FRI-C01

Uncharted Waters: Liability risks of (in)action in the face of climate change

What are the potential legal implications of failing to adapt to climate risk? When we do act? What is the standard of care when guidelines are in flux? This panel considers the evolving case law related to frightening liabilities designers may face — from clients, future owners, and the public.

LEARNING OBJECTIVES

— To understand the evolving legal basis for liability related to climate change

— To manage risk when the standard of care is unclear

— To understand how following client direction may not protect from third-party liability

— To leverage liability risk to encourage clients to embrace resilient design practices
PANELISTS

**Eric Kramer**, ASLA | Principal | Reed Hilderbrand LLC, Cambridge, MA
A Partner of Reed Hilderbrand, Eric has designed landscapes associated with the renewal and enrichment of campuses, cities, and institutions. Eric’s work is rooted equally in rigorous scientific field research and the engagement of people and communities. He edited *Visible|Invisible*, the firm’s award-winning monograph. Eric is an adjunct professor at the Rhode Island School of Design, served on the 2014 ASLA student awards jury, has presented at 9 ASLA Annual Meetings, and has served on the ASLA Annual Meeting Educational Advisory Committee and the Landscape Architecture Magazine Editorial Advisory Committee.

**Deanna Moran** | Director, Environmental Planning | Conservation Law Foundation, Boston, MA
As Director of Environmental Planning at Conservation Law Foundation (CLF), Deanna’s work focuses on identifying and implementing solutions to a variety of environmental problems that lie at the intersection of planning, development, and regulation. Deanna oversees CLF’s climate resiliency initiatives for Massachusetts, Rhode Island, and Connecticut and is the co-author of the CLF report *Climate Adaptation and Liability*. Deanna received a B.A. in Environmental Design from the University of Buffalo, a Masters in Public Policy and a Masters in City and Regional Planning from Rutgers University.

**Elena Mihaly** | Staff Attorney | Conservation Law Foundation, Boston, MA
As a Staff Attorney in Conservation Law Foundation’s Clean Water Program, Elena’s work focuses on developing and implementing law and policy solutions to protect water quality and enhance community climate preparedness. Elena oversees CLF’s climate resiliency initiatives for Vermont, Maine, and New Hampshire. She authored “Avoiding Septic Shock: How Climate Change can cause Septic System Failure and whether New England States are Prepared,” and co-authored the CLF report *Climate Adaptation and Liability*. Elena received her J.D., summa cum laude, and Masters in Environmental Law and Policy from Vermont Law School.
SUMMARY

This session will be structured as a seminar with audience participation solicited throughout using second-screen technology. We begin with a primer summarizing how existing legal precedent suggests that courts may respond to the evolving issues of liability related to climate change. (Hint: It isn’t exactly clear; the risks to designers are real; and the stakes are high.)

We will then tackle three specific hypothetical project conditions — hypothetical, but recognizable to most designers: a coastal site facing sea-level rise but with evolving regulatory guidelines, a client asking you to design without anticipating future climate conditions, and a river-side site prone to flooding where improving your site may impact an adjacent one. We’ll talk about how the designer might respond and describe the challenges and legal risks associated with those responses. How do you design for an unclear future? What ways can designers protect themselves? And what are the limits of our professional liability insurance?

We will also discuss ways in which designers can encourage their clients, municipalities, and other agencies to take progressive action to respond to changing climate conditions by leveraging liability risks that may fall on owners and regulators.

PRIMER

A general framework of liability for failure to adapt in the face of climate change.

• Improved science will lead to enhanced foreseeability of future climate impacts

• As extreme weather events become more frequent, increasing attention will be directed toward the responsibility of individuals involved in designing and building structures that will be impacted by foreseeable climate impacts

• Two potential legal claims against design professionals for (in)action in the face of climate change are Negligence and Breach of Contract.

1 — Negligence = Duty + Breach + Causation + Harm

Duty (“standard of care”) is established through Court’s analysis of:

» What’s written in contract
» Knowledge of climate change impacts
» Applicable regulations and codes
» Industry custom
» Foreseeability of harm, including damages to third parties

OUTLINE
2 — Breach of Contract = violation of any contract term, including:

» Standard of care provision — tied to project locality and time-specific circumstances
» Scope of work — e.g., requirement that project built to withstand increased flooding
» Indemnification clause — depends on what services are included in the contract

HYPOTHETICALS

1. How do you respond to an unclear Standard of Care?

Project
A new mixed-use development along an urbanized coastal site

Situation
You want to rely on specific regulatory guidance for setting building and site element location and elevation.

Current FEMA maps are in the process of being revised, but final maps have not been published yet.

The project is in design and Contract Documents will be issued before the new maps are complete.

Questions
What are you to do?

How do you assess and confirm the appropriate standard of care?

2. What do you do when the Owner isn’t thinking long term but you are? The limits of the CYA (cover your ass) letter.

Project
A new mixed-use development along an urbanized coastal site

Situation
You are concerned that the proposed finish floor of the building will be regularly flooded in the future. You consider an elevated finish floor to be proactive.
Owner directs design team to produce drawings to the lower finish floor elevation, which risks future flooding.

**Questions**
What kinds of liability might you have? And to whom?

What should you do?

3. **What if doing the right thing might have unintended consequences for others?**

**Project**
A new institutional use for site along an inland river prone to flooding

**Situation**
You design your project to the best practices recommendations and even exceed contemporary guidance.

In the process you mitigate flooding on your site, but you exacerbate flooding (or at least are perceived to have) down or up stream.

**Questions**
What kind of liability do you have outside of the limit of work of your own project?

Who is taking this liability on — the designer or the owner?

What kinds of modeling do you have to do to assess these adjacent risks?

And are you better off not undertaking these risks if you have the potential for passing risk off to other landowners?
RESOURCES

Climate Adaptation and Liability: A Legal Primer and Workshop Summary Report


ProPublica: “To See How Levees Increase Flooding, We Built Our Own”

https://projects.propublica.org/graphics/levees

Sophie Marjanac & Lindene Patton (2018)
“Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?”
Journal of Energy & Natural Resources Law, 36:3, 265-298
DOI: 10.1080/02646811.2018.1451020

https://doi.org/10.1080/02646811.2018.1451020