



Water Quality and Force Majeure

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Significant weather events can pose a number of challenges, whether it's drought and impacts upon water supply planning or heavy rain events, as we have seen with such devastation in the last several months. The Fall TWCA Conference highlighted a number of issues and considerations regarding Hurricane Harvey and its aftermath, however, this article focuses upon water quality impacts/best practices as well as the broader use of force majeure, in light of such events.

From a water quality perspective, significant rainfall can impact wastewater systems, as infiltration and inflow increase total flows reaching wastewater treatment plants, and as receiving waters are inundated by loadings of soil, bacteria, and other contaminants. These circumstances can require operational adjustments, and often trigger events that merit reporting to Texas Commission on Environmental Quality (TCEQ), media outlets, and local officials.

When high-quantity wastewater spills occur and may impact groundwater or other public/private drinking water sources, TCEQ rules require a 24-hour notice to media outlets and local officials with specific content requirements. Many TWCA members follow best practices by maintaining and regularly updating a list of such contacts, so that the distribution is as seamless as possible during times of high-volume spills. The use of notice templates can also be invaluable in order to meet regulatory requirements without having to draft notices from whole cloth at each event, and when time is of the essence.

Maintaining permit requirements at wastewater treatment plants can prove difficult depending upon the peaking flows the plant receives during the event. It is important to maintain sufficient records to demonstrate the type of rain event at issue and document

Considerations in Significant Weather Events

the operational responses that (ideally) match SOP/training plans for significant wet weather events. Such information can be important in addressing regulators' questions after the fact, and the storm event information, as compared to design/assessment storm metrics, can be useful in arguing "force majeure" in an enforcement context, as described below.

The term "Force Majeure" may seem like a confusing term with complex meaning, although its basic translation is straightforward – unexpected circumstances that can prevent someone from fulfilling obligations otherwise required. Regulatory and contract force majeure provisions are of critical importance for TWCA members, particularly in light of significant weather events, acts of God, or other circumstances that may have caused permit violations or contractual issues. Being prepared to address allegations of wrongdoing during times of significant wet weather events (among others) is important in order to defend against civil and regulatory litigation when it arises.

The reason force majeure is found in regulations and many contracts is because parties and regulators understand that during certain times when events are beyond one's reasonable control, compliance can be difficult, if not impossible. As such, force majeure language typically includes references to uncommon or unplanned events that could interfere with ordinary performance. In practice, an entity that wishes to claim force majeure typically raises it in the context of a lawsuit or enforcement action. In that context, it needs to be raised as an affirmative defense, however in some cases, depending upon particular language in a contract, agreement, or permit, an entity must raise the force majeure issue before any enforcement or litigation commences. Best practices include appropriate documentation, as noted above. Knowing the extent of possible

violations during or immediately after the event is also important: customer calls, information received, and staff response logs can be useful in determining whether a violation has actually occurred. Most often, the entity claiming force majeure bears the burden of proving that any alleged violation was actually caused by a qualifying event. Accordingly, the more information available to support such a narrative, the better equipped a utility will be in demonstrating why applicable non-compliance should be excused in these circumstances.

Following the events of late August 2017, many Texas utilities and POTWs face questions regarding planning for future events as well as litigation arising from the storm. Although the force majeure component of disaster response is understandably lower on most entities' priority lists during these times, it can be important in any subsequent claims of violations/wrongdoing to be equipped with the best information available to demonstrate both the significance of the noncompliance cause (whether such noncompliance is related to water quality or other media), and the utility's appropriate response to such events.



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