



Pack More Than An Umbrella: Minimizing Storm-Related Environmental Liability

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For many facilities and construction sites, the routine practical problems arising from wet weather go with the territory. However, if stormwater management is compromised or if flooding and coastal storm surges occur, a storm can cause damage and interruption of operations to even a well-designed and operated property. Depending on the configuration and state of repair of a facility or construction site, storm conditions can lead to significant environmental risks and impacts, including discharges of pollutants, discharges of fill material to streams and wetlands, and larger-scale releases of hazardous materials. Where measures to minimize these underlying risks are not implemented or maintained, even greater damages and environmental liabilities can result. Indeed, various potential storm-related environmental liabilities exist due to the complex framework of stormwater management regulation and permitting at the federal, state and local levels. These liabilities are exacerbated by other regulatory programs (especially those pertaining to petroleum, chemical, and waste management), land use laws, and common law causes of action (such as negligence, trespass, nuisance and strict liability). Below are some strategic and complementary tactical steps that can help to mitigate storm-related environmental legal risks.

1. Assess Storm-Related Environmental Risks Strategically. Environmental risks posed by storm events can vary, but understanding the nature, extent and timeline of such risks for a property is essential to taking appropriate precautions against related legal liabilities. Some of this analysis is already required as part of stormwater discharge permitting and local land use review and site plan approvals. While these processes are helpful in assessing some of the risks, site owners and operators should evaluate more holistically the risks of reasonably foreseeable storm-related impacts to the property and site operations. A major issue in this regard is whether current facility or site design and operational practices adequately mitigate such risks and, by extension, related potential environmental liabilities. Note that what is deemed foreseeable changes over time, particularly with improving technical stormwater flow and flooding models and evolving applicable regulations and case law. Therefore, this strategic risk assessment should be refreshed regularly, and related evolving potential liabilities should likewise be revisited and addressed.

2. Improve the Property's Overall Resilience to Flooding and Storm Surge. Having performed a strategic risk assessment of storm-related environmental risks and liabilities, the next step is to consider strategic means to offset these risks and liabilities in a cost-effective manner. For properties that are prone to (or will become prone to) flooding or storm surge, the facility owner and the property developer should consider engineered improvements and operational practices to make the property more resilient to significant storm events. Such measures may include defensive armoring of the perimeter of the facility or the construction site to deflect flood waters or storm surges, though such measures also need to allow accumulated stormwater to exit the property correctly and avoid damage to another's property. Instituting measures within the property itself may also be useful, such as (a) ensuring compliance with applicable stormwater control standards; (b) relocating command centers and power and communication systems to higher elevations; (c) securing hazardous material and waste storage and wastewater management systems against stormwater/flood impacts; and (d) remediating contaminated soil "hot spots" that could be scoured out by stormwater or flooding and increase pollutant loadings.
3. Maintain Stormwater Management Systems and E&S Controls. Industrial facilities often have permanent stormwater management systems and operational practices designed to minimize discharge of pollutants associated with that industrial activity. Construction sites normally need installation and upkeep of erosion and sediment control measures ("E&S Controls") during land disturbing activity to reduce displacement of sediment on-site and discharges of sediment off-site. These sites also require prudent management of potential pollution sources such as stored fuel or solid wastes. Failure to implement or timely maintain stormwater management systems, practices or E&S Controls can undermine stormwater management and can lead to aggravated facility or site flooding, or even damage to neighboring properties by impounded water or excessive flows discharged downstream. These scenarios may also involve pollutants from contaminated soils, flood-compromised hazardous material storage, or scouring and release of sediments. When this happens, environmental liability for any damages and permit noncompliance becomes more likely. Therefore, implementation and timely maintenance of these systems, practices and E&S Controls, as well as their adaptation to evolving property conditions and flooding risk, are foundational to minimize the risk of potential storm-related environmental liabilities.
4. Secure Potential Sources of Pollutants. Many industrial facilities and even construction sites entail outdoor management of petroleum products, raw materials, chemicals, or wastes. All of these activities are highly regulated at federal, state and local levels, often incorporating industry standards. For example, federal and state requirements for contingency planning address precautions against and responses to releases of petroleum, hazardous materials and wastes. There are also extensive regulatory standards for the location, design, and maintenance of storage tanks for these items. Likewise, state law and local floodplain ordinances and fire and building codes typically restrict hazardous materials and waste management in areas susceptible to flooding or storm surge. Compliance with these legal authorities, applicable industrial standards and required contingency plans is important to ward off environmental risks and liabilities associated with releases of hazardous materials and wastes that can result from severe storms and related flooding or storm surges. Regardless, outdoor storage tanks should be sufficiently moored in place and protected

against flooding, and other management of these substances may need to be removed to higher elevation locations to minimize the risk of a release. Finally, operators should ensure that stormwater flow or even flooding across the site will not impede the ability to respond to stored materials becoming unstable or to a release.

While these steps to minimize the practical problems associated with storm events can mitigate the potential legal liability risks arising from such events, these actions are not always easy to implement or even feasible due to site-specific conditions. In addition, they will not completely eliminate the risk of environmental liabilities caused by excessive stormwater or flooding during significant storms. However, timely attention to storm-related environmental risks and liabilities clearly pays dividends. If thoughtfully pursued, these steps offer cost-effective and material protection from foreseeable storm impacts and, in turn, can reduce the risk of related environmental legal liabilities.

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