

Force Majeure – Claiming Use of Force Majeure in Light of Unexpected Circumstances:

By Nathan E. Vassar

The term “Force Majeure” may sound 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 WEAT 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 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 war, riots, acts of God, terrorism, or other uncommon 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 – identify the particular event/events that gave rise to any noncompliance issues, whether a single incident, or an ongoing challenge that was caused by a single incident. Documenting the cause and the entity’s response to that event are also critical. Any communications with regulators, customers, and the media should be preserved as well, as such may be important to demonstrate contemporaneous actions and responses to events that may generate significant customer/media interest. 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 force majeure 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 may face questions and possible litigation regarding significant wet weather. WEAT has provided many resources available to help during these times of need. Although the force majeure component of disaster response is lower on most entities' priority lists during these difficult 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 and the utility's responsiveness to such violations.

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