



2005-2006

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November 21, 2005

VIA E-MAIL

The Honorable Stephen L. Johnson
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

Re: Legislation Creating Exemptions to Environmental Laws and Regulations

Dear Administrator Johnson:

The ABA Section of Environment, Energy, and Resources (SEER) is pleased to present the enclosed comments to you as the Administrator of the United States Environmental Protection Agency. SEER is comprised of attorneys and associated professionals in private practice, industry, and government service. The Section's Executive Council and substantive committees draw their membership from environment, energy, and resource lawyers across the country. Through its comments, the Section highlights the breadth and efficacy of existing exemptions in our federal environmental laws and regulations and supports the current framework and process of these laws.

Please note that these views are being presented only on behalf of the ABA SEER. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section appreciates the opportunity to provide this information and would be happy to provide additional information or assistance as you may require. If you have any questions after reviewing these comments, we would be happy to provide further comments.

Sincerely,

Lynn L. Bergeson, Chair
Section of Environment, Energy, and Resources

Enclosure

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The Honorable Stephen L. Johnson
November 21, 2005
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cc: Stephen N. Zack, Chair, House of Delegates
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**COMMENTS OF THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
OF THE AMERICAN BAR ASSOCIATION
NOVEMBER 2005**

The views expressed herein are being presented on behalf of the American Bar Association's (ABA) Section of Environment, Energy, and Resources (SEER). They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the Association. This document, however, was reviewed and approved on November 18, 2005, under the Blanket Authority Procedure, which was revised in August 2005 by the ABA Board of Governors.

Executive Summary

This document and appendices assess the possibility and risks of federal congressional action to provide new blanket exemptions, suspensions, modifications, and waivers from the nation's existing federal environmental laws in the aftermath of Hurricanes Katrina and Rita.

Part I describes emergency environmental responses to Hurricanes Katrina and Rita, including widespread damage and risks from untreated sewage sludge and debris, petroleum, and other contaminants. It summarizes the issues identified by the Joint Task Force formed by the Centers for Disease Control and Prevention (CDC) and the U.S. Environmental Protection Agency (EPA).

Part II identifies current legislative proposals to exempt activities from federal environmental laws in the aftermath of Hurricanes Katrina and Rita. Some proposals seek to expedite cleanup in affected areas with targeted responses. Others would effect broad changes to environmental laws, eliminating legal protections without a nexus to the catastrophes or to the needs of emergency responses.

Part III details the more than 50 existing exemptions federal law currently provides to environmental requirements. These exemptions range from the categorical, including those for acts of God or war, to the specific, such as allowing otherwise prohibited acts during weather disasters or in the interest of the nation. They allow the President or the Administrator of EPA to exempt, suspend, or modify existing requirements in times of emergency, disaster, or national security. These specific and detailed exemptions, adopted as part of the fabric of the environmental laws themselves, include a Clean Air Act (CAA) exemption for fuel burning facilities during significant national or regional emergencies, a Clean Water Act (CWA) provision allowing otherwise unauthorized discharges during disasters and in the interest of national security. Other provisions allowing specific departures from environmental requirements are found in the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Resource Conservation and Recovery Act (RCRA), the Coastal Zone Management Act (CZMA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Ocean Dumping Act (ODA), the Oil Pollution Act (OPA), the Safe Drinking Water Act (SDWA), the Toxic Substances Control Act (TSCA), and virtually all areas of environmental regulation.

Part IV concludes that the risks accompanying blanket exemptions to environmental regulations should not be removed without individual consideration of the dangers at issue. This part notes that substantial enforcement discretion is vested in EPA and state agencies and concludes that

broad exemptions carry significant costs and risks as well, which deserve individual and serious scrutiny before action is taken to eliminate environmental protections. Environmental statutes embody the legislative judgment that the environment and the public require protection from unreasonable risks with an adequate margin of safety. Accordingly, it is essential that existing federal and state environmental laws and regulations be maintained and appropriately applied. In other words, the dangers of dispensing with environmental protections to facilitate “quick fixes” or blanket treatment include long term and severe problems, including heightened exposure to harmful contaminants, creation of hazardous and costly new Superfund sites, loss of ecological systems, inequitable environmental justice impacts on disadvantaged populations, the need for costly long term treatment, repair and restoration, erosion of the rule of law, and erosion of the public confidence in the law. SEER opposes legislation that authorizes or creates broad exemptions or waivers of federal or state environmental laws. SEER offers its resources, expertise and experience to assist those responding to these disasters and preparing to respond to future emergencies.

I. Emergency Environmental Response to Hurricanes Katrina and Rita

On August 29, 2005, Hurricane Katrina made landfall on the coast of Louisiana, Mississippi, and Alabama as a Category 4 hurricane. Less than a month later, Hurricane Rita made landfall on coastal Louisiana and Texas as a Category 3 hurricane. Among the many devastating impacts resulting from these storms were the environmental, energy, and resource consequences in the Gulf Coast regions.

Hurricanes Katrina and Rita caused unprecedented environmental damage to these Gulf Coast states—damage that can present serious risks to relief workers and affected residents. For example, untreated sewage was released and mixed with sludge and debris throughout affected cities and towns. Public water supplies were compromised. Oil and petroleum products were widely released and dispersed in the affected areas. Industrial chemicals were also released and mixed with the sludge and debris. Superfund sites and other contaminated areas were inundated and contaminants dispersed. Buildings that will need to be demolished are contaminated with mold, asbestos, and various household and commercial chemicals. Extensive marine, wetland, and forest resources were severely damaged as was much energy infrastructure. As part of the cleanup and restoration, massive amounts of waste and debris must be collected and disposed of in a variety of ways. The environmental impacts and challenges posed by the aftermath of these storms are significant, as are the public health, safety, and environmental risks associated with the necessary cleanup, restoration and rebuilding efforts.

On September 17, 2005, the Joint Task Force (JTF) formed by CDC and EPA identified 13 broad environmental concerns and related infrastructure issues:

- Drinking water;
- Wastewater;
- Solid waste/debris;
- Sediments/soil contamination (toxic chemicals);
- Power;
- Natural gas;
- Housing;
- Dewatering/flood water;
- Occupational safety and health/public security;

- Vector/rodent/animal control;
- Road conditions;
- Underground storage tanks; and
- Food safety.

The JTF categorized these concerns by the amount of time and level of complexity before achieving full restoration:

Increasing Time & Complexity: →

Level 1	Level 2	Level 3	Level 4
Unwatering**	Drinking Water	Solid Waste/Debris	Housing
Power	Wastewater	Sediments/Soil Contamination (Toxic Chemicals)	
Natural Gas	Road Conditions		
Vector/Rodent/Animal Control			
Underground Storage Tanks (e.g., gasoline)			
Food Safety			

** The US Army Corps of Engineers uses this term to describe the pumping out of all standing water.

While the JTF focused its efforts primarily on the City of New Orleans and the impacts of Hurricane Katrina, its specific recommendations are broadly applicable to all areas of impact from both Katrina and Rita. For example:

- Local, state and federal agencies face a complex array of environmental health problems.
- “Unwatering” is a critical first step.
- It is important to bring infrastructure back online.
- Cleanup of debris and potentially contaminated soil/sediment are rate-limiting factors.
- Rehabilitation pressures will rise.
- Future housing, as well as health and safety of workers, is critical to recovery.

Significantly, the JTF noted that the requirements for the short- and long-term solutions may be different. Different criteria are necessary to address differing environmental risks and needs.

A variety of Emergency Orders were issued shortly after Katrina made landfall. These included an Order executed by the Governor of the State of Mississippi to allow the Executive Director of the Mississippi Department of Environmental Quality to act under Emergency Order. Additionally, an Amended Declaration of Emergency and Administrative Order was issued by the Governor of the State of Louisiana. Various federal agencies followed this course of action, and, to date a large number of emergency response actions have been taken under the auspices of these orders. These agencies, the EPA, local governments, and affected industries have worked cooperatively to address these storm impacts.

Within days of Hurricane Katrina’s landfall, the ABA formed a Task Force to respond to the myriad of legal issues that have arisen. With similar motivations and drawing upon its unique

and broad base of experienced practitioners, the ABA SEER also formed a Katrina Task Force to demonstrate its concern for victims and the environment, and to contribute its counsel and expertise. The [Mission of this Task Force](#) is to contribute its expertise to those who are responding to this disaster; to ensure that the goals of environment, energy, and resources law are not compromised; and to preserve the knowledge gained in order to aid those who may, in the future, need to respond to similar crises.

The urgent need to remediate, restore, and reconstruct impacted areas has resulted in a variety of response measures. For reasons set forth in this paper, SEER has taken a protective and future-looking view of how best to restore the environment, infrastructure, and natural resources devastated by Katrina and Rita and to do so in ways that preserve the protections established by the environmental, energy, and resources laws of this country. Drawing upon the cumulative experience and expertise of SEER members and leaders, who include current and former members of local, state, and federal environmental agencies, private, public-sector, and in-house attorneys practicing in wide-ranging areas such as emergency management and response, chemical contamination, waste and debris removal, and drinking water and wastewater treatment, the Section passed a resolution supporting the appropriate use of exemptions available under existing environmental laws, and opposing new blanket modifications, waivers, or suspensions of federal or state environmental requirements. (See Appendix A.)

II. Post-Katrina Legislation: Changing EPA Law/Regulation/Powers

In the wake of, and in response to these hurricanes, several members and committees of the U.S. Congress are actively proposing legislation that would modify, waive, and/or limit the applicability of federal environmental laws. Some of these proposals have been offered to expedite cleanup in the affected areas, while other proposals would affect regulations and requirements far beyond the geographic scope of the areas affected by the disaster. Our research to date, however, has not identified any instance of federal environmental laws thwarting disaster response or relief efforts.

The U.S. Congress has passed several Hurricane Relief funding bills. Subsequent funding bills, which are likely to move quickly and possibly without significant scrutiny, could become vehicles for “rider” legislation in the near term. While EPA itself has not committed to proposing or advancing legislative changes to the existing body of environmental law, the Agency has considered the issue of environmental law modifications or waivers and has developed a draft proposal for legislative change that has circulated among legislators. This proposal is attached as Appendix B. A responsive letter to EPA by Rep. Henry Waxman is attached as Appendix C. A summary of the various House and Senate bills—both proposed and passed—follows below.

A. Joint House/Senate Efforts

On September 29, 2005, Representative Hilda Solis, (D-CA) and Senator John Kerry (D-MA), introduced the Public Health and Environmental Equality Act (H. Res. 477 and S. Res. 261, attached as Appendices E & F, respectively). This legislation is designed to address the issues of public health, environmental protection, and environmental justice during the rebuilding of the Gulf Coast after Hurricane Katrina. In particular, the legislation expresses the “sense of Congress” that: Hurricane Katrina and other such disasters should not be used to weaken, waive, or roll back federal public health, environmental, and environmental justice laws; state, local, and regional authorities must retain their authority for compliance and permitting of industrial and other facilities and their role in enforcing and implementing monitoring and

cleanup regulations; testing, monitoring, cleanup, and recovery in the Gulf Coast region should be completed in a manner designed to protect public health and the environment and ensure habitability of the region and should be carried out in compliance with Executive Order 12,898; and federal rebuilding of communities and the economy of the Gulf Coast region should become a sustainable model.

B. Senate Efforts

The Senate proposal gathering the most discussion to date is S. 1711, introduced September 15, 2005 by Senator James Inhofe (R-OK). (See Appendix D.) This bill would allow the Administrator of EPA, in consultation with the Governor of the affected state, to waive or modify for a period of 120 days (beginning on August 26, 2005) the application of any requirement that is contained in any law (including a regulation) under the administrative jurisdiction of, or that applies to any project or activity carried out by, EPA, if the Administrator determines that the waiver or modification is necessary to respond, in a timely and effective manner, to a situation or damage relating to Hurricane Katrina; and is in the public interest, taking into consideration any emergency condition relating to Hurricane Katrina; and any consequence to public health or the environment of providing the waiver or modification. The modification or waiver can be extended for a period longer than 120 days, as the Administrator determines to be appropriate. In addition, EPA would have to provide notification of any waivers or modifications to specified congressional committees. S. 1711 is the most sweeping in scope of the various congressional efforts.

A more targeted effort is the September 28, 2005, Senate passage of S. 1709, known as the Gulf Coast Water Infrastructure Emergency Assistance Act of 2005. This bill would target the areas affected by the hurricanes, granting new authority to Alabama, Louisiana, and Mississippi to forgive principal amounts on clean water loans for states currently unable to satisfy the terms of their existing loans. The bill also would waive preconditions for funding drinking water projects. Presently, states are only able to fund drinking water projects that appear on their annual intended use plan. S. 1709 would waive that requirement, ensuring that drinking water and wastewater systems affected by Hurricane Katrina are immediately eligible for state funds. Finally, given the number of potential contaminants in the flood waters, the law allows EPA to conduct well testing upon a homeowner's request.

Another targeted approach toward environmental waivers is reflected in the active Senate bill S. 1765 (introduced by Senator Mary Landrieu (D-LA)) and related bill S. 1766 (introduced by Senator David Vitter (R-LA)). Both bills are entitled the Louisiana Katrina Reconstruction Act and are designed to provide disaster relief and incentives for economic recovery for Louisiana residents and businesses affected by Hurricane Katrina. Both bills address waivers of various laws and provisions to expedite cleanup of the affected areas. Notably, Section 502 of both bills provides that the President can issue an emergency permit for any project carried out in response to, or as part of a reconstruction effort relating to, Hurricane Katrina or a related condition, as the President determines to be in the best interests of the United States. Section 651 of the bills explains further that Section 502 applies to the authority of the EPA Administrator and the Secretary of Agriculture, and requirements, under the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) and FIFRA (7 U.S.C. § 136 *et seq.*), respectively, as that authority relates to the application of pesticides in such an area to control the mosquito population and reduce the spread of vector-borne illnesses. Section 652 of the bills addresses notice requirements for environmental waivers.

C. House Efforts

In September, the President signed two emergency spending bills into law that address hurricane response activities: H.R. 3645 (became Public Law No: 109-61) and H.R. 3673 (became Public Law No: 109-62)—which authorize \$62 billion to fund relief efforts along the Gulf Coast. A third emergency spending bill is expected.

In addition, on October 7, 2005, the House passed by a vote of 212 to 210 another bill that proposes sweeping changes, H.R. 3893, the Gasoline for America's Security Act (GAS Act). Critics complain that House members capitalized on the hurricanes to make sweeping changes to the CAA and other environmental laws. Senator James Jeffords (I-VT), Ranking Member of the Senate Environment and Public Works Committee, has stated that he will oppose any efforts to bring it up in the committee.

The GAS Act would: (1) extend deadlines for EPA's air quality standard for ozone in some areas; (2) codify 2003 EPA regulations exempting large equipment replacement projects from new source review requirements; and (3) codify a change to the way EPA determines whether an emissions increase has occurred at a facility by adopting an hourly emissions rate test endorsed by the 5th Circuit. The bill also would extend an attainment deadline for an area if ozone from an upwind source contributes to the area's inability to meet the ozone standard. The GAS Act would replace EPA with the Department of Energy (DOE) as the lead agency in determining whether to grant CAA, CWA, and other environmental permits required for building a new refinery. DOE would set schedules for processing permit applications that all federal and state agencies, such as EPA and state air permitting agencies, would have to follow. Finally, the GAS Act would require all challenges to be heard in the U.S. Court of Appeals for the District of Columbia Circuit, rather than in state courts or state administrative hearing boards. Critics complain that House members capitalized on the hurricanes to make sweeping changes to the CAA and other environmental laws. Senator Jeffords (I-VT) has stated he will not bring it up in the Senate Environment and Public Works Committee.

A last bill worthy of discussion is H.R. 889, the Coast Guard and Maritime Transportation Act of 2005. The bill, passed by the House on September 15, 2005, would authorize additional personnel and equipment for the Coast Guard to cope with Hurricane Katrina relief. It also would insert an additional hurdle into the process of approving offshore wind energy projects by requiring the head of the Coast Guard to submit a written opinion as to whether offshore wind projects would affect ship traffic and navigation.

III. Existing Exemptions, Suspensions, Modifications, and Waivers under Federal Environmental Laws in Times of Emergency or Exigency

The nation's federal environmental laws currently contain more than 50 applicable exemptions. These range from the categorical, including those for acts of God or war, to the specific, such as allowing otherwise prohibited acts during weather disasters, in the interests of national security, or when it is in the paramount interest of the nation.

These laws typically allow either the President or the Administrator of EPA to exempt, suspend, or modify existing requirements in times of emergency, disaster, national security, or when it is in the paramount interest of the country. For instance, the CAA allows the President to exempt fuel burning facilities during national or regional emergencies, and to waive requirements to sell fuel with emission-reducing additives. The CWA gives the President and EPA authority to allow otherwise unauthorized discharges during disasters and in the interest of national security. The

ESA authorizes the President to allow “taking” of protected species and suspend consultation requirements when he determines it to be in the “paramount interest” of the country. Restoration efforts are exempt from NEPA, and in times of emergency federal agencies can negotiate “alternate arrangements” with the Council on Environmental Quality (CEQ). RCRA allows the President to suspend hazardous waste requirements at federal facilities during emergencies.

Most other federal environmental laws have a wide variety of exemptions, including the CZMA, CERCLA, FIFRA, ODA, OPA, SDWA, TSCA, and Wilderness Act, which are outlined below. Moreover, the Stafford Act has two general waivers that allow federal agencies to modify or waive NEPA requirements and conditions for federal assistance during disasters.

In the aftermath of Katrina and Rita, the President, states and federal agencies invoked many of these provisions, including suspending fuel additive requirements across the country and waiving pollution control requirements for the discharge of contaminated wastewater into Lake Pontchartrain. Again, as stated above, our research to date has not identified any instance of federal environmental laws thwarting disaster response or relief efforts.

A complete listing of the federal laws identified below together with the relevant statutory exemption language is set forth in Appendix G.

Clean Air Act (CAA)

The CAA has at least eight waivers. CAA exemptions include those for stationary sources that burn fossil fuel, any stationary sources emitting hazardous air pollutants, fuel additives, federal actions from transportation emission standards, federal facilities for virtually any standard, and manufacturers of banned ozone depleting gases. EPA invoked six CAA waivers in Katrina’s aftermath, including exempting ten affected states from requirements to sell fuel with emission-reducing fuel additives.

Clean Water Act (CWA)

The CWA has at least five exemptions, including act of God and war, emergency situations, and other exigencies for oil and hazardous substances. EPA invoked the CWA’s waiver provisions to authorize the pumping of New Orleans’ floodwater into Lake Pontchartrain after Katrina.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA has at least five exemptions, including those for act of God or war, for public health, and for Department of Defense and DOE facilities when the President deems it to be in the interests of national security.

Coastal Zone Management Act (CZMA)

The CZMA at least two exemptions, including those allowing the President to authorize federal actions that are inconsistent with state coastal plans when it is in the paramount interest of the country, or when the Secretary determines it to be a matter of national security.

Endangered Species Act (ESA)

The ESA has at least three exemptions. In federal “disaster areas,” the ESA allows otherwise prohibited “takes” of protected species and exempts federal agencies from the Act’s consultation requirements. Critical habitat determinations must consider “national security.”

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

FIFRA has at least two exemptions, including when federal or state agencies declare an emergency.

Marine Protection Research and Sanctuaries Act (MPRSA)

The MPRSA has at least two exemptions, including that allowing EPA to authorize the dumping of industrial wastes into the ocean and other waters in times of “emergency.”

National Environmental Policy Act (NEPA)

While NEPA does not contain any exemptions, the CEQ implementing regulations have at least seven, including from NEPA altogether or from its environmental impact statements requirements during emergencies or disasters. CEQ regulations also exempt military operations and federal actions overseas during emergencies. (See also Stafford Act, below.)

Ocean Dumping Act (ODA)

EPA regulations implementing ODA allow vessels to scuttle cargo and waste during emergencies.

Oil Pollution Act (OPA)

OPA contains a complete defense to liability due either to act of God or war.

Noise Control Act (NCA)

The NCA allows EPA to provide exemptions “for reasons of national security.”

Resource Conservation and Recovery Act (RCRA)

RCRA and its implementing regulations have at least six exemptions, including those that allow the President to exempt federal waste facilities and underground storage tanks, and otherwise suspend medical waste tracking requirements, when it is in the “paramount interest” of the nation. EPA regulations also allow it to suspend treatment, storage, and disposal requirements during emergencies.

Robert T. Stafford Disaster Relief and Emergency Assistance Act (DREAA)

DREAA has at least three exemptions, including from NEPA for immediate response actions as well as in other situations as the President deems exigent.

Safe Drinking Water Act (SDWA)

The SDWA allows states to exempt “any” public water system from maximum contaminant levels due to “compelling factors,” like “urgent threats to public health.”

Toxic Substances Control Act (TSCA)

TSCA provides limited exemptions to address imminent hazards.

Wilderness Act

The Wilderness Act allows road building in Federal Wilderness Areas during emergencies.

IV. The Dangers of Blanket Exemptions

The risks accompanying blanket exemptions to environmental regulations are real. Indeed, they are as real as those that originally motivated federal and state lawmakers to pass legislation protecting people and the environment from those hazards. Opinion polls consistently indicate that the American public favors maintaining strong environmental protections. Notably, our environmental laws and regulations are the culmination of painstaking study and debate in Congress: through notice and comment rulemaking proceedings industry experts, NGOs, and others explore and deliberate upon the costs and benefits of protections and exemptions in the context of the risks involved in particular situations. This exacting process of assessing science within the context of law and policy is not superfluous. It is essential to regulate and balance known dangers and real world risks. Moreover, it is essential to maintaining the public trust in the government’s ability to regulate risks effectively.

Federal, state, and local governments work to protect the public from environmental hazards posed by pollution, contamination, and activities that create risks to the environment and the public. Environmental statutes and regulations are based on a legislative judgment that certain activities and conditions affecting the environment and public health are unreasonably dangerous and must be limited or regulated to “safe” levels. This judgment is informed by empirical study, risk assessment as a separate consideration, industry and NGO research and analysis, and substantial agency expertise. Statutory and regulatory exemptions have stood the test of a functional and specific balance of the risks at issue in particularized areas – from transportation of hazardous substances to resource management. These carefully crafted exceptions address emergency situations as well as other exigencies. Moreover, EPA and state agencies have substantial enforcement discretion, which allows them to take into account exigent circumstances and to decline to enforce particular requirements in appropriate situations.

Focusing on the costs of environmental regulation naturally leads to a desire to minimize these costs, especially at a time when federal and state budgets are challenged by unprecedented natural disasters and other extraordinary budget demands. However, broad exemptions from laws and regulations that protect the environment and public health carry significant costs and risks that must be scrutinized. Government cannot ignore the risks to the health and safety of

those living in the affected areas and to the environment that surrounds and supports them. Congress passed the 50 specific exemptions listed in Part III above as part of a series of comprehensive environmental protection and management programs that carefully balance the costs and benefits of applying environmental requirements in emergencies. This careful balance should not be altered through broad legislative exemptions.

It is essential that existing federal and state environmental laws and regulations be maintained and appropriately applied to protect the people living and working in the affected areas from adverse health and environmental impacts, and that environmental requirements not be waived to facilitate “quick fixes,” only to create long-term problems.

Among the inherent dangers when one waives or disregards environmental requirements during the disaster recovery process, SEER notes the following:

- Exposure to harmful levels of chemical and biological contaminants can lead to widespread illness (both acute and chronic).
- Creation of hazardous and costly new Superfund sites may require future remediation and may cause further health risks and ecological harm from uncontrolled disposal of storm debris, waste, and sludge (as previously occurred when debris from Hurricane Betsy was disposed of in the Agriculture Street landfill in New Orleans, which after subsequent residential development became a federal Superfund site).
- Loss of ecological systems such as wetlands and wildlife habitat can adversely impact future fish and wildlife populations, with adverse economic and environmental consequences (as well as increased vulnerability to future storms).
- Adverse and inequitable environmental justice impacts on disadvantaged minority populations that may exacerbate the initial storm damage inflicted on these communities through siting waste disposal, new industrial development, and other uncontrolled activities.
- Costly long-term treatment, repair, and restoration projects to repair adverse impacts caused by the circumvention of environmental laws.
- Erosion of the rule of law, setting a dangerous precedent for future disregard of the environment.

Agency enforcement discretion as applied to existing statutory exemptions are generally adequate to enable necessary hurricane recovery and reconstruction and, at the same time, protect public health and the environment from further damage. To the extent the current regulatory scheme is believed inadequate to provide necessary leeway, exemptions must be specifically justified to abrogate existing protections. Our system’s perspective of regulatory justice and protection includes specific, expert, and informed decision making on issues of public health and safety. This approach defined the original determination of what risks were regulated. This approach must also apply when lawmakers decide what risks should be discounted and what protections are to be abrogated. Removal of protections without individualized assessment is fundamentally at odds with our system of regulation and rule of law.

For these reasons, SEER opposes legislation that authorizes or creates broad exemptions, suspensions, or waivers of federal or state environmental laws. SEER, through its Katrina Task Force and substantive committees, offers its resources, expertise, and experience to assist those responding to these disasters and preparing to respond to future emergencies.

Appendix A

Resolution of the ABA Section of Environment, Energy, and Resources Executive Council

Adopted September 25, 2005

Whereas, the nation's environmental laws were established to protect the public health, safety, welfare, and the environment;

Whereas, Hurricanes Katrina and Rita have caused extensive damage in several states requiring urgent remediation, restoration, and reconstruction across a wide geographic area;

Whereas, the appropriate application of federal, state and local environmental laws will address both short- and long-term impacts to public health, safety, welfare, and the environment;

Whereas, suspending these laws could result in unintended long-term adverse impacts across a wide geographic area that will be costly to correct, while integrating environmental laws into the reconstruction process is more cost efficient;

Whereas, the existing environmental laws have provisions for federal, state, and local regulators to provide exemptions to certain requirements as needed in times of natural disasters as evidenced by the exemptions issued by EPA and state environmental agencies in the aftermath of Hurricanes Katrina and Rita;

Therefore Be it Resolved, that the Section supports the appropriate use of exemptions available under existing environmental laws, but is opposed to new blanket suspension of federal environmental requirements, which is unnecessary and likely to have damaging, unintended, long-term impacts.

And Be it Further Resolved, that the Section is committed to providing the expertise of its members to assist federal, state, and local authorities in the restoration and redevelopment process that considers both the needs of the affected communities and the short -and long-term environmental effects.

Appendix B

Legislative Changes Required For Hurricane Katrina Response

Agency Name: U.S. Environmental Protection Agency

Legislative language requested:

Amend Clean Air Act section 301 by adding the following subsection (e)

(e) Emergency exemption authority.

(1) **In general.** The Administrator may, at his discretion, exempt any person from any requirement or limitation established by or pursuant to this chapter, including federal requirements created as a result of approval of state permit programs or state implementation plans approved under this chapter, if the Administrator determines (A) that emergency conditions exist [as a result of an Act of God or another event that could not have reasonably been foreseen or prevented.] and (2) that it is in the public interest to grant the exemption in light of those emergency conditions, taking into account the public health and environmental consequences of granting the exemption. The Administrator, in making determinations under this paragraph, shall consult with the Governor of the State or States in which the emergency conditions exist or which would be directly affected by the exemption being considered.

(2) Terms of exemptions.

(A) Any exemption granted under this subsection shall expire on a date to be determined by the Administrator considering relevant factors such as the nature and likely duration of the emergency conditions and the public health and environmental consequences of granting the exemption. The Administrator may extend an exemption beyond its expiration date if he finds it in the public interest to do so.

(B) The Administrator may, at his discretion, subject any exemption granted under this subsection to any conditions that he deems appropriate for the purpose of minimizing the public health and environmental consequences of granting the exemption.

(C) Any condition of an exemption granted under this subsection shall be enforceable in the same manner and to the same extent as the provision for which the exemption is granted.

(D) In the case of provisions that apply to particular geographical areas, the Administrator shall limit the exemption to the smallest geographical area necessary to address the emergency conditions.

(E) The requirements of section 307(d) of this chapter and of 5 U.S.C. sections 553 et seq. shall not apply to the Administrator's action under this subsection. The Administrator shall give appropriate public notice of his actions under this subsection as promptly as is reasonable in light of the circumstances.

Purpose of language: This provision is intended to remedy the currently inadequate Clean Air

Appendix C

THOMAS, LINDSEY
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2005-09-22 10:58:11 AM
500 EAST CAPITOL BLVD
WASHINGTON, DC 20540-5001
TEL: 202-225-4800
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ONE HUNDRED NINTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143
Tel: 202-225-2877
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E-mail: govreform@house.gov
http://reform.house.gov

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September 22, 2005

The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Dear Administrator Johnson:

I am writing to express my grave concern about legislative proposals that your agency is developing to authorize sweeping waivers of environmental provisions. It appears that this Administration may be using the Katrina catastrophe to justify unrelated, unnecessary, and highly damaging changes to environmental law. I strongly urge you not to compound Katrina's harms by attempting to eviscerate the laws that Americans depend on to provide healthy air, safe drinking water, clean lakes and rivers, and protection from toxic pollutants.

Concerned Environmental Protection Agency employees have provided me with draft legislative language, which was prepared under the direction of political appointees within the agency. While these legislative proposals all target the Clean Air Act, this is apparently part of a broader effort that includes other environmental laws within EPA and other federal agencies.

These legislative proposals are breathtaking in their scope. They would allow a single person, the EPA Administrator, to waive the Clean Air Act, its implementing regulations, and state air pollution requirements approved by EPA.

The legislative proposals have six separate components targeting different portions of the Clean Air Act, and the Act as a whole. Almost all of these proposals would:

- Vest sole authority for waiving laws and regulations in the Administrator alone, subject only, in some instances, to a requirement to "consult" with the governors of states that would be directly affected;
- Allow the Administrator to grant waivers whenever the Administrator finds that "emergency conditions exist" (due to an Act of God or another event that could not have reasonably been forecast or prevented);

Appendix D

S 1711 IS

109th CONGRESS

1st Session

S. 1711

To allow the Administrator of the Environmental Protection Agency to waive or modify the application of certain requirements.

IN THE SENATE OF THE UNITED STATES

September 15, 2005

Mr. INHOFE (for himself and Mr. VITTER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To allow the Administrator of the Environmental Protection Agency to waive or modify the application of certain requirements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. WAIVERS AND MODIFICATIONS OF APPLICABILITY OF CERTAIN REQUIREMENTS.

(a) Waivers and Modifications-

(1) IN GENERAL- Notwithstanding any other provision of law, except as provided in paragraph (2), with respect to the 120-day period beginning on August 26, 2005, the Administrator of the Environmental Protection Agency, in consultation with the Governor of any affected State, as determined by the Administrator, may waive or modify the application of any requirement that is contained in any law (including a regulation) under the administrative jurisdiction of, or that applies to any project or activity carried out by, the Environmental Protection Agency, if the Administrator determines that the waiver or modification--

(A) is necessary to respond, in a timely and effective manner, to a situation or damage relating to Hurricane Katrina; and

(B) is in the public interest, taking into consideration--

(i) any emergency condition relating to Hurricane Katrina; and

(ii) any consequence to public health or the environment of providing the waiver or modification.

(2) EXTENSIONS-

(A) IN GENERAL- Except as provided in subparagraph (B), the Administrator may extend or modify a waiver or modification under paragraph (1) for a period of longer than 120 days, as the Administrator determines to be appropriate.

(B) LIMITATION- An extension under subparagraph (A) shall expire not later than the date that is 18 months after the date of enactment of this Act.

(3) EFFECTS OF WAIVERS AND MODIFICATIONS- Any effect of a waiver or modification under paragraph (1) shall be considered to be in accordance with the requirements of the waiver or modification, regardless of whether the effect occurs during the effective period of the waiver or modification.

(b) Notice to Congress-

(1) INITIAL NOTICE- Not later than 14 days after the date of enactment of this Act, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committees on Transportation and Infrastructure and Energy and Commerce of the House of Representatives an initial notice of any waiver or modification provided under this section during the period beginning on August 26, 2005, and ending on the date on which the notice is submitted, including a justification of the waiver or modification.

(2) SUBSEQUENT NOTIFICATIONS- Not later than 14 days after the date on which the Administrator submits the initial notice under paragraph (1), and every 14 days thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committees on Transportation and Infrastructure and Energy and Commerce of the House of Representatives a notice of any waiver or modification provided by the Administrator under this section during the preceding 14 days, including a justification of the waiver or modification.

(c) Report- Not later than 1 year after the date of enactment of this Act, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committees on Transportation and Infrastructure and Energy and Commerce of the House of Representatives a report describing--

(1) any provision of a statute or regulation that may have contributed to a delayed response or a delay in the provision of a recovery effort relating to Hurricane Katrina or a related condition; and

(2) recommendations for statutory and regulatory actions necessary to expedite or facilitate recovery efforts relating to a major disaster or emergency, as determined by the Administrator.

Appendix E

109th CONGRESS

1st Session

S. RES. 261

Expressing the sense of the Senate that the crisis of Hurricane Katrina should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

September 29, 2005

Mr. KERRY (for himself, Mr. DURBIN, Mr. REID, Mr. OBAMA, Mrs. BOXER, and Mr. JEFFORDS) submitted the following resolution; which was referred to the Committee on Environment and Public Works

RESOLUTION

Expressing the sense of the Senate that the crisis of Hurricane Katrina should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations, and for other purposes.

Whereas Hurricane Katrina made landfall in the Gulf Region on August 29, 2005, destroying property, causing massive floods, and resulting in more than \$35,000,000,000 in insured property losses and over 1,000 deaths;

Whereas expeditiously rebuilding those areas affected by Hurricane Katrina and providing the victims of the storm with normalcy and relief must be the top priorities for Congress;

Whereas Secretary of Homeland Security Michael Chertoff recently commented, 'We are going to have to clean probably the greatest environmental mess we have ever seen in the country as a result of Hurricane Katrina';

Whereas Hurricane Katrina demonstrates the connection between the health and safety of communities and the health of natural resources;

Whereas many of the hardest hit areas in New Orleans and the Gulf Coast from Hurricane Katrina were low-income and minority communities already facing decades of environmental injustices;

Whereas at least 9 major oil spills, and scores of smaller oil and hazardous substance spills, leaks, and other releases have occurred;

Whereas 60 underground storage tanks, hazardous waste storage facilities, and industrial facilities, and 5 Superfund sites in New Orleans were hit by Hurricane Katrina, yet monitoring reported to date has only been conducted at a handful of sites for a limited number of contaminants;

Whereas nearly 1,000 drinking-water systems were disabled or impaired because of power outages or structural damage, many people have been told to boil their water, and safe drinking water may not be available for the entire population for years to come;

Whereas the Environmental Protection Agency's initial water quality tests found that flood water in New Orleans contains 10 times more E. Coli bacteria than the Agency considers safe for human contact and lead concentrations that exceed drinking water standards, and the mix of contaminants poses a serious disease risk to those wading through the filthy water;

Whereas proper implementation and enforcement of Federal public health and environmental regulations are necessary to protect human health, especially among vulnerable populations, and are necessary in times of emergency to ensure that the response to a disaster does not exacerbate the initial impact;

Whereas major industrial facilities and toxic waste sites disproportionately impact low-income individuals, minorities, children, the elderly, and all underserved communities;

Whereas more than 1 in 4 Americans, including 10,000,000 children, live within 4 miles of a Superfund site, which poses serious public health issues when sites are not cleaned up adequately and in a timely manner;

Whereas the health of low-income and minority communities continues to suffer, largely because of the cumulative impact of all sources of pollution on public health in the acute impact area and the failure to consider cumulative impacts upon siting of new industrial facilities and cleanup of existing toxic communities;

Whereas the addition of poor environmental protection and enforcement to existing health vulnerabilities has only exacerbated the conditions in these communities, which often suffer from higher rates of illness and death in comparison with middle-class, suburban, and more affluent communities;

Whereas Federal public health and environmental laws provide many opportunities to address environmental risks and hazards in minority and low-income communities if applied and implemented;

Whereas Executive Order 12898 states that each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations;

Whereas in 2005, the Congress passed and President Bush signed into law (Public Law 109-54) language prohibiting the Environmental Protection Agency from using appropriated funds to work in contravention of Executive Order 12898 and further delay the implementation of this Order, which is critical to achieving environmental and health equity across all community lines;

Whereas environmental cleanup of affected areas must be done in an effective and timely manner to ensure the victims of Hurricane Katrina can return to their homes without enduring preventable environmental or health risks; and

Whereas weakening, waiving, and rolling back Federal public health and environmental protections would further threaten the heavily-damaged area of the Gulf Coast, negatively impact the public health of the already most-affected communities, and put public health and the environment at greater future risk at the expense of all communities: Now, therefore, be it

Resolved, That it is the sense of the Senate that--

(1) the crisis of Hurricane Katrina and other such disasters should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations;

(2) State, local, and regional authorities must retain their authority for compliance and permitting of industrial and other facilities, and their role in enforcing and implementing monitoring and cleanup regulations;

(3) testing, monitoring, cleanup, and recovery in the region hit by Hurricane Katrina and other areas of national emergency--

(A) should be completed in a manner designed to protect public health and the environment and ensure habitability of the region and mitigate against the effects of future storms; and

(B) should be carried out in compliance with Executive Order 12898; and

(4) the Federal rebuilding of communities and the economy of the Gulf Region should be a model of the integrated, diverse, and sustainable society that all people in the United States desire and deserve.

Appendix F

109th CONGRESS

1st Session

H. RES. 477

Expressing the sense of the House of Representatives that the crisis of Hurricane Katrina should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

September 29, 2005

Ms. SOLIS (for herself, Mr. HASTINGS of Florida, Mr. PALLONE, Mr. HINCHEY, Ms. PELOSI, Mr. GEORGE MILLER of California, Mr. NADLER, Mrs. CAPPAS, Mr. CROWLEY, Mr. MENENDEZ, Mr. HONDA, Mr. ALLEN, Ms. BALDWIN, Mr. BLUMENAUER, Mr. JEFFERSON, Mr. SERRANO, Mr. PAYNE, Mr. OWENS, Ms. MATSUI, Mr. DAVIS of Florida, Mr. GRIJALVA, Mr. LEWIS of Georgia, Mr. CLYBURN, Mr. BERMAN, Ms. SCHWARTZ of Pennsylvania, Mr. WEXLER, Ms. KAPTUR, Mr. MCGOVERN, Ms. LEE, Mr. DOGGETT, Mr. KUCINICH, Ms. LINDA T. SANCHEZ of California, Mr. CONYERS, Mr. ANDREWS, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. BISHOP of New York, Mr. RANGEL, Mr. VAN HOLLEN, Mr. UDALL of Colorado, Mrs. NAPOLITANO, Mrs. CHRISTENSEN, and Ms. KILPATRICK of Michigan) submitted the following resolution; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

RESOLUTION

Expressing the sense of the House of Representatives that the crisis of Hurricane Katrina should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations, and for other purposes.

Whereas Hurricane Katrina made landfall in the Gulf Region on August 29, 2005, destroying property, causing massive floods, and resulting in more than \$35 billion in insured property losses and over 1,000 deaths;

Whereas expeditiously rebuilding those areas affected by Hurricane Katrina and providing the victims of the storm with normalcy and relief must be the top priorities for the Congress;

Whereas Secretary of Homeland Security Michael Chertoff recently commented, 'We are going to have to clean probably the greatest environmental mess we have ever seen in the country as a result of Hurricane Katrina';

Whereas Hurricane Katrina demonstrates the connection between the health and safety of communities and the health of natural resources;

Whereas many of the hardest hit areas in New Orleans and the Gulf Coast from Hurricane Katrina were low-income and minority communities already facing decades of environmental injustices;

Whereas at least 9 major oil spills, and scores of smaller oil and hazardous substance spills, leaks, and other releases have occurred;

Whereas 60 underground storage tanks, hazardous waste storage facilities, and industrial facilities, and 5 Superfund sites in New Orleans were hit by Hurricane Katrina, yet monitoring reported to date has only been conducted at a handful of sites for a limited number of contaminants;

Whereas nearly 1,000 drinking-water systems were disabled or impaired because of power outages or structural damage, many people have been told to boil their water, and safe drinking water may not be available for the entire population for years to come;

Whereas the Environmental Protection Agency's initial water quality tests found that flood water in New Orleans contains 10 times more E. Coli bacteria than the Agency considers safe for human contact and lead concentrations that exceed drinking water standards, and the mix of contaminants poses a serious disease risk to those wading through the filthy water;

Whereas proper implementation and enforcement of Federal public health and environmental regulations are necessary to protect human health, especially among vulnerable populations, and are necessary in times of emergency to ensure that the response to a disaster does not exacerbate the initial impact;

Whereas major industrial facilities and toxic waste sites disproportionately impact low-income individuals, minorities, children, the elderly, and all underserved communities;

Whereas more than one in four Americans, including 10 million children, live within four miles of a Superfund site, which poses serious public health issues when sites are not cleaned up adequately and in a timely manner;

Whereas the health of low-income and minority communities continues to suffer, largely because of the cumulative impact of all sources of pollution on public health in the acute impact area and the failure to consider cumulative impacts upon siting of new industrial facilities and cleanup of existing toxic communities;

Whereas the addition of poor environmental protection and enforcement to existing health vulnerabilities has only exacerbated the conditions in these communities, which often suffer from higher rates of illness and death in comparison with middle-class, suburban, and more affluent communities;

Whereas Federal public health and environmental statutes provide many opportunities to address environmental risks and hazards in minority- and low-income communities if applied and implemented;

Whereas Executive Order 12898 states that each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations;

Whereas in 2005, the Congress passed and President Bush signed into law (Pub. L. 109-54) language prohibiting the Environmental Protection Agency from using appropriated funds to work in contravention of Executive Order 12898 and further delay the implementation of this Order, which is critical to achieving environmental and health equity across all community lines;

Whereas environmental cleanup of affected areas must be done in an effective and timely manner to ensure the victims of Hurricane Katrina can return to their homes without enduring preventable environmental or health risks; and

Whereas weakening, waiving, and rolling back Federal public health and environmental protections would further threaten the heavily damaged area of the Gulf Coast, negatively impact the public health of the already most-affected communities, and put public health and the environment at greater future risk at the expense of all communities: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that--

(1) the crisis of Hurricane Katrina and other such disasters should not be used to weaken, waive, or roll back Federal public health, environmental, and environmental justice laws and regulations;

(2) State, local, and regional authorities must retain their authority for compliance and permitting of industrial and other facilities, and their role in enforcing and implementing monitoring and cleanup regulations;

(3) testing, monitoring, cleanup, and recovery in the region hit by Hurricane Katrina and other areas of national emergency--

(A) should be completed in a manner designed to protect public health and the environment, ensure habitability of the region, and mitigate against the effects of future storms; and

(B) should be carried out in compliance with Executive Order 12,898; and

(4) the Federal rebuilding of communities and the economy of the Gulf Region should be a model of the integrated, diverse, and sustainable society that all Americans desire and deserve.

Appendix G
Existing Statutory Exemptions

I. Clean Air Act (CAA)

The CAA has at least eight waivers, six of which were invoked during Katrina. CAA exemptions include those for stationary sources that burn fossil fuel, any stationary sources emitting hazardous air pollutants, fuel additives, federal actions from transportation emission standards, federal facilities for virtually any standard, and manufacturers of banned ozone depleting gases. For example, EPA has exempted ten Katrina-affected states from requirements to sell fuel with emission-reducing fuel additives.

1. From Emission Restrictions For Fuel Burning Stationary Sources When President Specifies a National or Regional Energy: 42 U.S.C. § 7410(f) (reportedly invoked for Katrina):

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that –

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the conditions specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may

disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 119, as in effect before the date of the enactment of this paragraph or section 113(d) of this Act, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

2. From National Emission Standards for Hazardous Air Pollutants For Any Stationary Source When President Determines in the Interests of National Security: 42 U.S.C. § 7412(i)(4):

(4) Presidential Exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

3. EPA exemptions from fuel additive requirements during emergencies (EPA has issued one national waiver (expired 9/12/05), and ten for states affected by Katrina and Rita (including MS, LA, FL, AL, AZ, TX, CA, TN, GA (2), and VA (2)).

4. From CAA transportation conformity requirements for federal actions:

a. Contemporaneous responses during exigencies: 40 C.F.R. § 51.853(d):

“(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

.....

(2) Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of paragraph (e) of this section.”

b. Ongoing responses during exigencies: 40 C.F.R. § 51.853(e):

“(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more

than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to the overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section.”

5. For Any Federal Emission Source When President Determines it to be “in the Paramount Interest of the United States.” 42 U.S.C. § 7418:

(b) Exemption.

The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(i)(4) . No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

6. For Defense Department Vehicles due to National Security. 42 U.S.C. § 7588(e):

“Exemptions.—The requirements of this part shall not apply to vehicles with respect to which the Secretary of Defense has certified to the Administrator that an exemption is needed based on national security consideration.”

7. For Federal Procurement When President Determines Paramount Interest. 42 U.S.C. § 7606(d):

“The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.”

8. From CFC Class I Phase-Out to Protect “National Security Interests.” 42 U.S.C. § 7671c(f):

National Security.—

The President may, to the extent such action is consistent with the Montreal Protocol, issue such orders regarding production and use of CFC-114 (chlorofluorocarbon-114), halon-1211, halon-1301, and halon-2402, at any specified site or facility or on any vessel as may be necessary to protect the national security interests of the United States if the President finds that adequate substitutes are not available and that the production and use of such substance are necessary to protect such national security interest. Such orders may include, where necessary to protect such interests, an exemption from any prohibition or requirement contained in this title. The President shall notify the Congress within 30 days of the issuance of an order under this paragraph providing for any such exemption. Such notification shall include a statement of the reasons for the granting of the exemption. An exemption under this paragraph shall be for a specified period which may not exceed one year. Additional exemptions may be granted, each upon the President's issuance of a new order under this paragraph. Each such additional exemption shall be for a specified period which may not exceed one year. No exemption shall be granted under this paragraph due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

II. *Clean Water Act (CWA)*

The CWA has at least five exemptions, including Act of God and war, emergency situations, and other exigencies for oil and hazardous substances, which EPA invoked to authorize the pumping of New Orleans floodwater into Lake Pontchartrain after Katrina.

1. Act of God or War: 33 U.S.C. § 1321(a)(12) “Act of God” means “an act occasioned by an unanticipated grave natural disaster.”
2. During Upset: 40 C.F.R. § 122.41 (n) (1) (“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....”)
3. Other Emergencies: See, e.g., 33 C.F.R. § 337.7 (“After obtaining approval from the division engineer, the district engineer (for the Corps) will respond to emergency situations on an expedited basis, complying with the procedures of this regulation to the maximum degree practicable.”)
4. Exigent discharges of oil and hazardous substances:
 - a. Oil and hazardous substances: 33 U.S.C. § 1321(c).
 - b. Hazardous substances under direction of on-scene coordinator pursuant to NCP: 40 C.F.R. § 122.3(d). Cf. 40 C.F.R. § 121(e) (waivers only available for remedies conducted “entirely onsite”).

III. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

CERCLA has at least five exemptions, including those for act of God or war, for public health, and for DOD and DOE facilities in the interests of national security.

1. Act of God or War: 42 U.S.C. § 9607(b)(1).

“There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by – (1) an act of God; (2) an act of war . . .”

2. Emergency removal actions: 40 C.F.R. § 300.440.

“In cases of emergency removal actions under CERCLA, emergency actions taken during remedial actions, or response actions under section 311 of the Clean Water Act where the release poses an immediate and significant threat to human health and the environment, the On-Scene Coordinator (OSC) may determine that it is necessary to transfer CERCLA waste off-site without following the requirements of this section.”

3. From Remedial Standards: 42 U.S.C. § 9621(d)(4) (authorizing President to choose remedial action cleanup levels not meeting required standards when compliance "would result in greater risk to human health.").

4. Superfund Emergency Removals: 42 U.S.C. § 9604(a) (removal authority to protect public health).

5. Exemptions for DOE and DOD facilities based on “national security”: 42 U.S.C. § 9607(j) (authorizing President to modify or exempt requirements for response actions at Department of Energy or the Department of Defense facilities based on national security).

III. Coastal Zone Management Act (CZMA)

The CZMA allows the President to authorize federal actions that are inconsistent with state coastal plans if it is in the paramount interest of the country, or the Secretary determines it to be a matter of national security.

1. For Federal Agency Activity that is Inconsistent with State CZMA Plan When President Determines it to be of “Paramount Interest,” or the Secretary finds it to be a matter of national security: 16 U.S.C. § 1456(c).

(1)(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28, United States Code, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if

the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(3)(A) ... No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) ... No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until —

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

....

If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

2. For Other Federal Activities that are Inconsistent With CZMA Plan When Secretary Determines it "necessary in the interest of national security": 16 U.S.C. § 1456(d).

Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

IV. *Endangered Species Act (ESA)*

In federal "disaster areas," the ESA allows otherwise prohibited "takes" of protected species, and exempts federal agencies from the Act's consultation requirements. Critical habitat determinations must consider "national security."

1. From General Prohibition Against "Taking" T&E Species: 16 U.S.C. § 1533.
2. From Consultation Requirements: 16 U.S.C. § 1536 (invoked for Katrina).

- a. Streamlined or waiving consultation for repair or replacement of public facilities in “disasters areas.” 16 U.S.C. § 1536(p):

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, . . . the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, . . . and which the President determines

(1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and

(2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(See also 50 CFR 402.05 (deferring formal consultation until after exigency dissipates)).

3. Designation of Critical Habitat: 16 U.S.C. § 1533(b)(2).

The Secretary shall designate critical habitat, and make revisions thereto . . . on the basis of the best scientific data available and after taking into consideration . . . the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

V. *Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*

FIFRA provides for exemptions when federal or state agencies declare an emergency,

1. For Federal or State Agencies When Administrator Determines Emergency Conditions Exist, including specific conditions, quarantine, public health, or crisis: 7 U.S.C. § 136p:

The Administrator may, at the Administrator's discretion, exempt any Federal or State agency from any provision of this Act if the Administrator determines that emergency conditions exist which require such exemption. The Administrator, in determining whether or not such emergency conditions exist, shall consult with the Secretary of Agriculture and the Governor of any State concerned if they request such determination.

See also 40 C.F.R. § 166.2 (identifying emergency exemptions).

VI. *Marine Protection Research and Sanctuaries Act (MPRSA)*

The MPRSA allows EPA to authorize the dumping of industrial wastes into ocean and other waters in times of “emergency.”

1. Emergency Dumping of Industrial Waste into Waters When Administrator Determines an "Emergency": 33 U.S.C. § 1412a.

(a) Issuance of emergency permits:

Notwithstanding section 104B of the Marine Protection, Research, and Sanctuaries Act of 1972 33 U.S.C. 1414b after December 31, 1981, the Administrator may issue emergency permits under title I of such Act 33 U.S.C. 1411 et seq. for the dumping of industrial waste into ocean waters, or into waters described in such section 101(b), 33 U.S.C. 1411(b), if the Administrator determines that there has been demonstrated to exist an emergency, requiring the dumping of such waste, which poses an unacceptable risk relating to human health and admits of no other feasible solution. As used herein, "emergency" refers to situations requiring action with a marked degree of urgency.

(b) "Industrial waste" defined:

For purposes of this section, the term "industrial waste" means any solid, semisolid, or liquid waste generated by a manufacturing or processing plant.

VII. *National Environmental Policy Act (NEPA)*

While NEPA does not contain any provisions for emergencies, disasters, or national security, the Council on Environmental Quality's implementing regulations provide for categorical and EIA exemptions during emergencies or disasters. The regulations also exempt military operations and federal actions overseas during emergencies.

1. Restoring facility to prior condition. 42 U.S.C. § 5159:

An action which is taken or assistance which is provided . . . which has the effect of restoring a facility to its condition prior to the disaster or emergency, shall not be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.

2. Exemptions for Emergencies:

a. Emergency actions not "major federal action" during emergencies and exceptional circumstances. 22 C.F.R. § 161.7(d):

Emergencies and other exceptional circumstances . . . Several limited classes of action which might ordinarily be subject to these regulations will not be considered major Federal actions requiring the preparation of an environmental impact statement. Among them are the following:

- (1) Actions taken in emergency circumstances and disaster and emergency relief activities as defined in section 1506.11 of the CEQ Regulations (in such circumstances the responsible action officer should consult with the Office of Environment and Health which shall consult with the Council on Environmental Quality about appropriate alternative arrangements)."

b. "Alternate arrangements" during emergencies. 40 C.F.R. § 1506.11 (authorizing lead agencies to arrange "alternative arrangements" with the Council on Environmental Quality in emergency situations).

Emergencies. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

3. EIS Exemptions for Disasters and Emergencies: 42 U.S.C. § 5159.

"An action which is taken or assistance which is provided . . . which has the effect of restoring a facility to its condition prior to the disaster or emergency, shall not be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act."

See also 22 C.F.R. § 161.7(d) (providing specifics).

4. Exemptions for military during emergencies.

a. For discharge of oil and hazardous substances during emergency: 32 C.F.R. § 650.205(a)

b. Allowing Emergency Response by Air Force: 32 C.F.R. § 989.34

5. For Disasters and Emergencies Abroad: Executive Order No. 12114, 2-5 (requires NEPA-like considerations for actions with environmental effects abroad). See also 32 C.F.R. Pt. 187 (implementing the E.O.).

2-5. Exemption and Considerations.

(a) " . . . the following actions are exempt from this Order: . . .

(vii) disaster and emergency relief action.

(c) Agency procedure under Section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this section as may be necessary to meet emergency circumstances . . .

6. Army cannot discharge oil or hazardous materials except in emergency. 32 C.F.R. § 650.205(a)

7. An emergency does not exempt the Air Force from following NEPA, but they can do an emergency response while completing NEPA. 32 C.F.R. § 989.34.

VIII. Ocean Dumping Act (ODA)

EPA regulations allow vessels to scuttle cargo and waste during emergencies. 40 C.F.R. § 220.

IX. *Oil Pollution Act (OPA)*

OPA provides a complete defense to liability due to act of God or war. 33 U.S.C. § 2703 (a) (“A responsible party is not liable for removal costs or damages under section 2702 of this title if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused by -- (1) an act of God; (2) an act of war . . .”).

X. *Noise Control Act (NCA)*

The NCA allows EPA to provide exemptions “for reasons of national security.” 42 U.S.C. § 4909(b)(1):

For the purpose of research, investigations, studies, demonstrations, or training, or for reasons of national security, the Administrator may exempt for a specified period of time any product, or class thereof, from paragraphs (1), (2), (3), and (5) of subsection (a), upon such terms and conditions as he may find necessary to protect the public health or welfare.

XI. *Resource Conservation and Recovery Act (RCRA)*

RCRA allows the President to exempt federal waste facilities and underground storage tanks, and otherwise suspend medical waste tracking requirements, when it is in the “paramount interest” of the nation. EPA regulations also allow it to suspend treatment, storage and disposal requirements during emergencies.

1. Exemption for federal solid waste management units when President determines it to be in the “paramount interest” of the nation. 42 U.S.C. § 6961(a).

The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

2. Exemption for federal underground storage tanks when President determines it to be in the “paramount interest” of the nation. 42 U.S.C. § 6991f(a).

Presidential Exemption. —The President may exempt any underground storage tanks of any department, agency, or instrumentality in the executive branch from compliance with such requirement if he determines it to be in the paramount interest of the United States

to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriations. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his

3. Issuance of temporary emergency permits by RCRA Director to treat, store or dispose of hazardous wastes in situations of "imminent and substantial endangerment to human health or the environment." 40 C.F.R. § 270.61(a) (for otherwise "non-permitted facilities to allow treatment, storage, or disposal of hazardous waste or ... to a permitted facility to allow treatment, storage, or disposal of a hazardous waste not covered by an effective permit").
4. Exemption from standards for TSD facilities during Emergencies. 40 C.F.R. § 264.1(g)(8).

The requirements of this part do not apply to:

- (i) Except as provided in paragraph (g)(8)(ii) of this section, a person engaged in treatment or containment activities during immediate response to any of the following situations:
 - (A) A discharge of a hazardous waste;
 - (B) An imminent and substantial threat of a discharge of hazardous waste;
 - (C) A discharge of a material which, when discharged, becomes a hazardous waste.
 - (D) An immediate threat to human health, public safety, property, or the environment, from the known or suspected presence of military munitions, other explosive material, or an explosive device, as determined by an explosive or munitions emergency response specialist as defined in 40 CFR 260.10.
 - (ii) An owner or operator of a facility otherwise regulated by this part must comply with all applicable requirements of Subparts C and D (Preparedness and Prevention, and Contingency Plan and Emergency Procedures).
5. Exemption from standards for interim status TSDs. 40 C.F.R. § 265.1(c) (11) (same as above).
 6. Presidential exemption from medical waste tracking requirements. 42 U.S.C. § 6992e(a).

XII. *Robert T. Stafford Disaster Relief and Emergency Assistance Act*

1. NEPA exemption for immediate response actions: 42 U.S.C. § 5159; 44 C.F.R. § 10.8(c), 10.8(d)(2)(xii).
2. Other Presidential Authority: 42 U.S.C. § 5173 (a)

“The President, whenever he determines it to be in the public interest, is authorized -- (1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters; and (2) to make grants to any State or local government or owner or operator of a private nonprofit facility for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.”

XIII. *Safe Drinking Water Act (SDWA)*

The SDWA allows states to exempt “any” public water system from maximum contaminant levels due to “compelling factors,” like “urgent threats to public health.” 42 U.S.C. § 300g-5.

(a) A State which has primary enforcement responsibility may exempt any public water system within the State’s jurisdiction from any requirement respecting a maximum contaminant level or any treatment technique requirement, or from both, of an applicable national primary drinking water regulation upon a finding that —

(1) due to compelling factors (which may include economic factors, including qualification of the public water system as a system serving a disadvantaged community pursuant to section 1452(d)), the public water system is unable to comply with such contaminant level or treatment technique requirement or to implement measures to develop an alternative source of water supply,

(2) the public water system was in operation on the effective date of such contaminant level or treatment technique requirement, or, for a system that was not in operation by that date, only if no reasonable alternative source of drinking water is available to such new system,

(3) the granting of the exemption will not result in an unreasonable risk to health; and

(4) management restructuring changes (or both) cannot reasonably be made that will result in compliance with this title or, if compliance cannot be achieved, improve the quality of the drinking water.

XIV. *Toxic Substances Control Act (TSCA)*

TSCA has limited imminent hazard authority: 15 U.S.C. § 2606.

XV. *Wilderness Act*

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

“Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness

area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, no motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.”