

# Hurricane Harvey Alert: Addressing Environmental Releases and Obligations

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As the cleanup begins, companies face challenges in meeting existing environmental obligations and addressing the environmental impacts of the storm.

The havoc caused by Hurricane Harvey, including in some instances environmental crises caused by the storm, has been widely reported. The scope and magnitude of the environmental issues caused by the storm continue to evolve as the waters recede. As they do, a host of questions have arisen and will continue to arise. The below Q&A attempts to address some of the most common environmental questions that are likely to arise for companies in the aftermath of Hurricane Harvey.

## **DOES HURRICANE HARVEY EXCUSE COMPLIANCE WITH ENVIRONMENTAL OBLIGATIONS?**

*Question:* Due to Hurricane Harvey, my company is unable to meet its obligations under an environmental statute, regulation, permit, consent decree, settlement, or other agreement with the Environmental Protection Agency (EPA) and/or the Texas Commission on Environmental Quality (TCEQ). Does Hurricane Harvey excuse compliance?

*Answer:* It may. Environmental laws provide exemptions, releases from liability, relaxation of substantive standards, and/or an acceleration of certain processes during times of natural disaster. Related consent decrees or settlement agreements typically contain force majeure provisions and exceptions that similarly apply to disasters or acts of God.

## **Notable Exceptions Under Federal Environmental Laws**

Below are examples (but not a comprehensive list) of relevant exceptions to federal environmental laws that may be applicable to your company during the aftermath of Hurricane Harvey.

### ***Oil Pollution Act (OPA)***

- An act of God defense. 33 U.S.C. § 2703(a).

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## ***Resource Conservation and Recovery Act (RCRA)***

- EPA may issue temporary emergency permits to permitted or nonpermitted facilities to allow treatment, storage, or disposal of hazardous wastes where there is imminent and substantial endangerment to human health or the environment. 40 C.F.R. § 270.61(a).
- Generally, RCRA does not require entities to obtain permits for treatment or containment activities in response to discharges of hazardous waste, the imminent threat of a discharge to hazardous waste, or an immediate threat to human health, public safety, property, or the environment from explosive materials. 40 C.F.R. §§ 264.1(g)(8), 265.1(c)(11), 270.1(c)(3).

## ***Clean Air Act (CAA)***

- Emission restrictions for fuel-burning stationary sources during national or regional energy emergencies. 42 U.S.C. § 7410(f).
- National emission standards for hazardous air pollutants from stationary sources when in the interests of national security. 42 U.S.C. § 7412(i)(4).
- Fuel additive requirements during natural disasters that cause extreme or unusual fuel and fuel additive supply circumstances. 42 U.S.C. § 7545(c)(4)(C).
- Transportation conformity requirements during emergencies or natural disasters. 40 C.F.R. § 51.853(d).
- Certain requirements under the National Emissions Standards for Hazardous Air Pollutants for the demolition of asbestos-containing buildings when the building has been ordered torn down because it “is structurally unsound and in danger of imminent collapse.” 40 C.F.R. § 61.145(a)(3).

## ***Clean Water Act (CWA)***

- An act of God exception. 33 U.S.C. § 1321(f).
- Compliance may be excused during an upset, which means “an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee.” 40 C.F.R. § 122.41(n)(1).
- Emergencies that require expedited procedures for the processing of permit applications by the Corps of Engineers. 33 C.F.R. § 325.2(e)(4).
- Exigent circumstances regarding discharges of oil and hazardous substances do not require permits. 33 U.S.C. § 1321(c); 40 C.F.R. § 122.3(d).

## ***Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)***

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- An act of God defense. 42 U.S.C. § 9607(b)(1).
  - Emergency removal actions. 42 U.S.C. § 9604(a); 40 C.F.R. § 300.440.
  - Relaxation of remedial standards if compliance “would result in greater risk to human health.” 42 U.S.C. § 9621(d)(4).

### ***Coastal Zone Management Act (CZMA)***

- Allows the president to authorize federal actions that are inconsistent with state coastal plans if the president finds it is in the paramount interest of the country, or the secretary of commerce determines it is a matter of national security. 16 U.S.C. § 1456(c).

## **Notable Exceptions Under Texas Environmental Laws**

Below are examples (but not a comprehensive list) of relevant exceptions to Texas environmental laws that may be applicable to your company in the wake of Hurricane Harvey.

### ***Enforcement and Force Majeure***

- TCEQ enforcement provisions expressly provide that “force majeure” (defined, in part, as an act of God) is an affirmative defense. The entity applying the defense of “force majeure” has the burden to demonstrate that it applies and has the obligation to notify the state as provided by 30 Tex. Admin. Code § 305.125(9) (relating to Standard Permit Conditions).

### ***Texas Water Code***

- An act of God defense. Tex. Water Code § 7.251.
- The Texas Water Code contains specific emergency order provisions that address the following topics:
  - Suspension of Beneficial Inflows. Tex. Water Code § 5.506; 30 Tex. Admin. Code, Chapter 35, Subchapter D.
  - Utilities. Tex. Water Code § 5.507; 30 Tex. Admin. Code, Chapter 35, Subchapter E.
  - Water Quality. Tex. Water Code § 5.509; 30 Tex. Admin. Code, Chapter 35, Subchapter F.
  - Solid Waste and Uranium By-Product. Tex. Water Code § 5.512; 30 Tex. Admin. Code, Chapter 35, Subchapter G.
  - Storage Tanks. Tex. Water Code § 5.510; 30 Tex. Admin. Code, Chapter 35, Subchapter I.

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- Air Emissions. Tex. Water Code § 5.515; Tex. Health & Safety Code § 382.063; and 30 Tex. Admin. Code, Chapter 35, Subchapter K.
  - On-site Sewage. Tex. Water Code § 5.513; 30 Tex. Admin. Code, Chapter 35, Subchapter L.

### ***Governor's Suspension of Procedural Laws***

- The governor of Texas may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster. Tex. Gov't Code § 418.016.
- The executive director of TCEQ requested written approval for the suspension of certain environmental rules in certain counties on August 28, 2017.

### ***TCEQ Guidance and Disaster Response***

- As per TCEQ guidance, TCEQ approval is not necessary for actions directly related to disaster response. Response actions pursuant to the guidance include “all reasonable actions necessary and prudent to facilitate, maintain, or restore fuel production and/or distribution, within the State of Texas, directly related to Hurricane Harvey.”

### **Consent Decrees and Settlements**

- Most consent decrees and settlements have an “act of God” or “force majeure” provision that excuses a party from performance when the circumstances outside the control of the person make performance impossible. The provision often describes what constitutes an “act of God” or “force majeure.” A natural disaster generally creates the requisite circumstances for a party to a settlement or consent decree to claim force majeure. For example, any extreme flooding due to Hurricane Harvey that prevents critical personnel from performing their jobs, makes necessary supplies unavailable, renders a company unable to contain hazardous substances, or causes other similar circumstances may constitute a force majeure or an act of God.
- Notably, many force majeure provisions have notice requirements that are important prerequisites for claiming that an event delayed or impeded compliance with the consent decree or settlement.

## **WHAT DO I DO IF I AM UNABLE TO COMPLY WITH MY ENVIRONMENTAL OBLIGATIONS?**

*Question:* How do I respond if my company is unable to meet its obligations under an environmental statute, regulation, permit, consent decree, or settlement with EPA and/or TCEQ due to Hurricane Harvey?

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*Answer:* It is important to consult with counsel first, but counsel is likely to recommend that you contact EPA or your state environmental agency if you believe it is likely that you are unable to meet your obligations.

Steps to consider (in consultation with counsel) if your company is unable to comply with environmental obligations include the following:

1. Assess and list the reason(s) that your company may not be able to meet an environmental obligation.
2. Determine if the issue is an emergency that should be reported immediately. If so, you may need to contact your local law enforcement agency or state hotline.
3. You may need to contact EPA and/or the relevant state environmental agency to notify it that you may be unable to meet your environmental obligations. In doing so, you should consider steps necessary to create a record of the exact nature of the problem, any steps you have taken to mitigate, and any relief requested going forward.
4. You should consider mitigation to the extent possible.
5. You should retain all records of the event for future investigations.

For more guidance specific to Texas law, review the following TCEQ regulator guidance concerning Hurricane Harvey:

- Air Quality for Permitted Facilities: Responding to Hurricanes
- Wastewater-Treatment Plants: Responding to Disasters

## **WHAT SHOULD I DO TO ADDRESS CONTAMINATION THAT HAS MIGRATED ONTO MY PROPERTY OR THAT HAS ESCAPED FROM MY PROPERTY DUE TO FLOODING?**

*Question:* Due to flooding, my company's property is covered in materials that may be hazardous and/or I have solid or hazardous materials onsite that may have escaped containment. What do I do?

*Answer:* In consultation with counsel and after review of any applicable cleanup agreement, notify the appropriate authorities and control the release as best possible. Written reports are often advisable.

### ***Waste to be concerned about:***

- Household hazardous waste
- Asbestos-containing material
- PCBs in transformers

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- Petroleum products
  - Firearms and ammunition
  - Waste contained in underground storage tanks

***Reporting spills:***

- Federal: Oil spills and chemical releases may be reported to the National Response Center (NRC) hotline at +1.800.424.8802.
- Local: Notice of any spills or releases may also be provided to the Local Emergency Planning Commission.

***TCEQ guidance:***

- Generally, TCEQ exercises enforcement discretion in the event of a hurricane or other major natural disaster and can waive a 24-hour notice requirement.
- Contact the spill-reporting hotline at +1.800.832.8224.
- See TCEQ guidance on Spills, Discharges, and Releases.
- If you intend to burn debris, follow TCEQ guidance on Air Quality for Permitted Facilities: Responding to Hurricanes.

## **WHAT ACTIONS HAVE ENVIRONMENTAL AGENCIES TAKEN IN RESPONSE TO HURRICANE HARVEY?**

*Question:* What actions have EPA and/or TCEQ taken in response to Hurricane Harvey?

*Answer:* EPA and TCEQ have taken a number of actions in response to Hurricane Harvey, including the following:

***U.S. EPA***

- [EPA Approves Emergency Fuel Waiver for Florida](#) (09/06/2017)
- [EPA Approves Emergency Fuel Waivers for 38 States and Washington, DC](#) (08/31/2017)
- [EPA Approves Emergency Fuel Waivers for Gulf and East Coast States](#) (08/30/2017)
- [EPA Approves Emergency Fuel Waivers for Texas and Georgia](#) (08/29/2017)
- [EPA Approves Emergency Fuel Waivers for Louisiana](#) (08/28/2017)
- [EPA Approves TCEQ Request to Expand Emergency Fuel Waivers](#) (08/26/2017)

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- EPA reports on Superfund sites affected by Hurricane Harvey (09/02/17). EPA has identified the following 13 Superfund sites as affected or potentially affected. The remaining 28 of 41 sites EPA inspected do not currently show damage or flooding resulting from the hurricane.

1. Falcon Refinery
2. Brine Service
3. Bailey Waste Disposal
4. French LTD
5. Geneva Industries/Fuhrmann Energy
6. Gulfco Marine
7. Highland Acid Pit
8. Malone Services
9. US Oil Recovery
10. Patrick Bayou
11. Petro-Chemical Systems
12. Triangle Chemical
13. San Jacinto Waste Pits

## **Texas**

- TCEQ request for suspension of certain rules submitted (8/28/17). This suspension only applies in counties that are the subject of the Governor's disaster proclamation(s).
- Disaster proclamations for counties
  - Governor Abbott's initial proclamation
  - Additional counties added on August 26
  - Additional counties added on August 27
  - Additional counties added on August 28

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