

INSIGHTS

## Navigating Texas Regulations During Hurricane Harvey: TCEQ Executive Director's Regulatory Guidance and Governor Abbott's Disaster Proclamation Provide Potential Relief

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A series of decisions between the Governor's office and the Executive Director of the Texas Commission on Environmental Quality ("TCEQ") has resulted in the suspension of a number of state environmental rules relating to a broad range of areas impacted by Hurricane Harvey, to the extent that the rules prevent, hinder, or delay necessary action in coping with the disaster. The rules covered by the suspension include rules governing the reporting and recordkeeping requirements for unauthorized emissions, visible emissions limits and outdoor burning prohibitions, low-emission-fuel requirements, a number of volatile organic compound ("VOC") and oxides of nitrogen ("NOx") emissions control requirements, wastewater treatment and surface water quality standards, operation of on-site sewage facilities, permits related to the disposal of water-treatment sludge, and regulations related to industrial solid and municipal solid waste.

On August 23rd, [\*\*Governor Abbott preemptively issued a disaster proclamation\*\*](#) certifying that Hurricane Harvey posed a threat of imminent disaster to specific Texas counties. The Governor has amended the proclamation three times to add additional counties as Hurricane Harvey impacts additional counties in the state. Below is the effective date each Texas county was included in the natural-disaster proclamation.

### **August 23rd Proclamation**

Aransas, Austin, Bee, Brazoria, Calhoun, Chambers, Colorado, Brazoria, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzalez, Harris, Jackson, Jefferson, Jim Wells, Karnes, Kleberg, Lavaca, Liberty, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Waller, Wharton, and Wilson counties.

### **August 26th Amendment Adding the Following Additional Counties**

Atascosa, Bexar, Brazos, Caldwell, Cameron, Comal, Grimes, Guadalupe, Hardin, Jasper, Kerr, Lee, Leon, Madison, Montgomery, Newton, Tyler, Walker, Washington, and Willacy counties.

### **August 27th Amendment Adding the Following Additional Counties**

Bastrop, Burleson, Polk, and San Jacinto counties.

#### **August 28th Amendment Adding the Following Additional Counties**

Angelina, Orange, Sabine, and Trinity counties.

By declaring each of these counties a disaster area, Governor Abbott was able to immediately suspend enforcement of any statute or rule regarding state contracting or procurement that would impede any state agency's emergency response. Additionally, the Governor noted in the Proclamation that any state agency rule or order that "would in any way prevent, hinder, or delay necessary action in coping" with Hurricane Harvey could be suspended on written approval of the Office of the Governor.

On August 24th, [the Executive Director of the TCEQ issued regulatory guidance concerning the impact of Hurricane Harvey](#) and directing the regulated community to documents it has previously issued regarding storm preparation and response activities. Based upon the guidance, the Executive Director stated that companies do not need to seek TCEQ approval for activities directly related to disaster prevention or response as a result of Hurricane Harvey.

On August 28th, the Executive Director of the TCEQ—consistent with the Governor's Proclamation—[formally requested written approval for the suspension of a list of specific rules](#) because the rules may hinder or delay necessary action in coping with the disaster. [The Office of the Governor quickly granted the request.](#) The suspension is in effect until terminated by the Office of the Governor or until the disaster declaration is lifted or expires.

Generally speaking, the TCEQ has suspended parts of the following rule chapters in 30 Texas Administrative Code: 101, 111, 114, 115, 117, 285, 293, 304, 305, 307, 309, 312, 314, 321, 327, 330, 331, 334, and 335.

Although the Governor has authorized the temporary suspension of these state rules, the TCEQ made clear that some of these rules have federal counterparts in federal statutes or regulations and the state suspension does not apply to federal rules.

The TCEQ's previously-issued documents provide regulatory guidance during hurricanes and other disasters and include ["Air Quality for Permitted Facilities: Responding to Hurricanes"](#) (August 2013) and ["Wastewater-Treatment Plants: Responding to Disasters"](#) (April 2016). More information can be found at <https://www.tceq.texas.gov/response/hurricanes>.

As a best practice, regulated entities can continue to prepare and maintain records related to the suspended rules. TCEQ regulatory guidance references the Texas Water Code defense to enforcement for violations caused by an act of God or other catastrophe. See Tex. Water Code § 7.251. The Executive Director directs the regulated community to keep written records of the disaster prevention or response activities that it considers covered by this defense to enforcement. Those records should document:

- how the action is directly related to Hurricane Harvey
- why the action is necessary to prevent or minimize risk to human health, safety, and the environment
- how the company is employing the best engineering and pollution control practices that are feasible
- how the company is following its standard operating procedures as well as startup, shutdown, and maintenance activities, requirements, and plans—to the extent feasible
- the county where the action occurred

The regulatory guidance specifically notes that response activities include all reasonable actions necessary and prudent to facilitate, maintain, or restore fuel production and/or distribution within the State of Texas that relate to Hurricane Harvey.

Additionally, [\*\*the U.S. Chemical Safety Board has issued a Safety Alert\*\*](#) providing specific guidance on safety precautions needed during oil and chemical facility startup after Hurricane Harvey.

Many companies will have disaster recovery protocols in place for ensuring the safety of its workforce and bringing assets back online. Some key questions for in-house lawyers to be thinking about include:

- Does the process unit have adequate staffing and expertise in place to restart operations?
- Is the process unit applying appropriate management-of-change policies before modifying any procedures, equipment, or staffing levels?
- Has the team performed a full pre-start up safety check?
- Does the restart plan adequately anticipate potential damages from an 800-year flood event and, if not, what additional protocols should be added?
- Have the company's key vendors resumed operations prior to restart – e.g., waste removal contractors, maintenance crews, etc.?
- Has the shutdown caused any permit violations or notification requirements?
- Have we looked for and reported any releases of hazardous chemicals that may have occurred?
- Have any contaminants reached our property from offsite sources?
- Has the company's shutdown caused a breach of any commercial agreements and how will the force majeure clauses impact our ability to defend against claims?

- What documentation is needed to substantiate force majeure claims?
- What documentation is needed to differentiate between wind damages and flood damage claims?
- What sources of funding or other assistance may be available to assist with recovery – insurance, Texas legislature, FEMA, U.S. Congress, etc.?
- Is the company prepared to respond adequately to an incident once operations resume?
- Has the company appropriately communicated its status to key stakeholders such as community representatives and first responders?

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For crisis-response assistance, please call our crisis-response hotline at **(855) 892-9303**.