

Emergency Exemptions From Environmental Laws

Michael B. Gerrard¹, Andrew Sabin Professor of Professional Practice;

Faculty Director, Sabin Center for Climate Change Law, Columbia Law School

The national response to the coronavirus crisis may face several impediments but federal and state environmental laws should not be among them. Most of these laws have emergency exemptions that allow the usual (and sometimes lengthy) procedures to be bypassed, and some substantive requirements to be waived, in instances of true urgency. However, there is concern that some agencies and corporations will use this as an excuse to bypass environmental laws that aren't actually getting in the way of responses to the crisis.

Statutes and Regulations

It is too early to know all that must be done to cope with this crisis but some that can be imagined would ordinarily be subject to environmental regulation.

To pick one example that is already apparent, if some of the more dire predictions of the virus's spread come true, the nation's supply of hospital beds will be overwhelmed and it will be necessary to build many new medical treatment facilities. If this was to be done with federal money, it could ordinarily be deemed to be a major federal action (or perhaps many actions – one for each facility) requiring environmental impact statements (EISs) under the National Environmental Policy Act (NEPA).

¹ Senior Counsel in the New York office of Arnold & Porter.
Brian D. Israel and Francesca Bochner-Brown of Arnold & Porter assisted in the preparation of this chapter.

However, President Trump's declaration of a national emergency on March 13 invoked the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition to giving many powers to the Federal Emergency Management Agency, the Stafford Act provides an exemption from NEPA for immediate response actions. (The legal citation for this exemption, and for most of the other laws and regulations cited in this chapter, can be found [here](#))

Many of these facilities might be built in existing hospital parking lots or on other open land. However it is possible that some will require demolishing existing buildings. The Stafford Act also authorizes the President to clear debris and wreckage resulting from major disasters.

The text of NEPA contains no emergency exemptions. However the implementing regulations issued by the Council on Environmental Quality (an office in the White House) authorize lead agencies to make "alternative arrangements" in emergency situations. For disasters and other emergencies abroad, a presidential executive order provides for exemptions from environmental review requirements for relief action.

Several states have laws comparable to NEPA that govern actions requiring discretionary state or local approval. These might otherwise require environmental review of new construction but these too tend to have emergency exemptions.

One example is New York's State Environmental Quality Review Act (SEQRA). The regulations under it exempt from the 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." 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 coronavirus would qualify.

Likewise, the California Environmental Quality Act (CEQA) exempts from the environmental impact report (EIR) requirement “emergency repairs to public service facilities necessary to maintain service” as well as “specific actions necessary to prevent or mitigate an emergency.” CEQA defines an emergency as a “sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.” The CEQA Guidelines elaborate that “emergency projects . . . exempt from the requirements of CEQA” include “emergency repairs to public or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare” including those “that require a reasonable amount of planning to address an anticipated emergency.” As in New York, California state courts have interpreted the emergency exemptions broadly to encompass events that at first glance do not seem like emergencies (such as prison overcrowding and beach erosion), but the response to the coronavirus would clearly qualify.

The Massachusetts Environmental Policy Act (MEPA) provides for a more limited emergency exemption in the “rare cases” when it is “essential to avoid or eliminate an imminent threat to environmental resources or quality or public health or safety[.]” However the project proponent must “limit any emergency action taken without due compliance with MEPA . . .to the minimum action necessary to avoid or eliminate the eminent threat.” Additionally, the proponent must file an initial environmental notification form within 10 days of commencing the action and must later file an EIR after the emergency action is taken.

By comparison, the Washington State Environmental Policy Act (SEPA) does not include any relevant statutory or regulatory provisions that would exempt emergency actions. However the Washington Department of Ecology guidance on SEPA provides that a lead agency can grant an emergency exemption if an action meets two conditions: First, the action must be “needed to avoid an imminent threat to public health or safety” and second, there must not be “adequate time to complete SEPA procedures.”

Many states have laws that provide for broad exemptions from a wide variety of laws in the event of emergency. For example a New York statute provides that:

Subject 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.

After the destruction of the World Trade Center on September 11, 2001, 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 in order to facilitate the WTC removal operation. It became clear, however, that the SEQRA process was about to delay the start of replacement of 7 World Trade Center, one of the buildings that had collapsed. This was a serious matter because that building 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 the state invoked SEQRA's emergency provision and allowed site preparation activities to go forward before the completion of the SEQRA process. Ultimately the state decided that no EIS was necessary because the new 7 WTC, though taller than the original, had less square footage and therefore 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.

Additionally, after 9/11 the Environmental Protection Agency (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, after major disasters, states issue many waivers. For example, after Hurricane Katrina the Louisiana Department of Environmental Quality 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.

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 non-navigability that shielded certain areas from Corps of Engineers permitting requirements and congressional and state legislative declarations that certain projects did not need to 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 from 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.

The National Historic Preservation Act applies to a broad array of federal actions. The regulations of the Advisory Council on Historic Preservation provide for emergency procedures.

Most of the substantive environmental laws and their implementing regulations contain emergency exemptions of various sorts. Many of them have been used after disasters like hurricanes and earthquakes.

Under the Clean Air Act, the available waivers include:

- from national emission standards for hazardous air pollutants from stationary sources when in the interests of national security,

- for federal emission sources where “in the paramount interest of the United States,”
- 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.”
- for federal procurement when in the paramount national interest.

The Clean Water Act and its regulations have several exemptions. Among them are:

- Act of God or war.
- emergencies that require expedited procedures for the processing of permit applications by the Corps of Engineers.
- emergencies requiring expedited direct action by the Corps of Engineers.
- exigent discharges of oil and hazardous substances.

The Comprehensive Environmental Response, Compensation and Liability Act, which governs the cleanup of the most contaminated sites and dictates who pays for the cleanup, also has an Act of God or war defense. It also allows emergency removal actions – i.e. fast actions to address an immediate threat.

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.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) 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. On March 13, EPA announced that it had used expedited procedures under FIFRA to expand the list of approved disinfectant products for use in combating the COVID-19 virus. Since then EPA has allowed several other disinfectants to rush through the approval process.

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. This authority also extends to federal underground storage tanks. 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. The standards applicable to treatment, storage, and disposal facilities may also give way in time of emergency.

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.”

Enforcement

Even where there is no explicit exemption, the environmental authorities have generally made it clear that they will take no enforcement action that could impede the immediate response to a major disaster. However EPA took that a step further on March 26, 2020, when it issued a [memorandum](#) saying it will exercise “enforcement discretion” in connection with violations of otherwise applicable laws during the pandemic. This covered civil violations; routine compliance monitoring and reporting by regulated entities; reporting obligations and milestones imposed by settlement agreements and consent decrees; failure of air emission controls or wastewater or waste treatment systems or other equipment; hazardous waste storage rules; and many other requirements.

The EPA memorandum stated that it will exercise its discretion not to enforce the environmental laws only if the COVID-19 crisis was really the reason for the violation and that regulated companies should do the best they can under the circumstances. It also said that criminal penalties would still apply if applicable. However the memorandum was met with protests and petitions by many groups that do not trust today’s EPA and that feared that companies had been given a blank check to pollute for however long the crisis lasts.

Companies may also use the crisis to avoid local requirements. One example of how this can play out came in Georgia. A medical sterilizer company wanted to use ethylene oxide, a toxic substance, to clean medical equipment for use in COVID-19 treatment. The county where the plant is located limited the plant's operations until it installed upgraded emissions controls to prevent fugitive releases of ethylene oxide from drifting into the nearby residential community. On March 30 the U.S. District Court in Georgia issued a temporary restraining order against the county, preventing it from enforcing this limitation and allowing the plant "to sterilize medical products without interference" from the county.

Past experience lends credence to the concern that some will abuse these exemptions. For example, in August 2017, Governor Greg Abbott of Texas declared a state of emergency as Hurricane Harvey approached, suspending dozens of environmental rules. However, this suspension was still in effect months after the hurricane had left, the area had dried out, and electricity had been restored. Later investigations discovered more than 100 toxic releases. Some of them may well have occurred after the hurricane and many were in the sorts of low-income communities that have long been disproportionately exposed to toxic hazards and other forms of pollution.

It may not require excessive cynicism to be concerned that the Trump Administration, which has shown little enthusiasm either for environmental enforcement or for minority communities, may look the other way as companies take advantage of the emergency to save the money that environmental compliance requires, with negative health impacts on their neighbors. Some states may similarly relax their environmental vigilance to a greater extent than the crisis demands. Time will tell.