

Atmospheric Rivers: Force Majeure Or Just A Rainy Day?

By **Kyle Hamilton and Corey Boock** (June 21, 2024)

In the first few months of 2024, Californians heard a lot about "atmospheric rivers" — weather phenomena that involve concentrated corridors of tropical moisture traveling through the atmosphere.[1] Atmospheric rivers are endemic to California, but for many, this year may be the first time encountering the term.

After years of devastating drought, extra rainfall should be welcome. However, due to an El Niño condition in the Pacific Ocean, the 2024 atmospheric rivers have been particularly strong, leading to much higher than average rainfall, flooding, landslides and even blizzards.

Experts are predicting that atmospheric rivers will provide an increasingly large percentage of California's annual precipitation. In an article published in March by Newsweek, Breanna Zavodoff, an assistant scientist at the University of Miami's Cooperative Institute for Marine and Atmospheric Studies, was quoted as saying:

Predictions have shown that atmospheric rivers are going to bear the larger burden of being California's water resources in the future.... They're going to need them to get water, but they're going to be so strong that every time you're hit by one, or nearly every time, you're going to have a consequential impact. You're getting the water you need, but you're getting too much at once. You're busting a drought, but you're getting landslides.[2]

Agencies and contractors around the state have been grappling with the rain, floods and landslides in managing the construction, operation and maintenance of their projects, leading to delays, additional costs and setbacks. For many, the assumption is that these atmospheric rivers and the resulting floods and landslides are a clear-cut case of force majeure.

But, as with all construction risk issues, the terms of the project agreement govern, and relief may not always be provided. Contractors and agencies alike should closely review their project agreement before agreeing to grant schedule, cost or performance relief.

Contracts can define force majeure with various levels of detail. Some definitions of force majeure are very broad, and grant relief to a party for just about any event outside of its control — including inclement weather — provided the event prevents the party from performing its obligations.

Consider the following force majeure provisions potentially applicable to weather events:

No Party shall be liable or responsible to the other Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make previously owed payments to the other Party hereunder) when and to the extent such failure or delay is caused by or results from acts beyond the impacted Party's (Impacted Party) reasonable control, including, without limitation, the following



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Force Majeure events (Force Majeure Event(s)) that frustrate the purpose of this Agreement: (a) acts of God; (b) flood, fire, earthquake or explosion; ... (g) national or regional emergency; ... and (m) other similar events beyond the reasonable control of the Impacted Party.

Under this broad type of force majeure clause, a party could potentially pursue relief for floods and landslides caused by the 2024 atmospheric rivers through several clauses. The party could certainly argue that the atmospheric rivers were out of their reasonable control, that they are "acts of God," that they are floods or that they have resulted in a regional emergency.

If this form of force majeure provision was included in a contract, the rains, floods and landslides caused by the atmospheric rivers would likely qualify as events of force majeure, to the extent a party was unable to perform its obligations because of the weather events.

On the other hand, some contracts use a focused definition of force majeure that delineates specific events and greatly limits the circumstances in which a party may be relieved of performing its obligations. Consider the potentially applicable weather provisions in this definition of force majeure:

Force Majeure Event(s) means the occurrence of any of the following events or circumstances that directly causes either Party to be unable to perform all or a material part of its obligations under the Agreement:

(a) any earthquake, tornado, hurricane, uncontrolled fire in an area of combustible vegetation, lightning, a 100-year flood or other natural disaster ...

Excluding: (i) any physical destruction or damage, or delays to the Work that occur by action of the elements or weather events, except as specified in subsection (a).

Under this type of force majeure clause, it would be significantly more difficult to claim that the weather events caused by the 2024 atmospheric rivers constitute an event of force majeure.

The party requesting relief due to force majeure would need to establish that flooding from the atmospheric rivers constituted a "100-year flood," meaning that such a flood has only a 1% chance of occurring in any given year.^[3] This is obviously a much higher standard than simply being beyond the reasonable control of a party.

Whether to adopt a broader or more focused approach to force majeure is an agency decision, and should be based on a number of factors, including project characteristics and goals, bidding competition, and the likelihood of the force majeure events. In that context, one often sees a more focused approach in alternative project delivery — i.e., design-build, public-private partnerships, construction-manager-at-risk — and a more general approach in traditional design-bid-build delivery.

With the effects of climate change increasing the severity of weather events, it is more important than ever for parties to a contract to consider force majeure before executing their contract.

And it's not just weather that needs to be considered — war, terrorism, pandemics, supply chain issues, strikes, natural disaster and changes in law are all impactful events that have occurred in recent years. For longer contracts, claims for events of force majeure, whether

related to weather or something completely different, are increasingly likely.

Parties should ask themselves some questions before executing a contract:

- How likely is it that an event of force majeure will occur?
- How significant are the consequences of an event of force majeure?
- What are the likely costs, losses and schedule impacts that would follow an event of force majeure?
- Which party is best situated to mitigate events of force majeure, perhaps by including float in a project schedule to account for potential force majeure?
- How much risk of an event of force majeure is a party willing to assume?
- How much is the party paying to avoid the risk of an event of force majeure?

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[1] Atmospheric Rivers "Double-Edged Sword" for Water in California, Newsweek (<https://www.newsweek.com/atmospheric-rivers-double-edged-sword-california-1877305>).

[2] Id.

[3] The 100-Year Flood, U.S. Geological Survey (<https://www.usgs.gov/special-topics/water-science-school/science/100-year-flood>).