

H O N O R A B L E M E N T I O N

HOLDING POLLUTERS ACCOUNTABLE IN TIMES OF CLIMATE AND COVID RISK: THE PROBLEMS WITH “EMERGENCY” ENFORCEMENT WAIVERS

by Victor B. Flatt

Victor B. Flatt is Dwight Olds Professor of Law at the University of Houston Law Center, where he also serves as the Faculty Co-Director of the Environment, Energy, and Natural Resources Center.

In 2020, the oil and gas industry claimed that employee shortages induced by lockdowns and social distancing during the COVID-19 pandemic made it difficult to comply with the U.S. Environmental Protection Agency’s (EPA’s) anti-pollution rules. EPA, followed by state agencies, responded to industry pressure with relaxed enforcement. However, EPA’s enforcement waiver, entered ostensibly to protect workers from the novel coronavirus, likely increased negative public health impacts. Specifically, harmful air pollutants rose in heavily industrialized areas where the increase correlated with a spike in daily death rates from COVID-19. Congressional investigators link this to particularly severe impacts on minority communities.

This Article examines the legal basis of emergency exemptions, provides examples of how they have been abused during climate-related disasters and the COVID-19 pandemic, and proposes solutions to curtail the abuse of these exemptions while still accounting for genuine emergency conditions.

Federal and state laws, including environmental laws, provide for emergency exemptions from otherwise mandatory regulations. However, emergency exemptions often last well beyond the acute period of the qualifying emergency, exempting industries from containing and documenting the release of significant amounts of air and water pollutants. EPA should create solutions that would

minimize the negative effects of overextended, unnecessary emergency exemptions.

First, EPA should require facilities generating above a threshold amount of emissions to plan for an emergency or disaster as a condition of their permits under the Clean Air Act (CAA), Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA). This could be accomplished with new rulemaking or guidance, as modeled by the Emergency Planning and Community Right-to-Know Act (EPCRA).

Second, EPA should promulgate a rule specifying that, to the extent possible, all permitted entities must keep records of releases during disaster exemptions and continue to report these to their permitting agency (whether the state or federal). Except during the most acute phase of an emergency, when personnel may need to evacuate or power is not available, most companies are already keeping track of their releases.

Finally, waivers should automatically sunset after a certain period, subject to permitted parties’ demonstration of a continued inability to meet their obligations. EPA should revoke a state’s authority to administer emergency exemptions if it does not impose and monitor sunset provisions. Although EPA has little appetite or capacity for state program takeovers, the mere threat of a possible takeover may alter state actions.

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