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Emergency Exemptions from Environmental Laws After Disasters

Michael B. Gerrard

Many environmental statutes had their origins in disasters. And when disasters strike, the environmental laws come into play in the response. Some have urged Congress to adopt emergency exemptions so that the environmental laws do not interfere with rescue and recovery.

This article explains how disasters helped create our current statutes, and then describes the role that environmental laws played in the immediate response to the September 11 attacks and Hurricane Katrina. It catalogs the multiple exemptions that already exist in the current environmental statutes and regulations and then summarizes the exemptions that were proposed after Hurricane Katrina.

Legislation has addressed risks in the transport and use of hazardous chemicals since the mid-1800s, when the railroads were transporting explosives and flammable materials such as nitroglycerin. The Explosives and Combustibles Act of 1908 gave the Interstate Commerce Commission jurisdiction over these issues. This statute gradually evolved over the years, but the evolution was punctuated by reactions to terrible accidents. Later on, the 1967 Torrey Canyon oil tanker spill and the 1968 Santa Barbara Channel oil spill helped lead to the Federal Water Pollution Control Act of 1972, which required the newly created Environmental Protection Agency (EPA) to promulgate a National Oil and Hazardous Materials Contingency Plan (NCP). The 1973 crash at Logan International Airport in Boston of a cargo jet loaded with hazardous materials highlighted the fragmentation of regulatory authorities and led to enactment of the Hazardous Materials Transportation Act of 1975. Worker exposure to the chemical Kepone at a factory in Virginia in 1975, with ensuing health damage, helped lead to two 1976 enactments, the Toxic Substances Control Act and the Resource Conservation and Recovery Act. The Love Canal incident in Niagara Falls in 1978 inspired the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), which expanded the mission of the NCP to include the cleanup of hazardous substance sites.

Most terribly, the release of methyl isocyanate at a Union Carbide plant in Bhopal, India, in 1984, killing several thousand people, shortly followed by a frightening but nonlethal release in Institute, West Virginia, led to the Emergency

Planning and Community Right-to-Know Act of 1986 (EPCRA), requiring state and local emergency planning and the compilation and public disclosure of extensive information about chemical use. The Exxon Valdez spill in Alaska in 1989 led to the Oil Pollution Act of 1990. Also enacted in 1990 were the Clean Air Act Amendments, which included Section 112(r), requiring chemical plants to develop risk management plans and to specify worst-case scenarios.

September 11

By the day the planes hit the World Trade Center towers on September 11, 2001, an elaborate system of exemptions from the environmental laws was in place, and it was fully utilized.

In the hours after the buildings collapsed, a massive rescue effort was launched in search of anyone who might have survived. Large quantities of construction equipment were brought in to lift the crumbled steel and shattered concrete, and fleets of trucks and barges hauled the material to the Fresh Kills Landfill on Staten Island, where officials searched for human remains and for forensic evidence. The landfill had been scheduled to close by December 31, 2001, by operation of a state law enacted in 1996 and accompanying consent decrees, and in fact it had stopped accepting waste in March 2001. The closure was brought on by the landfill's negative environmental effects and not by a lack of physical capacity. It suddenly reopened with little or no legal formality to accommodate WTC debris. The total quantity of WTC material brought to Fresh Kills—more than 1 million tons—was more than the amount of construction and demolition (C&D) debris that all municipal solid waste (MSW) landfills in New York State accept in a year.

The debris that went to Fresh Kills included material that ordinarily could not lawfully be disposed at a C&D or MSW landfill, and would need to go to facilities specially designed for hazardous, asbestos, or petroleum wastes. The task of separating the material would have been extremely laborious, and would have slowed down the disposal operation, and exposed the workers to further hazards.

In theory, many of these demolition, transport, and disposal operations may have violated environmental laws. Environmental impact review, advance notice of asbestos removal, source separation, and many other procedures would ordinarily be required for a large demolition project. None of these legal procedures were followed, and no one

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said a thing. No environmental agency or advocacy group would dare try to interfere with the rescue effort. In short, the environmental laws worked as they should have under such extreme circumstances—they got out of the way.

A New York State statute provides that

[s]ubject to the state constitution, the federal constitution and federal statutes and regulations . . . the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.

Governor George Pataki used this law on September 12 to suspend many statutes of limitations, and on October 9 he used it to suspend certain regulations regarding transportation and handling of solid wastes, so as to facilitate the WTC removal operation.

The regulations under the State Environmental Quality Review Act (SEQRA) exempt from the environmental impact statement (EIS) requirement “emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment.” 6 N.Y.C.R.R. § 617.5(c)(33). The courts have interpreted this provision broadly to encompass events that at first glance do not look much like emergencies (such as prison overcrowding and homelessness), but obviously the response to the WTC disaster fit squarely within this definition. Emergency provisions were invoked to allow solid waste transfer stations to handle the large quantities of garbage that backed up when much transportation in the city ground to a halt, and to expedite dredging (long delayed by fear of contaminated sediments) to create new berths in Manhattan and Brooklyn to accommodate the barges that took away some of the debris.

At the federal level, certain exemptions were triggered by the declaration of the Federal Emergency Management Agency (FEMA) on September 11 that New York City was a disaster area. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the federal emergency response is largely exempt from the National Environmental Policy Act (NEPA), SEQRA’s federal counterpart.

Congress granted an extension from compliance with certain transportation conformity requirements of the Clean Air Act, largely because the metropolitan planning organization in charge of this planning process was housed at the World Trade Center; its files and work papers were destroyed and several of its employees were killed.

Within a few days after the attacks it became clear that there were no remaining survivors, and the rescue operation ended. The removal of the smoldering debris, and the human remains within, then continued without delays caused by environmental permitting requirements.

The first building to be reconstructed at the site was 7 World Trade Center, situated north of the twin towers; it collapsed on the afternoon of September 11, but it had been completely evacuated and there was no loss of life there. Its replacement was designed to be thinner and taller, so that a street that had been cut off by the original construction could be reopened. An environmental assessment was prepared under SEQRA, with a state agency, the Empire State Development Corporation (ESDC), acting as lead agency. It became clear, however, that the SEQRA process was about to delay the start of construction by a few months. This was a serious matter, because 7 World Trade Center had been built atop a Consolidated Edison Co. electrical substation that provided electricity to much of Lower Manhattan. Until that substation could be rebuilt, electricity service was provided through a jerry-rigged system of cables running on the surface of the streets. This was an intrinsically unstable situation. Thus ESDC invoked SEQRA’s emergency provision and allowed site preparation activities to go forward before the completion of the SEQRA process. Ultimately ESDC decided that no EIS was necessary, as the new 7 WTC, though taller than the original, had less square footage and therefore it generated less traffic and sewage, used less water and energy, and otherwise had fewer impacts. Thus SEQRA did not delay the reconstruction of 7 World Trade Center.

No emergency was declared for the replacement of the office space in the twin towers and of the nearby roadways, commuter railway terminal and subway stations, and the construction of a memorial to the victims of the attacks. Four full EISs were prepared covering all this work. They were processed under a combination of SEQRA and NEPA, since federal financial assistance was involved. The reconstruction has endured a series of delays, but none caused by the SEQRA and NEPA processes. Instead, disputes over the design, financing, and security measures caused these delays. The formal environmental review process (in which the author participated as environmental counsel to the holder of the ground lease to the World Trade Center site, Silverstein Properties) provided an important forum for the systematic examination of the many environmental issues that arose in the design of the project.

Many environmental controversies have surrounded the recovery and reconstruction efforts at the World Trade Center site. The most contentious probably concern whether EPA gave full information to nearby residents and to recovery workers about the nature of lingering air pollution. Several cases on this issue are still being litigated. However, none of this has seriously delayed the reconstruction efforts.

Hurricane Katrina

On August 29, 2005, Hurricane Katrina swept across coastal areas of Louisiana and Mississippi. The levees protecting New Orleans broke, leaving much of the city flooded. More than 1,400 died.

Even before landfall, Governor Kathleen Blanco of Louisiana and Governor Haley Barbour of Mississippi both declared that a state of emergency existed. On the day the hurricane hit, FEMA declared both states to be disaster areas. A flurry of emergency orders ensued, exempting various operations from the standard environmental requirements.

As soon as the storm left, there was an immediate need to drain the floodwaters. The fastest way was pumping the water and discharging it into Lake Pontchartrain. That ordinarily would have required a National Pollutant Discharge Elimination System permit under the Clean Water Act. However, Section 311(c) of the Clean Water Act authorizes the President to “ensure immediate and effective removal” of discharges from onshore facilities of oil and hazardous substances that pose substantial threats to public health or welfare. EPA determined that exemption applied, since there were numerous industrial facilities, sewer systems, and oil and hazardous substance discharges in the flooded areas.

Much of the immediate recovery work also involved depositing materials in wetlands. That ordinarily requires a permit under Section 404 of the Clean Water Act. The Corps of Engineers invoked emergency procedures to waive or modify the permitting requirements for emergency response work.

Hurricane Katrina and Hurricane Rita, which followed less than a month later, disrupted the major oil and gas production and refining industries on the Gulf Coast. Thus, various kinds of fuels and fuel additives could not be produced in the needed quantities. EPA granted four kinds of waivers from Clean Air Act requirements. It waived the volatility requirements that apply to gasoline sold during the summer driving season; it waived the requirement that diesel fuel sold for use in on-road vehicles contain no more than 500 parts per million of sulfur; it waived the requirement that certain cities use reformulated gasoline; and it waived certain low-sulfur gasoline requirements that apply to the Atlanta area.

Additionally, EPA used its enforcement discretion and issued “no action assurances” to allow certain actions that would otherwise violate the Clean Air Act. This included, for example, rules regarding vapor recovery at gasoline pumps, and certification rules for tank truck carriers.

Similarly the states issued many waivers. The Louisiana Department of Environmental Quality, for example, granted relief from the rules applicable to wastewater discharges; air emissions relating to repair activities and temporary power sources; on-site solid and hazardous waste management; inspection and rehabilitation of

underground storage tanks; and numerous inspection, monitoring, and discharge reporting requirements.

Thousands of buildings have to be demolished because the water has rendered them uninhabitable, and often structurally unstable. Ordinarily such demolition must be preceded by an asbestos inspection and, if asbestos is found, advance notice to EPA and special removal procedures. This would have greatly impeded the work, and in many cases would have exposed demolition workers to unsafe conditions. Thus this requirement was enforced flexibly (though not as flexibly as some Louisiana officials would have liked). Efforts were made to remove household appliances that contained freon and other ozone-depleting compounds and recover these gases, but this requirement too was bypassed when the work would have been hazardous to workers. Demolition was delayed by a lawsuit against the City of New Orleans over the adequacy of

notification to residents of demolition, but this was not brought under the environmental laws.

Immense quantities of debris from the hurricanes have to be removed—two orders of magnitude more than that involved at the WTC site. Many financial, manpower, political and bureaucratic hurdles have delayed this removal. Environmental rules are among the factors involved.

The environmental regulations were also enforced flexibly in allowing some businesses that had been shut down by the floodwaters to reopen. Many facilities needed emergency power generators, new water supply wells, sewage treatment variances, and other items that would ordinarily take many months, but that were greatly expedited after the hurricanes.

All in all, it appears that the emergency response to Hurricanes Katrina and Rita—like that to the 9/11 attacks—was not inhibited by the environmental laws. Exemptions or waivers were granted, or the authorities simply looked the other way.

As with 9/11 as well, reconstruction of the areas devastated by the hurricanes has faced numerous challenges—engineering, financial, economic, political, legal, and emotional. Indeed, the area destroyed by the hurricanes is far larger, and the challenges are far more complex, than those involved after 9/11. NEPA will apply to much of the work. Neither Louisiana nor Mississippi has a “little NEPA” law like New York’s SEQRA (though Louisiana has other mechanisms for requiring similar kinds of environmental review). To date it does not appear that NEPA or other environmental laws have stood in the way of reconstruction, except for some delays in demolition due to EPA’s enforcement of the asbestos rules.

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The decisions about just how to rebuild, and in what sequence and at what pace, remain ahead. The shape of the environmental review process to be followed has also not been determined. However, it is clear that the magnitude of the disaster had been greatly increased by a long history of poor environmental decisions with respect to flood protection, destruction of coastal wetlands, and other items. Thus making new decisions without due regard of the serious environmental issues involved would mean that little had been learned from the catastrophe.

Exemptions in Place

The emergency exemptions in environmental law fall into two broad categories—the generic and the case-specific. The generic exemptions, in turn, come in four types: exemptions from permitting requirements; relaxation of substantive standards; exemptions from, or acceleration of, certain processes; and releases from liability. The case-specific exemptions are aimed at specific projects or geographic areas. Examples included congressional declarations of nonnavigability that shield certain areas from Corps of Engineers permitting requirements, and congressional and state legislative declarations that certain projects need not go through the standard environmental review process.

Few of these exemptions are self-executing. Most require a declaration or finding of the administrator of EPA (either acting on her own authority, or under a delegation from the President) or of another high federal official. In the absence of such a federal action, regulated entities generally cannot simply plead that the environmental laws do not apply to them. A notable exception is the act of God or war defense that is found in most of the federal statutes that confer environmental liability.

Before listing the statutes that are aimed at specific environmental conditions, three overarching laws should be mentioned. NEPA is a procedural overlay applicable to most federal actions of environmental significance. The text of NEPA contains no emergency exemptions. However, the implementing regulations of the Council on Environmental Quality authorize lead agencies to make “alternative arrangements” in emergency situations. 40 C.F.R. § 1506.11. For disasters and other emergencies abroad, Executive Order 12,114 provides (in Section 2-5) for exemptions from environmental review requirements for relief action.

The National Historic Preservation Act applies to a broad array of federal actions. It provides for disaster waivers from some of its requirements, 16 U.S.C. § 470h-2(j). The regulations of the Advisory Council on Historic Preservation also provide for emergency procedures. 36 C.F.R. §§ 78, 800.12.

The third overarching statute is the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition to giving many powers to FEMA, it provides a NEPA exemption for immediate response actions. 42 U.S.C. § 5159, 44 C.F.R. § 10.8. It also gives the President the

authority to clear debris and wreckage resulting from major disasters. 42 U.S.C. § 5173(a).

Most of the substantive environmental laws and their implementing regulations contain emergency exemptions of various sorts.

The Clean Air Act has at least nine, most of which, as noted above, were invoked after Hurricane Katrina. The available waivers include:

- from emission restrictions for fuel burning stationary sources during national or regional energy emergencies, 42 U.S.C. § 7410(f);
- from national emission standards for hazardous air pollutants from stationary sources when in the interests of national security, 42 U.S.C. § 7412(i)(4);
- from fuel additive requirements during emergencies, 42 U.S.C. § 7545(c)(4)(C);
- from transportation conformity requirements during emergencies or natural disasters, 40 C.F.R. § 51.853;
- for federal emission sources where “in the paramount interest of the United States,” 42 U.S.C. § 7418;
- from certain of the 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);
- for Defense Department vehicles due to national security, 42 U.S.C. § 7588(e);
- for federal procurement when in the paramount national interest, 42 U.S.C. § 7606(d); and
- from chlorofluorocarbon Class 1 phase-out to protect national security interests, 42 U.S.C. § 7671c(f).

The Clean Water Act and its regulations have at least six exemptions. These are:

- act of God or war, 33 U.S.C. § 1321(a)(12);
- during upset (“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);
- emergencies requiring expedited direct action by the Corps, 33 C.F.R. § 337.7; and
- exigent discharges of oil and hazardous substances, 33 U.S.C. § 1321(c), 40 C.F.R. § 122.3(d).

CERCLA also has an act of God or war defense. 42 U.S.C. § 9607(b)(1). Additionally, it allows:

- 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); and
- exemptions for Department of Energy and Department of Defense facilities based on national security, 42 U.S.C. § 9607(j).

The Coastal Zone Management Act 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).

The Endangered Species Act allows otherwise prohibited “takes” of protected species in federal disaster areas, 16 U.S.C. § 1533, and streamlines or waives consultation for repair or replacement of public facilities in such areas, 16 U.S.C. § 1536.

The Federal Insecticide, Fungicide and Rodenticide Act allows EPA to exempt federal and state agencies from any requirement of the statute if EPA determines that emergency conditions exist that require such exemption. 7 U.S.C. § 136p, 40 C.F.R. § 166.2.

The Marine Protection Research and Sanctuaries Act, also known as the Ocean Dumping Act, allows emergency dumping of industrial wastes when EPA has found an emergency requires it. 33 U.S.C. § 1412a. It also allows vessels to scuttle cargo and waste during emergencies. 40 C.F.R. § 220.

The Oil Pollution Act has an act of God or war defense. 33 U.S.C. § 2703(a).

The Noise Control Act allows exemptions for reasons of national security, 42 U.S.C. § 4909(b)(1).

The Resource Conservation and Recovery Act allows the President to determine it to be in the “paramount interest” of the nation to exempt any federal solid waste management facility. 42 U.S.C. § 6961(a). This authority also extends to federal underground storage tanks. 42 U.S.C. § 6991f(a). EPA may issue temporary emergency permits 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). The standards applicable to treatment, storage, and disposal facilities may also give way in time of emergency. 40 C.F.R. § 264.1(g)(8).

The Safe Drinking Water Act allows states to exempt public water supply systems from maximum contaminant levels due to “compelling factors,” including “urgent threats to public health.” 42 U.S.C. § 300g-5.

The Toxic Substances Control Act allows EPA to go to court for seizure of an imminently hazardous chemical substance or mixture, or for relief against anyone who manufactures, processes, distributes, uses, or disposes of such material. 15 U.S.C. § 2606.

The Wilderness Act allows road-building in wilderness areas during emergencies. 16 U.S.C. § 1133(c).

Proposed Legislation

In the immediate aftermath of Hurricane Katrina, Congress passed and President Bush signed several emergency funding laws. These were not especially controversial, though there was some debate about the appropriate amounts.

Considerable controversy, however, attended a number of bills that attempted to create additional exemptions from the environmental laws. For example, S. 1711, introduced on September 15, 2005, by Senator James Inhofe (R-Okla.) would allow EPA, in consultation with the governor of the affected state, to waive or modify for a period of 120 days the application of any requirement that is contained in any statute or regulation that is administered by EPA, if the administrator finds that such action is necessary to respond to Hurricane Katrina, and makes a number of related findings.

More narrowly targeted was S. 1709, the Gulf Coast Water Infrastructure Emergency Assistance Act of 2005, which dealt with the funding of drinking water projects. Other bills, including S. 1765, introduced by Senator Mary Landrieu (D-La.), and S. 1766, introduced by Senator David Vitter (R-La.), both entitled the Louisiana Katrina Reconstruction Act, would have allowed waivers from environmental laws to facilitate reconstruction.

The House narrowly passed the Gasoline for America's Security Act, H.R. 3893, which would have waived numerous Clean Air Act requirements.

As of the writing of this article, in March 2006, none of these exemptions has been enacted into law. The impetus for them appears to have dissipated as it has become clear that, of all the serious impediments facing response to the hurricanes in the Gulf Coast, environmental laws were very low on the list, and Congress has been distracted by other priorities.

The American Bar Association's Section of Environment, Energy, and Resources submitted detailed comments to EPA in November 2005 expressing reservations about expanded exemptions. The comments concluded “that the risks accompanying blanket exemptions to environmental regulations should not be removed without individual consideration of the dangers at issue,” and that “broad exemptions carry significant costs and risks as well, which deserve individual and serious scrutiny before action is taken to eliminate environmental protections.” The Section opposed legislation that authorizes or creates broad exemptions or waivers of federal or state environmental laws. The Section's report included an extensive analysis of the existing environmental exemptions. (The listing contained in this article is drawn in part from that report.)

Both the September 11 attacks and Hurricane Katrina led to horrific loss of life and considerable environmental damage. Recovery from both has been, and continues to be, a long and difficult process. However, thanks to an ample supply of existing exemptions, the environmental laws have not been a major impediment to recovery, and have actually assisted in the systematic assessment of the best courses of action. This experience should be borne in mind if future disasters lead to renewed calls for further exemptions from the environmental laws.

