁶ Sellers are also required to disclose whether a property is located in a high flood hazard area.⁶⁷ However, California's disclosure form does not impose a duty to disclose the potential impacts from sea level rise.⁶⁸ Sellers only need to disclose current or past flooding issues.⁶⁹

As such, California's common law disclosure requirements would need to be relied upon to impose such a duty onto a seller. Under the common law, "where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, [i.e., latent] the seller is under a duty to disclose them to the buyer."⁷⁰ Each of these elements – *known*, *latent*, and *material* – must be satisfied to find that a seller under California law must disclose the potential impacts of sea level rise to a buyer. Most relevant for this analysis is whether the impacts of sea level rise are material and latent.

Facts are considered material if they would have a significant and measurable effect on market value.⁷¹ Sellers only need to disclose facts about a property that are quantifiably detrimental to its value.⁷² Whether something is detrimental to a property's value is a fact specific inquiry.⁷³ As discussed in *Climate Change and Real Estate in California: Can Climate-Related Risk Be a Required Disclosure for Residential Real Estate?*, a court would need to determine whether the potential impacts

⁶⁵ Dadashi, *supra* note 5, at 2.

⁶⁶ *Id.* at 3 (citing CAL. CIV. CODE § 1102.6 (West 2021)).

⁶⁷ *Id.* (citing CAL. CIV. CODE § 1103.2 (West 2024)).

⁶⁸ STATE OF CAL. DEP'T OF REAL EST., DISCLOSURES IN REAL PROPERTY TRANSACTIONS 10-14 (2023).

⁶⁹ *Id.*

⁷⁰ Shapiro v. Sutherland, 64 Cal. App. 4th 1534, 1544 (Cal. Ct. App. 1998) (quoting Lingsch v. Savage, 213 Cal. App. 2d 729, 735 (Cal. Ct. App. 1963)).

⁷¹ Assilzadeh v. Cal. Fed. Bank, 82 Cal. App. 4th 399, 415 (Cal. Ct. App. 2000).

⁷² *Id.*; see also Lindsey Jacques, *Climate Change and Real Estate in California: Can Climate-Related Risk be a Required Disclosure for Residential Real Estate?*, 14 SAN DIEGO J. CLIMATE & ENERGY L. 259 (2022-2023).

⁷³ Reed v. King, 145 Cal. Rptr. 130, 132 (Cal. Ct. App. 1983) (quoting Lingsch v. Savage, 29 Cal. Rptr. 201, 205 (Cal. Ct. App. 1963)).

to a property from climate risks, like sea level rise, have a significant and measurable effect on the property's value.⁷⁴ As the article notes, "the likelihood of significant sea level rise in the coming decades will very likely impact the market value and desirability of a house located next to the ocean."⁷⁵ However, the challenge is satisfying the "measurable effect" requirement.⁷⁶ Courts would need to grapple with which sea level rise projection to apply, over what time frame, and how such projections and their associated impacts measurably affect market value. This may be difficult to determine as studies have shown that the U.S. housing market is overvalued due to unpriced climate risk.⁷⁷

In addition, known material facts (i.e., defects), must be latent. Under California common law, latent defects are defects known by or only accessible to the seller and not known to, or within the reach of the diligent attention and observation of, the buyer.⁷⁸ The duty to disclose arises when the defect is known to the seller, and the seller knows the buyer is unaware of the defect and cannot reasonably discover the undisclosed fact.⁷⁹ In California, the potential impacts of sea level rise are, arguably, a patent defect. The risks associated with sea level rise are well-documented in scientific literature, international reports such as those from the Intergovernmental Panel on Climate Change, and governmental assessments. Information on these risks is widely accessible to the public. A seller is not likely to have more specific information about potential impacts, like flooding severity and frequency, than a buyer could determine from diligent attention and observation.

2. *Texas*

Like California, Texas has both statutory and common law disclosure requirements for home sales. Per Section 5.008 of the Texas Property Code, sellers of single-unit residential real property must give purchasers a written notice containing their knowledge of the condition of the property.⁸⁰ The Texas Real Estate Commission (TREC) has created a mandatory disclosure form, which requires home sellers to inform buyers about material defects affecting a property, including

⁷⁴ Jacques, *supra* note 72, at 270.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Jesse D. Gourevitch et al., *Unpriced climate risk and the potential consequences of overvaluation in US housing markets*, 13 NATURE CLIMATE CHANGE 250 (2023); see also Miyuki Hino & Marshall Burke, *The effect of information about climate risk on property values*, 118 PROC. OF THE NAT'L ACAD. OF SCI. 1, 5 (2021).

⁷⁸ Reed, 193 Cal. Rptr. at 131–32.

⁷⁹ *Id.*

⁸⁰ TEX. PROP. CODE ANN. § 5.008 (West 2023).

natural hazards.⁸¹ The section on flooding is detailed. A seller must disclose: (1) previous water damage to a structure due to a natural flood event; (2) previous flooding due to a failure or breach of a reservoir or a controlled emergency release of water from a reservoir; (3) whether the property is located wholly or partly in a 100-year floodplain, a 500-year floodplain, or a reservoir; (4) whether the seller has ever filed a claim for flood damage to property with any insurance provider, including the National Flood Insurance Program; (5) whether flood insurance covers the property; and (6) whether the seller ever received assistance from FEMA or the US Small Business Administration (SBA) for flood damage to the property.⁸² However, Texas's disclosure form does not impose a duty to disclose the potential impacts from sea level rise. Sellers only need to disclose current or past flooding issues.⁸³

Instead, Texas's common law disclosure requirements would need to be relied upon to impose a potential duty onto a seller to disclose the impacts of sea level rise. The Texas Supreme Court has held that a seller must disclose material facts that are not discoverable by the buyer exercising ordinary care and diligence or that a reasonable investigation or inquiry would not uncover.⁸⁴ Further, a seller has no duty to disclose facts that he does not know and is not liable for failing to disclose "what he only should have known."⁸⁵

In Texas, facts are material if they would likely affect the "conduct of a reasonable person" involved in the related transaction.⁸⁶ Given that even small amounts of floodwater can cause extensive damage to a home,⁸⁷ a reasonable person would likely act differently concerning the purchase of a house if they knew it was likely to flood due to rising sea levels.⁸⁸ Arguably, the impacts of sea level rise, like more frequent

⁸¹ *Seller's Disclosure Notice*, TEX. REAL ESTATE COMM'N, <https://www.rec.texas.gov/sites/default/files/pdf-forms/55-0.pdf> [<https://perma.cc/663U-KKVW>].

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655 (Tex. 1979), declined to extend on other grounds by *Thomas v. State*, 226 S.W.3d 697, 709 (Tex. App. 2007), review dismissed 2007 Tex. LEXIS 805 (Tex. 2007).

⁸⁵ *Rohrs v. Hartz*, No. 09-19-00196-CV, 2021 WL 2677422, at *9 (Tex. App. 2021) (quoting *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995)).

⁸⁶ *Coldwell Banker Whiteside Assocs. v. Ryan Equity Partners Ltd.*, 181 S.W.3d 879, 888 (Tex. App. 2006) (citing *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 345 (Tex. App. 2002, pet. denied)).

⁸⁷ FED. EMERGENCY MGMT. AGENCY, *Everyone Needs Flood Insurance* (2023), <https://www.fema.gov/fact-sheet/everyone-needs-flood-insurance> [<https://perma.cc/KKV2-3PFR>] ("Just one inch of water can cause roughly \$25,000 of damage to your property.").

⁸⁸ *Cf. WILLIAM MCCLAIN & NUNO MOTA, THE IMPACT OF 2019 CHANGES TO TEXAS' FLOOD DISCLOSURE REQUIREMENTS ON HOUSE PRICES* 17 (2024) (finding that home prices in 500-year flood zones fell 4.2 percent compared to properties outside flood zones after Texas changed the real estate disclosure law to require disclosure of moderate-risk flood zones).

and extreme flooding, could be considered a material fact. However, Texas common law only imposes a duty to disclose on the seller if the material facts are not discoverable by a buyer exercising ordinary care and diligence or which a reasonable investigation or inquiry would not uncover.⁸⁹ Concerning the impacts of sea level rise, a buyer could learn about the potential impacts to a property from sea level rise through reasonable investigation. As noted above, the risks associated with sea level rise are well-documented and that information is widely accessible to the public. A seller is not likely to have more specific information about potential impacts, like future flooding severity and frequency, than a buyer could determine from reasonable search. As such, Texas common law is likely insufficient to mandate the disclosure of sea level rise impacts.

3. *Florida*

Florida's common law regarding a seller's duty of disclosure liberally applied the principle of *caveat emptor* until the Florida Supreme Court decided *Johnson v. Davis* in 1985.⁹⁰ Prior to this decision, Florida state courts typically followed the approach that "mere nondisclosure does not constitute a fraudulent concealment" in which the parties were at arm's length and had equal access to the facts.⁹¹ However, in deciding *Johnson*, the court found that approach "unappetizing."⁹² Citing notions of justice and fairness, as well as many other states' shift away from this approach, the Court held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."⁹³

Concerning the disclosure of potential sea level rise impacts, the question of what qualifies as a "defect" is relevant. To constitute a "defect," a fact about the condition of the property must be material and must be latent.⁹⁴ The test for determining the materiality of a fact is whether the fact "substantially affects the value of the property."⁹⁵ Regarding latency, the fact must not be "readily observable."⁹⁶

⁸⁹ Smith, 585 S.W.2d at 655, declined to extend on other grounds by Thomas, 226 S.W.3d at 709, review dismissed 2007 Tex. LEXIS at 805.

⁹⁰ 480 So. 2d 625.

⁹¹ *Id.* at 628 (citing *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876 (Fla. Dist. Ct. App. 1961) and *Banks v. Salina*, 413 So. 2d 851 (Fla. Dist. Ct. App. 1982) ("there is no duty to disclose when parties are dealing at arms length.")).

⁹² Johnson, 480 So. 2d at 630.

⁹³ *Id.* at 628-29. In reaching this holding, the court discussed cases from California, Illinois, Nebraska, West Virginia, Louisiana, New Jersey, and Colorado.

⁹⁴ *Id.* at 629.

⁹⁵ Dorton v. Jensen, 676 So. 2d 437, 439 (Fla. Dist. Ct. App. 1996) (citing *Revitz v. Terrell*, 572 So. 2d 996, 998 (Fla. Dist. Ct. App. 1990)).

⁹⁶ Johnson, 480 So. 2d at 629.

While Florida courts could find the potential impacts of sea level rise to be material, they are unlikely to find such facts to be latent. *Nelson v. Wiggs* provides a strong example of how Florida courts would likely rule concerning the potential impacts of sea level rise.⁹⁷ In *Nelson*, buyers bought a property during dry season, unaware of seasonal flooding.⁹⁸ The court defined “readily observable” as “information [that] is within the diligent attention of any buyer” and stated that a “buyer would be required to investigate any information furnished by the seller that a reasonable person in the buyer’s position would investigate” and to “take reasonable steps to ascertain the material facts relating to the property and to discover them – if, of course, they are reasonably ascertainable.”⁹⁹ The court held that the flood-prone nature of the area was within the diligent attention of the buyers because there was nothing concealed about the rainy seasons and the tendency to flood in low-lying areas. Additionally, the county’s regulations required that homes in such areas be built on elevations to minimize flood damage.¹⁰⁰ Under this reasoning, Florida courts are likely to find the potential impacts of sea level rise are within the diligent attention of a buyer. Much like a buyer could find public information about the county regulations on flooding, a buyer could find information about the potential impacts of sea level rise.

4. Virginia

Virginia is still a “buyer beware” state.¹⁰¹ Buyers are typically responsible for examining and determining the suitability of a property before purchase. As such, rather than discussing Virginia real estate duties in terms of “duty to disclose,” they are typically framed as whether the buyer has a “duty to investigate.”¹⁰² Disclosure cases in Virginia generally fall into two categories: (1) where the sources of knowledge are equally available to the buyer and seller,¹⁰³ and (2) where the seller has thrown the buyer off their guard by the seller’s assurances and diverted the buyer from making a further inquiry.¹⁰⁴

For the former, there is no duty of disclosure. Rather, the buyer is responsible for inquiring into the true status of the property.¹⁰⁵ In *Costello v. Larsen*, the court held that when both parties have equal means of information, so that either may rely on their own judgment, both par-

⁹⁷ *Nelson*, 699 So. 2d at 259.

⁹⁸ *Id.*

⁹⁹ *Id.* at 261.

¹⁰⁰ *Id.*

¹⁰¹ VA. CODE ANN. § 55.1-703 (2024).

¹⁰² *Costello v. Larsen*, 182 Va. 567, 571 (Va. 1944); *Horner v. Ahern*, 207 Va. 860, 864 (Va. 1967).

¹⁰³ *Costello*, 182 Va. at 571.

¹⁰⁴ *Horner*, 207 Va. at 864.

¹⁰⁵ *Costello*, 182 Va. at 571.

ties are presumed to have done so and responsible for the outcome.¹⁰⁶ Under this holding, the seller has no duty of disclosure where sources of information are equally available to the parties. Thus, a court is likely to find a Virginia seller has no duty to disclose the potential impacts of sea level rise as both the seller and buyer would have access to the same quality of information.

For the latter, a buyer has a potential action for fraud where they relied on the seller's intentional misrepresentations of a latent defect. If a seller knows of a latent defect, they must answer, truthfully and fully, any questions raising issues as to the condition of the property.¹⁰⁷ A seller cannot willfully mislead a buyer to induce them into a sale. In this context, a seller would have to purposefully lie about the potential impacts of sea level rise to the property for a buyer to have a cause of action. However, as noted above, a Virginia court is not likely to consider the potential impacts of sea level rise as latent, as the sources of information about such potential impacts are equally available to both parties. In addition, "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events."¹⁰⁸ The only recourse a buyer might have is if the buyer inquired about current impacts, like flooding, on a property, and a seller intentionally misrepresented that a property was safe from flooding. However, absent an inquiry from a buyer, a seller does not have a duty to disclose.

Hence, Virginia common law is insufficient to ensure disclosure of the potential impacts of sea level rise. Virginia courts are likely to find buyers and sellers have equal access to the same sources of information about future impacts, as a seller is not likely to have access to greater information about future impacts than the buyer. It is also unlikely that a court would hold that the willful non-disclosure of the potential impacts of sea level rise constituted fraud if they are solely projected to happen in the future. While a seller would have information about current impacts, like coastal flooding, they have no duty to disclose such impacts absent an inquiry from the buyer. Mere silence is not sufficient to establish fraud. To overcome these hurdles, Virginia would need to enact an explicit statutory mandate requiring the disclosure of sea level rise.

5. *Massachusetts*

Like Virginia, Massachusetts follows the legal rule of "buyer beware" in residential real estate transactions.¹⁰⁹ Besides the existence

¹⁰⁶ *Id.*

¹⁰⁷ *Seymour v. McDonald*, 24 Va. Cir. 531, 533 (Va. Cir. Ct. 1981).

¹⁰⁸ *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 293 (Va. 1996) (citing *Patrick v. Summers*, 235 Va. 452, 454 (Va. 1988) (quoting *Soble v. Herman*, 175 Va. 489, 500 (Va. 1940))).

¹⁰⁹ *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808 (Mass. 1942).

of lead paint in the house and the presence of a septic system,¹¹⁰ Massachusetts sellers do not have a duty to disclose any defects associated with the property.¹¹¹ Massachusetts courts have held that silence, even where a seller may have knowledge of a defect and fails to disclose it, does not constitute fraud and misrepresentation.¹¹² However, a seller cannot affirmatively misrepresent a material fact nor respond dishonestly in response to specific questions about the condition of the property.¹¹³ Massachusetts common law concerning residential real estate transactions is stacked against the buyer. A seller is under no obligation to proffer information about defects concerning a property, like past flooding. As such, a seller would not have any duty to disclose the potential impacts of sea level rise. A potential scenario in which a seller may have to disclose potential sea level rise impacts is if specifically asked such by a buyer. Still, the extent of the disclosure would be a subjective determination and depends on the case-specific facts.

IV. FEDERALLY MANDATING A DUTY TO DISCLOSE SEA LEVEL RISE

Besides the statutory mandates of Hawaii and New Jersey, sellers are likely not required to disclose the potential impacts of sea level rise. Based on the analysis of the aforementioned states, the common law is insufficient to require disclosure. Most likely, a court would hold that the threat of rising sea levels is not a latent defect. The risks associated with sea level rise are documented in publicly accessible scientific literature and international reports such as those from the Intergovernmental Panel on Climate Change, and governmental assessments. Arguably, sea level rise, then, is a known consequence of climate change, and its impacts, like future flooding, are not hidden. Therefore, a court would likely find the impacts of sea level rise do not meet the criteria of a latent defect, which, as discussed above, typically involves hidden flaws or issues that are not readily apparent at the time of purchase.

As such, a disclosure of sea level rise would need to be statutorily mandated similarly to how many states already statutorily mandate the disclosure of flood risk. While states could adopt an approach like that

¹¹⁰ 105 MASS. CODE REGS. 460.720 (2017); 310 MASS. CODE REGS. 15.301 (2023).

¹¹¹ *See* Swinton, 42 N.E.2d at 809 (holding that concealment alone cannot carry a claim of fraud; there is no liability for nondisclosure).

¹¹² *Urman v. S. Bos. Sav. Bank*, 674 N.E.2d 1078, 1081 (Mass. 1997) (citing *Nei v. Burley*, 446 N.E.2d 674 (Mass. 1983)).

¹¹³ *Kannavos v. Annino*, 247 N.E.2d 708, 712 (Mass. 1969) (sellers had advertised the offered houses as investment properties and expressly asserted that the houses were being rented to the public, knowing the buyers planned to use the buildings as rental units. The court held that the sellers, thus, were bound to disclose to the purchasers that multi-family use of the houses for sale was illegal and their failure to do so constituted deception and fraud).

of Hawaii, as seen with flood disclosure laws, a state-by-state approach is likely to lead to significant disparities in disclosed information. Alternatively, a federally mandated disclosure requirement, like the disclosure of lead-based paint, could be an effective risk communication tool.

A. *Lead-Based Paint Disclosure*

The history of lead-based paint disclosure in the United States dates to the early 1990s.¹¹⁴ Recognizing children are more susceptible to its toxic effects, the Department of Housing and Urban Development (“HUD”) implemented regulations to address this issue. Before then, lead-based paint was commonly used in homes and other buildings due to its durability.¹¹⁵ In 1978, the U.S. Consumer Product Safety Commission (CPSC) banned the sale of lead-based paint for residential use. This ban was followed by the passage of the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X, which aimed to reduce lead exposure in housing, especially among children.¹¹⁶ Section 1018 of the law required the disclosure of known lead-based paint hazards in housing built before 1978 and mandated the provision of certain lead-hazard information to prospective buyers or renters.¹¹⁷ Title X required the Environmental Protection Agency (EPA) and HUD to promulgate regulations implementing Section 1018.¹¹⁸

The Section 1018 implementing regulations mandate that before a purchaser or lessee is obligated under contract, the seller or lessor must satisfy the following requirements. First, the seller or lessor must provide the EPA pamphlet, *Protect Your Family from Lead in Your Home*.¹¹⁹ The pamphlet provides information on the health risks of lead poisoning, sources of lead in the home, and tips for reducing lead exposure.¹²⁰ In addition, sellers or lessors must disclose the presence of any known lead-based paint or known lead-based paint hazards, including any relevant reports.¹²¹ Further, purchasers must receive a ten-day

¹¹⁴ *The Lead Disclosure Rule*, DEP’T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/healthy_homes/enforcement/disclosure#:~:text=the%20regulations%20became%20effective%20on,1%20to%204%20residential%20dwellings [<https://perma.cc/PH2P-THVT>].

¹¹⁵ Anne Harding, *Lead-laden paint still widely sold around the world*, REUTERS (Aug. 25, 2009), <https://www.reuters.com/article/healthNews/idUSTRE57O64G20090825/> [<https://perma.cc/ZS7Y-PKE2>].

¹¹⁶ See Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897 (1992) (codified as amended at 15 U.S.C. §§ 2601-90 and 42 U.S.C. §§ 4851-56 (1994)).

¹¹⁷ 42 U.S.C. § 4852d.

¹¹⁸ 42 U.S.C. § 4852d(a)(1).

¹¹⁹ 24 C.F.R. § 35.88(a)(1) (2024); 40 C.F.R. § 745.107(a)(1) (2024).

¹²⁰ ENV’T PROT. AGENCY, EPA-747-K-12-001, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME (2021), <https://www.epa.gov/sites/default/files/2020-04/documents/lead-in-your-home-portrait-color-2020-508.pdf> [<https://perma.cc/92HH-F6FW>].

¹²¹ See 24 C.F.R. § 35.88(a)(2)-(4) (2024); 40 C.F.R. § 745.107(a)(2)-(4) (2024).

period to conduct a risk assessment or inspection for the presence of lead.¹²² Lastly, the regulations require that every sale and leasing contract must include a lead hazard warning statement and an acknowledgment affirming that the purchaser or lessee received the required information.¹²³ These regulations help “ensure that families receive both specific information on the housing’s lead history and general information on lead exposure prevention.”¹²⁴

B. Federally Mandated Sea Level Rise Disclosure

Like the mandate to disclose the potential for lead-based paint in pre-1978 homes, Congress should pass legislation mandating the disclosure of sea level rise impacts, particularly flooding, in real estate transactions to protect home buyers. Such legislation should target disclosure for all properties within a certain projection of sea level rise over a given period. The National Oceanic and Atmospheric Administration’s Sea Level Rise Viewer, which is a web-based mapping tool that visualizes community-level sea level rise impacts,¹²⁵ could serve as a reliable and universal data source. In addition, the legislation should require the provision of a federally approved pamphlet on the potential for future flooding and other impacts to the property from sea level rise. This pamphlet could describe the financial and health risks associated with flooding, methods to reduce one’s exposure, such as buying flood insurance, and contacts for more information. Further, the legislation should mandate that sellers must disclose any past flood damages. A home that has flooded once is likely to flood again, and climate change is only making coastal flooding more likely. Lastly, the legislation should require that every sales contract include a sea level rise hazard warning statement and an acknowledgment affirming that the purchaser received the required information.

V. THE DISCLOSURE OF SEA LEVEL RISE IMPACTS WILL HELP HOME BUYERS MAKE MORE INFORMED DECISIONS TO PROTECT THEIR FAMILIES FROM FUTURE FLOODING

Sea level rise portends significant consequences for coastal communities and their residents. Farther reaching coastal storms and more frequent tidal flooding will negatively impact the homes of those living along the coast. Access to information about current and future risk

¹²² 24 C.F.R. § 35.90 (2024); 40 C.F.R. § 745.110 (2024).

¹²³ 24 C.F.R. § 35.92 (2024); 40 C.F.R. § 745.113 (2024).

¹²⁴ Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064 (Mar. 6, 1996) (to be codified at 24 C.F.R. pts. 35, 745).

¹²⁵ *Sea Level Rise Viewer*, NOAA OFF. FOR COASTAL MGMT. DIGIT. COAST, <https://coast.noaa.gov/digitalcoast/tools/slr.html> [<https://perma.cc/ZX5L-NVT8>].

is key for enacting risk reduction and risk transference measures, like purchasing flood insurance. Disclosure laws can be an effective mechanism for communicating risk to the uninformed home buyer. Currently, the common law is insufficient to require the disclosure of the potential impacts of sea level rise. Most likely, a state court would hold the threat of sea level rise is not a latent defect, and thus, the seller has no duty to disclose the potential impacts from sea level rise. As such, the federal government should require all coastal home sales to contain a disclosure about the potential flooding impacts of sea level rise. Given how destructive flooding can be to a home, buyers deserve to know the future flood risks associated with sea level rise so they can make an informed decision about how to best protect their families.