

# Client Alert

Tort Litigation & Environmental Practice Group

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## EPA's Ability To Provide Regulatory Relief To Facilities Facing Hurricane Harvey-Related Environmental Burdens

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When businesses are faced with the staggering effects of natural disasters such as Hurricane Harvey, they usually rise to the occasion, doing all they can to remediate those effects and provide needed goods and services. In the process, they may face the Hobson's choice of whether to take actions that are needed to promote the well-being of the community, but that would violate environmental laws. Fortunately, the federal Environmental Protection Agency ("EPA") has the authority and discretion to provide some much-needed help to those facing storm-related environmental requirements or barriers to compliance. The Texas Commission on Environmental Quality has already obtained approval from Governor Abbott to suspend a range of TCEQ regulations,<sup>1</sup> and similar comfort from EPA would provide the complementary assurances at the federal level.

Various federal environmental laws include provisions authorizing EPA to grant emergency relief from normal requirements, *e.g.*, exemptions from permitting requirements. A number of environmental statutes also expressly provide "Act of God" defenses against some environmental liabilities, without the need for any waivers. In cases where the governing statute does not specifically empower EPA to alter existing requirements, EPA can use its "enforcement discretion" to allow individuals or companies to perform actions that would ordinarily be considered a violation of an environmental law. While EPA's normal policy is to disfavor use of its enforcement discretion to allow violations, the agency has recognized the special need for "No Action" Assurances memorializing the decision to use its discretionary authority when doing so "is clearly necessary to serve the public interest . . . and [it has] no other [adequate] mechanism . . ." available to address the need.<sup>2</sup> Accordingly, EPA has been willing to use its discretionary authority to allow people to take actions that will speed recovery from major natural disasters.

Notably, EPA and some other agencies have used this relief authority in the past to help affected entities address environmental issues that arose out of Hurricane Katrina and Superstorm Sandy. These past actions have included:

- An EPA grant of emergency relief under Section 311 of the Clean Water Act allowing the temporary discharge of New Orleans' contaminated floodwaters into Lake Pontchartrain without a normal wastewater discharge permit (because EPA determined the discharge would be allowed as an immediate removal action addressing a substantial threat to public health or welfare);<sup>3</sup>
- Temporary fuel waivers from EPA under the Clean Air Act in states affected by Superstorm Sandy that allowed the sale of fuels that did not meet normal fuel formulation requirements;<sup>4</sup>
- EPA issued similar Clean Air Act fuel waivers in response to the effects of Hurricane Katrina;<sup>5</sup>
- The Army Corps of Engineers used its authority under the Clean Water Act to waive or expedite permit requirements for post-Katrina emergency response work that required placement of fill in wetlands;<sup>6</sup> and
- EPA exercised its enforcement discretion during the post-Katrina period, choosing not to enforce certain Clean Air Act requirements that applied to temporary gas stations and tanker truck operators providing vital fuel distribution during the storm's immediate aftermath.<sup>7</sup>

As with any effort to obtain special relief from a regulatory agency, entities facing significant environmental requirements because of Hurricane Harvey's after-effects must be prepared to present their case for alternative standards forcefully and completely. They must provide adequate information explaining why the normal regulatory requirements present significant obstacles to needed actions. They also must be prepared to act quickly, consistent with the urgent nature of the requests. The affected entities cannot simply act based on the existence of a statutory provision empowering EPA to allow certain waivers or expedited actions unless EPA affirmatively approves the alternative approach. There are dozens of provisions in the federal environmental laws empowering EPA to approve certain types of alternative actions outside the standard regulatory approach. These provisions would need to be reviewed to determine which, if any, could be used in a particular situation. In some cases, such as those where fuel waivers are needed in a particular location, State Governors, typically make the statutory-based requests to EPA; businesses do not directly ask EPA for that type of relief. Environmental regulatory relief can also be obtained at the State level in some situations where a state environmental law applies.

Any request for discretionary enforcement relief (documented as No Action Assurances) should also be made as an urgent matter because it seeks relief from potential enforcement of statutory liabilities and no specific statutory waiver or relief provision governs the request. Accordingly, these require a case-specific approach and strong arguments to overcome EPA's normal reluctance to issue these assurances of no enforcement.

Operators of facilities that are under site-specific environmental consent decrees or similar agreements with EPA face site-specific environmental requirements imposed by those documents. The effects of a natural disaster can prevent the operators from meeting those site-specific obligations. Typically those documents include force majeure provisions that excuse performance or reduce obligations when natural disasters prevented compliance. For example, the effects of natural disasters may limit what air emissions or site-specific activities are to be subjected to certain consent decree requirements, and proof of force majeure may excuse performance and/or serve as a shield against stipulated penalties. Businesses seeking storm-related relief from consent orders or similar obligations must ensure they act within the typically very limited time periods spelled out in the governing documents and otherwise adhere to the document's terms.<sup>8</sup>

We know that regulatory concerns are only one part of dealing with the environmental after-effects of a natural disaster, but it is important for companies to take steps to avoid compounding environmental regulatory issues while taking action to minimize harm to the community and the environment. There are opportunities to at least minimize some of the environmental issues related to taking such action.

Fortunately, EPA and other environmental regulators – if properly and promptly engaged -- have exhibited a willingness to take a reasonable approach to streamlining and limiting environmental regulatory requirements, as appropriate, that would be unreasonable impediments to needed recovery efforts. We have successfully managed these types of environmental regulatory relief efforts for our clients, and we stand ready to help those harmed by Hurricane Harvey who could benefit from environmental regulatory relief.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."*

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<sup>1</sup> See Letter from Office of Governor Greg Abbott granting the August 28, 2017 request from the Texas Commission on Environmental Quality's ("TCEQ") request to temporarily suspend various environmental rules and original TCEQ request.

<sup>2</sup> Steven A. Herman, USEPA, Assistant Administrator, Office of Enforcement and Compliance Assurance, Processing Requests for Use of Enforcement Discretion, 3/3/95 at 2.

<sup>3</sup> See Congressional Research Service, Emergency Waivers of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina, 2/4/06.

<sup>4</sup> See [www.epa.gov/enforcement/fuel-waivers](http://www.epa.gov/enforcement/fuel-waivers).

<sup>5</sup> See *id.*

<sup>6</sup> See Congressional Research Service, Emergency Waivers.

<sup>7</sup> Cindy Skrzycki, Katrina Relief Leads to Some Bending of the Rules, *The Washington Post*, 9/19/05; see also Congressional Research Service, Emergency Waivers.

<sup>8</sup> See, e.g., *U.S. v. Shell Oil Company, Deer Park*, S.D. Tex. No. 4:13-CV-2009 (consent decree) (15-day notice provision but some decrees impose a 72-hour deadline, *See, U.S. v. Magellan Pipeline Co., LLP*, N.D. Okl., Civil No. 17-cv-00031-JED-TLW).