



COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

Can Liability for Failure to Adapt Encourage More Resilient Energy & Industrial Infrastructure?

Dena Adler

Climate Law Fellow

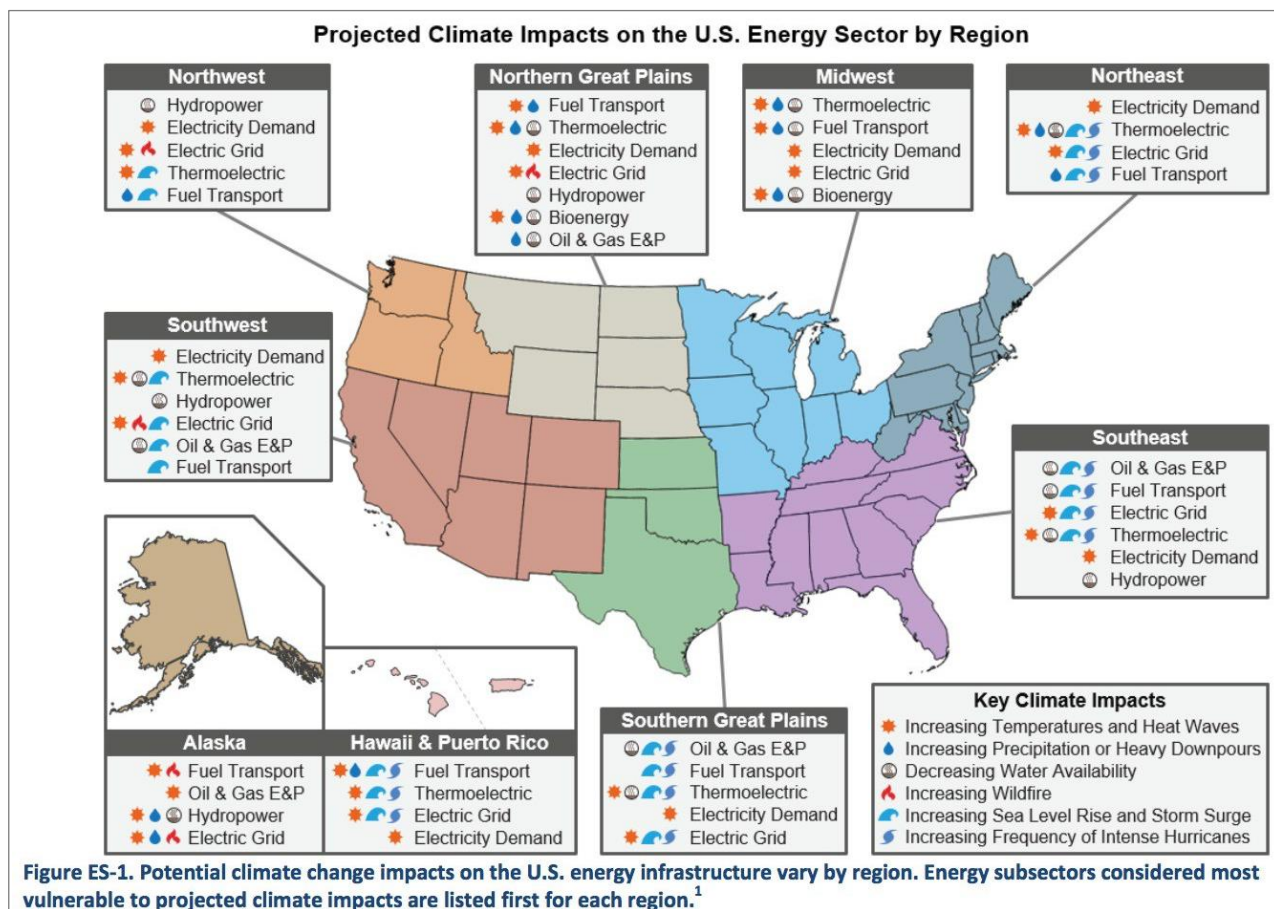
Sabin Center for Climate Change Law

2018 Local Solutions: Eastern Climate Preparedness Conference

Legal Solutions Workshop

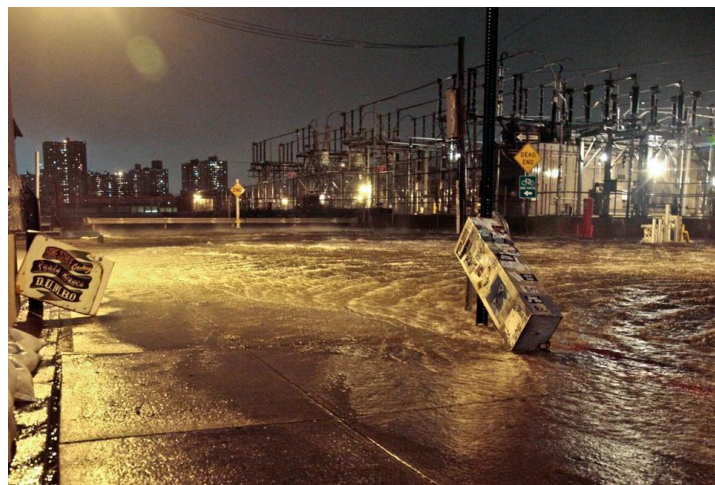
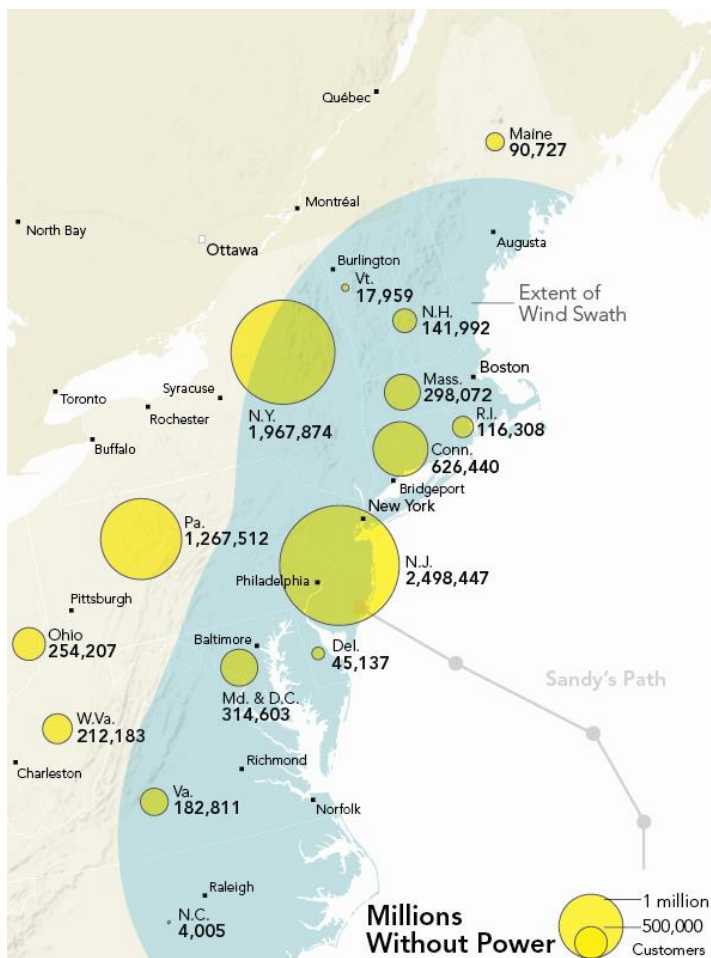
April 30, 2018

Vulnerability of U.S. Energy Infrastructure to a Changing Climate

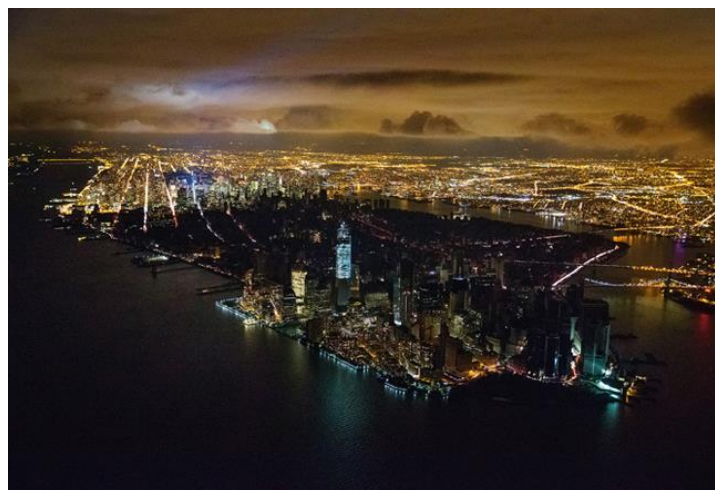


U.S. Dept. of Energy (2015), available at <https://www.energy.gov/policy/downloads/climate-change-and-us-energy-sector-regional-vulnerabilities-and-resilience>

Can We Power Resilience through the Courts?



Brooklyn Substation as floodwaters Approach During Hurricane Sandy. Credit: Beбето Matthews.AP



Large Swathes of Lower Manhattan Without Power After Hurricane Sandy. Credit: Iwan Baan, Getty Images

Potential Liability for Failure to Adapt & Prepare for Climate Change

Select Potential Claims Against Governments:

1. Negligence
2. Takings
3. Fraud

Government Defenses Limit Potential Liability:

1. Sovereign Immunity Blocks Many Negligence & Fraud Claims
2. Takings Case Law Indicates Potential Liability for Temporary Flooding But Recent Circuit Court Decision Found Takings Did Not Apply When Caused by Government Inaction.

QUESTION: What are some alternative ways to use the courts and other regulatory proceedings to prod resilience?



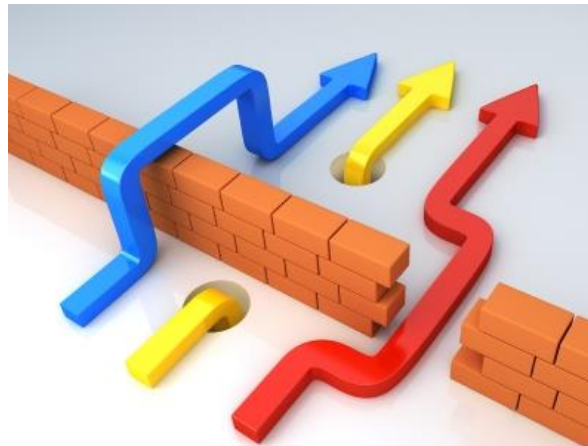
Flooding in Port Arthur, Texas, on August 31, 2017 following Hurricane Harvey.
Credit: U.S. Air National Guard photo by Staff Sgt. Daniel J. Martinez

For more on claims, defenses, and emerging liability see Gundlach and Klein, The Built Environment (December 11, 2017): <https://ssrn.com/abstract=3086217>

Courting Adaptation: Three Opportunities to Advance Energy & Industrial Sector Resilience

Potential Areas of Intervention:

1. CLF Litigation for Failure to Adapt Petroleum Products Storage and Distribution Facilities Highlight a Need to Update State Permitting Requirements
2. National Environmental Policy Act (NEPA) & “Little NEPA” Opportunities to Integrate Climate Considerations into Environmental Review
3. Petitions State Public Utility/Service Commissions (PUCs/PSCs) to Require Utilities to Understand and Prepare for Climate Change Impacts



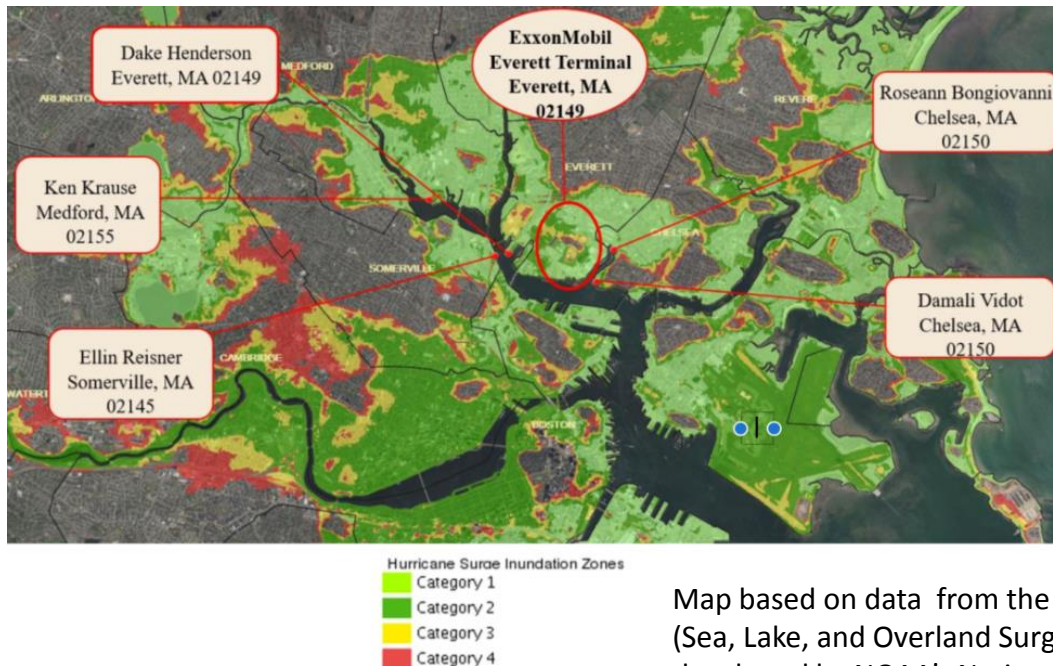
CLF Litigation: Failure to Adapt Lawsuits for Clean Water Act Violations

Conservation Law Foundation v. ExxonMobil Corp., No. 1:16-cv-11950 (D. Mass. filed Sept. 29, 2016)

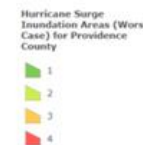
- 15 Causes of Action Listed: 14 under the Clean Water Act (CWA) and 1 under the Resource Conservation & Recovery Act (RCRA)

Conservation Law Foundation, Inc. v. Shell Oil Products US, No. 1:17-cv-00396 (D. R. I. filed Aug. 28, 2017)

- 21 Causes of Action Listed: 20 under the CWA, 1 under the RCRA



Map based on data from the "SLOSH" model (Sea, Lake, and Overland Surges from Hurricanes), developed by NOAA's National Weather Service.



Clean Water Act Litigation: Permit Shields & Government Opportunities

Issues of Standing

September 2017: The U.S. District Court for the District of Massachusetts found that:

- ***CLF has standing*** for present and imminent “injuries to its members’ aesthetic and recreational interests in the Mystic River.”
- ***CLF lacks standing*** “for injuries that allegedly will result from rises in sea level, or increases in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100.”

Effect on Permit Shields & Opportunity to Update Permit Requirements

- Under the CWA, NPDES permit holders are “shielded” from liability for discharges made in compliance with their permits. See 33 U.S.C. § 1342(k).
- If the CLF suits are unsuccessful, that could expand the permit shield.
- ***States with authority to issue permits can update their permit requirements to reflect climate adaptation needs.***

National Environmental Policy Act Litigation & Petition Opportunities

- **The National Environmental Policy Act (NEPA) § 102(2)(c)**: Requires federal government agencies to conduct environmental review for all major federal actions significantly affecting the environment.
- **2016 CEQ Guidance (Withdrawn in April 2017)**: Provided a framework to clarify agencies obligations under NEPA to consider the effects of climate change.
- **Recent Case Law**: Confirms continued obligation to consider climate impacts after withdrawal of guidance.
- **FERC Guidance Issued in 2017**: Requires applications for certain energy infrastructure to report on natural hazards from extreme winds and flooding associated with hurricanes, storm surge, and sea level rise due to climate change.
- **FERC Orders Have Found Adequate Consideration of Climate Impacts on Facilities**: See, e.g., Order Denying Rehearing and Stay re Dominion Cove Point LNG, LP (Docket CP13-113-001).



Cove Point LNG Export Facility
Credit: Dominion Energy



“Little NEPA” State-Level Opportunities

Table 2.0 – Legal Requirements to Consider Climate Change Impacts in EIA

Jurisdiction	Law	Policy / Guidance	Content
UNITED STATES			
Massachusetts	Massachusetts Environmental Policy Act (MEPA) (2009 Amendments)	<i>Draft MEPA Climate Change Adaptation and Resiliency Policy</i> (2014) ³⁵	MEPA was amended in 2009 with the following language: “In considering and issuing permits, licenses, and other administrative approvals and decisions, the respective agency, department, board, commission or authority shall also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.” ³⁶
New York	State Environmental Quality Review Act (SEQRA)	<i>Commissioner’s Policy – Climate Change and DEC Action</i> (2010) ³⁷	A 2010 policy document directs the NY State Department of Environmental Conservation (DEC) staff to “identify potential adverse impacts from climate change” on all DEC programs, “incorporate climate change adaptation strategies into applicable DEC programs, actions and activities” and to “use the best available scientific information of environmental conditions resulting from the impacts of climate change.” ³⁸
New York City, NY	City Environmental Quality Review Act (CEQR)	<i>CEQR Technical Manual</i> (2014) ³⁹	The CEQR Technical Manual states: “...depending on a project’s sensitivity, location, and useful life, it may be appropriate to provide a qualitative discussion of the potential effects of climate change on a proposed project in environmental review. Such a discussion should focus on early integration of climate change considerations into the project and may include proposals to increase climate resilience and adaptive management strategies to allow for uncertainties in environmental conditions resulting from climate change.” ⁴⁰
Washington	State Environmental Policy Act (SEPA)	<i>WSDOT, Guidance for NEPA and SEPA Project-Level Climate Change Evaluations</i> (2014) ⁴¹	A 2014 guidance document published by the Washington State Department of Transportation (WSDOT) outlines an analytical process and provides template language for assessing the impacts of climate change on all WSDOT projects subject to NEPA and SEPA. ⁴²

Wentz, “Assessing the Impacts of Climate Change on the Built Environment under NEPA and State EIA Laws,” (2015): <http://wordpress.ei.columbia.edu/climate-change-law/files/2016/06/Wentz-2015-08-Climate-Change-Impact-on-Built-Environment-.pdf>.

Working with Public Utility/Service Commissions: NYC Case Study

New York State Public Service Commission Case No. 13-E-0030:

- [Petition](#), filed Dec. 12, 2012, requesting that the PSC require its utilities to prepare and implement natural hazard mitigation plans to address the anticipated impacts of climate change.
- [Final Order](#), issued Feb. 21, 2014, requiring Con Edison to implement state-of-the-art measures to plan for and protect its electric, gas, and steam systems from climate change impacts.
- The Storm Hardening and Resiliency Collaborative was simultaneously created to consider how best to invest the proposed \$1 billion in storm hardening funds.



*ConEdison and Metropolitan Transportation Authority (MTA) employees at a temporary ConEdison substation in 2013.
Credit: MTA/flickr*



Conclusions

Opportunities for Steps Forward:

- Several Strategies to Prod Actors to Make Both Existing & New Facilities Better Prepared for Climate Impacts.
- Local and State Government Actors—and Others—Can Work in Collaboration to Enhance Resiliency of Energy & Industrial Infrastructure.
- Liability Is Currently Evolving.





COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

Contact Information:

dadler3@law.columbia.edu

(212) 854-0081

Important Links:



www.columbiaclimatelaw.com



www.climatecasechart.com



blogs.law.columbia.edu/climatechange/



twitter.com/columbiaclimate



www.facebook.com/ColumbiaClimateLaw