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Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina

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Specialists in Resources and Environmental Policy
Resources, Science, and Industry Division

Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina

Summary

As state, local, and federal officials respond to Hurricane Katrina and its aftermath, there has been discussion regarding whether environmental regulations might slow or impede response efforts, and whether Congress needs to provide authority to waive environmental regulations in order to speed response to and recovery from the hurricane and subsequent flooding.

Responding to these concerns, on September 16, 2005, Senator Inhofe, the Chairman of the Senate Environment and Public Works Committee, and Senator Vitter of Louisiana introduced S. 1711, to allow the Environmental Protection Agency (EPA) to waive or modify the application of any requirement that is contained in any law under EPA's administrative jurisdiction, if it is necessary to respond in a timely and effective manner "to a situation or damage relating to Hurricane Katrina." On September 22, Senator Vitter and Senator Landrieu of Louisiana introduced S. 1765 and S. 1766, identical bills to provide disaster relief and recovery incentives for Louisiana. Identical legislation, H.R. 3958, was introduced by Representative Melancon of Louisiana on September 29. These bills would allow the President to issue emergency permits under which any project carried out in response to the disaster would be considered to be in compliance with any applicable Federal law. A fifth bill, Representative Shadegg's H.R. 3836, would require expedited issuance of permits for Katrina-related refinery reconstruction.

This report reviews some of the environmental laws that could affect response and recovery actions, discusses existing waiver authority, and identifies issues raised by proposals to grant new waiver authority. The focus is on regulatory programs administered by EPA, including the Clean Water Act, Superfund, and the Clean Air Act. In the short term, in the immediate aftermath of Hurricane Katrina, environmental regulations do not appear to have posed an obstacle to local, state, federal, or private response efforts, in part because existing waiver or flexibility provisions were used in certain cases.

For the longer term, the report raises questions concerning the waiver authority that new legislation might grant, including what its scope (both geographic and regulatory) would be, how facilities granted waivers would be regulated after the expiration of the waiver period, the effect of such legislation on state and local requirements, and whether substantive as well as procedural requirements should be waived, if waivers are to be granted.

Questions have also been raised regarding the requirements of the National Environmental Policy Act (NEPA), a non-regulatory statute that, with exceptions, requires written analyses of environmental impacts before major federal actions are undertaken. NEPA questions are addressed in CRS Report RL33104, *NEPA and Hurricane Response, Recovery, and Rebuilding Efforts*, by (name redacted). This report will not be updated.

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Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina

Introduction

As state, local, and federal officials respond to Hurricane Katrina and its aftermath (including Hurricane Rita, which hit many of same Gulf Coast areas nearly four weeks later), there has been discussion regarding whether environmental regulations might slow or impede response efforts, and whether Congress needs to provide authority to waive environmental regulations in order to speed response to and recovery from the hurricane and subsequent flooding. This report reviews some of the environmental laws that could affect response and recovery actions, and discusses existing waiver authority, before proceeding to a discussion of legislative proposals.

The focus of this report is on regulatory authorities and programs administered by the Environmental Protection Agency (EPA), including the Clean Water Act, Superfund, and the Clean Air Act. Questions have also been raised regarding the requirements of the National Environmental Policy Act (NEPA), a non-regulatory statute that, with exceptions, requires analyses of environmental impacts before major federal actions are undertaken. NEPA questions are addressed in CRS Report RL33104, *NEPA and Hurricane Response, Recovery, and Rebuilding Efforts*, by (name redacted).

Proposed New Waiver Authority

In a Special Report issued September 12, 2005, three Heritage Foundation analysts concluded that regulatory requirements, including specific environmental requirements, should be waived or repealed in order to facilitate cleanup and redevelopment of the areas affected by Hurricane Katrina, which struck the Gulf Coast on August 29. Their report provides a summary of points raised by several analysts and policy-makers in the wake of the hurricane and subsequent flooding. It states: “Rather than have rebuilding efforts across the Gulf controlled or directed by bureaucrats and hampered by endless restrictions and litigation, Congress and

state and local governments should eliminate or reduce the regulatory burden and allow communities to decide for themselves how best to rebuild.”¹

Others, though, have questioned whether additional waiver authority is needed. In a September 16, 2005 press report, Senator James Jeffords was quoted as saying, “EPA Administrator Stephen Johnson told us yesterday that current environmental laws and regulations do not stand in the way of EPA’s response to Hurricane Katrina. ... Based on the administrator’s response, I am opposed to a blanket waiver for environmental laws.”²

Some Members of Congress have proposed legislation to waive environmental requirements in response to the hurricane. On September 16, Senator James Inhofe, the Chairman of the Senate Environment and Public Works Committee, and Senator David Vitter of Louisiana introduced S. 1711, to allow the Environmental Protection Agency (EPA) to waive or modify the application of any requirement that is contained in any law under EPA’s administrative jurisdiction, or that applies to any project or activity carried out by EPA if it is necessary to respond in a timely and effective manner “to a situation or damage relating to Hurricane Katrina.” On September 22, Senator Vitter and Senator Mary Landrieu of Louisiana introduced S. 1765 and S. 1766 (identical bills), to provide disaster relief and recovery incentives for Louisiana. Representative Charlie Melancon introduced identical legislation, H.R. 3958, on September 29. Section 502 of these bills would allow the President for two years to issue emergency permits to any state, local government, or private entity for any project carried out in response to or as part of a reconstruction effort relating to the disaster. A fifth bill, Representative John Shadegg’s H.R. 3836, would require expedited issuance of permits for Katrina-related refinery reconstruction. As of February 2006, there has been no legislative action on any of these bills.

Waiving Environmental Requirements In Current Laws

In emergency situations, EPA and other regulatory agencies have emergency powers under several statutes. EPA has used this authority in the wake of Hurricane Katrina to waive some regulatory requirements or to exercise its available enforcement discretion (i.e., to decline to enforce against certain categories of violations) under environmental statutes. In addition to these statutes, the Robert T. Stafford Disaster Relief and Emergency Assistance Act provides waiver authority. It allows the waiver of administrative conditions that would otherwise prevent the giving of assistance by federal agencies, if the inability to meet such conditions is a result of a major disaster (42 U.S.C. 5141), and it waives the application of certain requirements of the National Environmental Policy Act (42 U.S.C. 5159). A list of waivers granted (by all federal agencies) can be found on the Department of Homeland Security website at [<http://www.dhs.gov/dhspublic/interapp>]

¹ Edwin Meese III, Stuart M. Butler, and Kim R. Holmes, *From Tragedy to Triumph: Principled Solutions for Rebuilding Lives and Communities*, The Heritage Foundation, Special Report #05, September 12, 2005, p. 2.

² “Critics Fear Katrina Impact Could Include Environmental Laws,” *CQ Green Sheets*, September 16, 2005.

/editorial/editorial_0718.xml]. Of particular interest for this report are the waiver authorities under the Clean Water Act, Superfund, and the Clean Air Act.

Clean Water Act National Contingency Plan Exception. Perhaps the most immediate need for regulatory flexibility in the immediate New Orleans area related to evacuating trapped floodwaters from New Orleans. Officials recognized that immediate removal was necessary to protect city residents and emergency responders from public health risks through exposure to waters that had mixed with human and animal sewage, oil and gas from ruptured tanks and pipes, and myriad chemicals that leaked from damaged properties and vehicles. The most expedient option for un-watering the city was to pump and discharge the water into adjacent Lake Pontchartrain.

The discharge of pollutants to waters of the United States is typically regulated by permits under the Clean Water Act (CWA, 42 U.S.C. §1251 et seq.) That are issued by states (or in some cases EPA) under the act's National Pollutant Discharge Elimination System (NPDES) program. Both the statute and EPA regulations, however, establish exceptions to the requirement for a discharge permit, and EPA determined that one exception under Section 311 of the CWA was applicable to un-watering New Orleans. The existing allowable exception in this case (found at 40 CFR §122.3(d)) involves flexibility already contemplated by EPA's rules, not an express waiver of normal requirements.

Section 311(c) of the Clean Water Act authorizes the President to "ensure immediate and effective removal" of discharges from onshore facilities of oil and hazardous substances that pose substantial threats to public health or welfare. EPA determined that this provision of the law applies to the floodwaters of New Orleans, because industrial facilities, sewer systems, and property from which oil and hazardous substances had been discharged constituted an "onshore facility." Section 311(c) requires that removal of oil and hazardous substances be in accordance with an overall framework called the National Contingency Plan (codified at 40 CFR part 300).³ Further, EPA's NPDES regulations (40 CFR §122.3(d)) provide that a discharge to water that is conducted as part of a Section 311(c) removal action is an allowed exception that does not require a Clean Water Act NPDES permit.

Clean Water Act "Upset" Exception. Another exception under NPDES regulations may be utilized by industrial or municipal facilities in the hurricane-affected region. EPA regulations recognize the possibility of situations in which an

³ The National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan or NCP, is the federal government's blueprint for responding to both oil spills and hazardous substance releases. It is intended to provide a national response capability and promote overall coordination among the hierarchy of responders and contingency plans. Under the Plan, EPA is the lead federal response agency for spills occurring in inland waters or on land, and the U.S. Coast Guard is the lead response agency for spills in coastal waters and deepwater ports. Congress has broadened the scope of the NCP over the years, since it was first developed in 1968 in response to an oil spill, adding requirements for responses to hazardous substance spills as well as oil discharges, and to releases at hazardous waste sites that require emergency removal actions. For additional information, see [<http://www.epa.gov/oilspill/ncpover.htm>].

industrial or municipal facility would be temporarily unable to comply with NPDES permit terms for reasons beyond the control of the operator. Under the rules (40 CFR §122.41(n)), an “upset” is an exception incident in which there is a temporary and unintentional noncompliance with permit effluent limitations because of factors beyond the reasonable control of the permittee. For example, a power failure may cause a treatment system not to function, resulting in a permit violation before the facility can halt its discharge. EPA’s rules recognize an upset as an affirmative defense to an enforcement action for violations of technology limits in the permit. Under these rules, to establish an upset defense, a permittee must notify the permitting authority within five days, must demonstrate the specific cause of the upset, and provide information that the violation was beyond the permittee’s reasonable control.

In Louisiana, the state’s Department of Environmental Quality issued an emergency declaration on September 3 containing a number of measures to prevent irreparable damage to the environment as a result of the hurricane emergency. One portion of this document advised permittees about activating the upset provisions in state NPDES permits, with certain modifications of normal procedures, such as generally waiving the state’s requirement for notification of an upset within 24 hours of occurrence, and granting authorization to discharge water that had been placed in storage tanks, other containers or vessels for stabilization purposes.⁴ Similarly, the Mississippi Department of Environmental Quality issued an emergency order that addressed wastewater treatment systems. It waived the initial notification requirement for an upset condition, waived effluent monitoring requirements for 30 days, allowed the discharge of water from tanks that were emptied of their previous contents, and allowed owners and operators of wastewater plants to make repairs without prior notice.⁵

Clean Water Act Section 404 Permits. Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. The U.S. Army Corps of Engineers administers the program, particularly the issuance of permits that authorize regulated activities, using environmental guidance from EPA. The Army Corps also regulates activities that affect navigable waters under authorities in the Marine Protection, Research, and Sanctuaries Act (MPRSA, 33 U.S.C. §1413)⁶ and the Rivers and Harbors Act of 1899 (33 U.S.C. §403). On September 3, the Corps invoked emergency procedures in its regulations (33 CFR Part 325.2(e)(4)) to modify for 90 days certain procedural requirements for carrying out work needed to respond to Hurricane Katrina within the states of Louisiana and Mississippi. According to the

⁴ State of Louisiana. Department of Environmental Quality. “Amended Declaration of Emergency and Administrative Order.” Sept. 3, 2005, p. 2.

⁵ State of Mississippi. Department of Environmental Quality. “Emergency Order No. 506205.” Sept. 13, 2005, p. 5.

⁶ Also under the MPRSA, EPA issues permits for ocean dumping of all substances except dredged spoil, and the act contains a provision (33 U.S.C. §1412(a)) that allows EPA to issue emergency permits for dumping of industrial waste into ocean waters, based on an unacceptable risk to human health and no feasible alternative. EPA has not utilized these procedures in connection with disposal of Hurricane Katrina wastes.

Corps, the emergency permitting procedures were put in place to save lives and property and to restore some infrastructure; they apply to local, state, and federal agencies within the affected area, plus utility companies, electrical, phone, and pipelines, including natural gas distribution systems, plus road and railroad transportation projects. The emergency procedures allowed needed work to proceed with minimal prior notice to the Corps, and they specified the types of information to be provided after work is complete.⁷ The Corps later determined that these procedures could be used in response to Hurricane Rita, too.

Superfund Response Authority. The Superfund law (officially, the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA) provides the President and EPA broad authority and flexibility to respond to releases of hazardous substances. Section 104(a)(1) of the act (42 U.S.C. §9604(a)) provides that whenever there is a release or threatened release of a hazardous substance, or a pollutant or contaminant that may present an imminent and substantial danger:

... the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

This authority can be invoked by on-scene coordinators, who have broad authority to conduct emergency response actions under the National Contingency Plan (NCP). Further, the NCP specifies in 40 CFR §300.400(e)(1) that “No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA....” This exception does not apply to off-site activities, however: “Permits, if required, shall be obtained for all response activities conducted off-site.”⁸

Similar provisions regarding actions taken in response to the emergency are contained in relevant state laws. For example, the State of Louisiana Department of Environmental Quality Emergency Declaration⁹ provided that owners and operators of solid waste management facilities that had permits from the Department before the hurricane “are authorized to make all necessary repairs to restore essential services and the functionality of stormwater management and leachate collection systems

⁷ U.S. Department of the Army, Mississippi Valley Division, Corps of Engineers. “Emergency Permit Procedures for the States of Louisiana and Mississippi within the Boundaries of the Mississippi Valley Division.” Sept. 3, 2005.

⁸ 40 CFR 300.400(e)(2).

⁹ State of Louisiana, Department of Environmental Quality, “Amended Declaration of Emergency and Administrative Order,” Sept. 3, 2005.

damaged by the Hurricane, without prior notice to the Department.”¹⁰ The order provided that vegetative debris and construction and demolition debris mixed with other hurricane-generated debris need not be segregated prior to disposal. It authorized local governments or their agents to conduct the open burning of vegetative debris without prior notice to the Department, and it waived numerous requirements that would otherwise apply to the cleanup of asbestos-containing material.

The order maintained some substantive requirements, however. For example, hazardous waste generated as a result of the hurricane “must be separated from other hurricane generated waste and disposed of at a permitted hazardous waste disposal facility.”¹¹ The burning of asbestos-containing materials was also prohibited.

Clean Air Act. Various provisions of the Clean Air Act (CAA, 42 U.S.C. §7401 et seq.) were also waived by EPA in its response to Hurricane Katrina. These waivers addressed concerns regarding the impact of the hurricane and subsequent flooding on energy supplies within the four states that suffered major damage, as well as impacts in other states. Because of the importance of the Gulf area as both a producer of oil and gas and a refiner of petroleum products, EPA temporarily waived regulations regarding gasoline and diesel fuel in all 50 states.

All of the fuel waivers were granted under the authority of Section 211(c)(4)(C) of the Clean Air Act, as amended by P.L. 109-58, the Energy Policy Act of 2005. As amended, this section allows EPA to temporarily waive a control or prohibition respecting the use of a fuel or fuel additive if: (1) the Administrator determines that “extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers”; (2) these circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented, and not the lack of prudent planning; and (3) it is in the public interest to grant the waiver.

Four types of waiver were issued. First, the Agency waived the volatility requirements that apply to gasoline sold during the summer driving season.¹² Lower volatility gasoline is less prone to evaporation, thereby lowering emissions of the volatile organic compounds that contribute to the formation of ground-level ozone. The volatility requirements vary depending on region of the country, making the supply of gasoline available in Northern states unusable in the South during summer months. The summer volatility requirements expire on September 15 of the year in most states. In order to prevent supply disruptions that might otherwise have occurred, EPA waived these requirements beginning August 30 in Alabama, Florida, Louisiana, and Mississippi, and, on August 31 extended the waiver to all 50 states

¹⁰ Ibid., p. 3

¹¹ Ibid., p. 5.

¹² All the waivers discussed in this section can be found on EPA’s Fuel Waiver Response to Hurricanes 2005 website at [<http://www.epa.gov/compliance/katrina/waiver/index.html>]. Visited February 13, 2006.

and the District of Columbia. This waiver expired in most states in mid-September, but on September 13, the agency extended the waiver until late September or October in California, Texas, and Phoenix, Arizona, all of which require low volatility gasoline after September 15. All these waivers have now expired.

Second, to prevent supply disruptions, the agency waived the requirement that diesel fuel sold for use in on-road vehicles contain no more than 500 parts per million of sulfur. This waiver permitted higher sulfur diesel fuel, which is allowed in construction equipment, farm machinery, and other off-road vehicles, to be used in highway vehicles such as trucks and buses. Sulfur content is normally limited because sulfur dioxide is a pollutant that affects human health and the environment, and because sulfur in exhaust gases interferes with the effective operation of pollution control devices. The agency decided, however, that the potential harm from shortages of compliant fuel outweighed the health and environmental impacts of noncompliance, and waived the sulfur limit, first in the four states directly affected by Katrina, and then, on August 31 in all 50 states and D.C., through September 15, 2005. The waiver was subsequently extended through October 5 in 25 mostly Eastern and Southern states and the District of Columbia, and extended again (through October 25) in 13 Southern and Southwestern states. The last of these waivers, affecting Florida, Mississippi, Kentucky, Iowa, and Nebraska, expired in mid-November. Separately, EPA delayed the effective date of the Texas Low Emission Diesel program, which was to have been implemented October 1.

Third, beginning September 2, the agency waived the requirement that Richmond, Virginia, use cleaner burning reformulated gasoline (RFG) — also because of fears of inadequate supply. This waiver was later extended through October 20. Similar waivers were granted to the St. Louis, Missouri, Houston-Galveston, and Dallas-Fort Worth areas.

Fourth, on September 1, EPA waived until September 15 certain low sulfur gasoline requirements that apply to the Atlanta area. Atlanta has special gasoline sulfur requirements as part of its State Implementation Plan for compliance with the ozone air quality standard. This waiver was subsequently extended through October 25. Following Hurricane Rita, the agency also raised the per gallon cap on sulfur in conventional gasoline produced at specific refineries for a limited period of time, and allowed the fuel to be sold in 25 states.

EPA also used enforcement discretion to allow on a temporary basis actions that would otherwise violate the Clean Air Act or other statutes and regulations. Examples cited in the press included rules regarding vapor recovery at gasoline pumps and certification and registration procedures for tank truck carriers.¹³ EPA provided CRS information regarding 12 cases in which enforcement discretion or “no action assurances” were granted. Several of these instances affected multiple facilities.¹⁴ In addition, the agency provided information concerning cases in which

¹³ See “Katrina Relief Leads to Some Bending of Rules,” Washington Post, September 20, 2005, p. D1.

¹⁴ Personal communication, Gary Jones, U.S. EPA, Office of Civil Enforcement, (continued...)

EPA or the Department of Justice extended consent decree compliance deadlines due to *force majeure*.

The Clean Air Act also provides authority in Section 110(f) for the President to declare a national or regional energy emergency during which the Governor of an affected state could suspend for up to four months provisions of the State Implementation Plan for achieving air quality standards, excess emission penalties, and compliance schedules. The President did not take such action in response to Hurricane Katrina.

Issues Raised by Proposed New Authority

In recent years, Congress has been asked to grant additional authority to waive or to exempt activities from environmental regulations in a number of situations (e.g., to facilitate military training and readiness, and to speed the construction of highway and transit projects, to cite two of the most important and controversial examples). As far back as the Carter Administration, there was discussion of whether environmental regulations should be waived to facilitate the siting or expansion of energy facilities. Thus, the call for additional waiver authority in response to Hurricane Katrina may be viewed as part of a broader effort to relax environmental requirements in the face of important policy objectives. Whether such authority is needed, and if so, how it should be structured, are the key questions.

In the short term, in the immediate aftermath of Hurricane Katrina, it would not appear that environmental regulations posed an obstacle to local, state, federal, or private response efforts. As a result, the question of whether additional waiver authority is needed would appear to be best addressed in the context of longer term recovery efforts.

Legislation. As noted earlier in this report, several bills have been introduced to provide longer term authority to waive environmental regulations. S. 1711, for example, would allow the EPA to waive or modify the application of any requirement that is contained in any law or regulation under the administrative jurisdiction of EPA, or that applies to any project or activity carried out by EPA, if it is in the public interest and is necessary to respond in a timely and effective manner “to a situation or damage relating to Hurricane Katrina.” The bill would grant EPA this authority for a period of up to 18 months after the date of enactment.

S. 1765, S. 1766, and H.R. 3958, developed by members of the Louisiana congressional delegation to provide disaster relief and recovery incentives for Louisiana, would allow the President, in Section 502, to issue emergency permits for any project carried out in response to the disaster during a two-year period beginning on the date of enactment. The President would be given 30 days to approve or disapprove an application for such an emergency permit, and the application would be considered approved if the President failed to act within the 30 days. Projects given emergency permits would be considered to be in compliance with any

¹⁴ (...continued)
September 21, 2005.

applicable federal law (including regulations). The provision makes no distinction between environmental and other laws: thus, the section would waive minimum wage, worker safety, civil rights, and many other protections in addition to environmental requirements.

A fifth example, H.R. 3836, would expedite the construction of new refining capacity by requiring that permit applications under eight environmental laws be approved within 90 days of submittal unless the President determines that the benefits of increased refinery capacity are outweighed by the costs of approving the permit. This authority would apply to any refinery repair or reconstruction at an existing refinery in the area affected by Hurricane Katrina if undertaken as a result of Hurricane Katrina.¹⁵ (As of January 26, 2006, one refinery damaged by Hurricane Katrina, with a capacity of 120,000 barrels per day, remained closed, and another, larger refinery had resumed partial operation. Two refineries affected by Hurricane Rita, were also either shut down or operating below capacity, with 437,000 barrels per day of capacity shut down.¹⁶)

Issues. These bills raise a number of general questions (some of which are addressed by one or more of the specific bills, but that might help guide discussion on the broader question of whether additional waivers are desirable, and if so, under what circumstances). This is not meant to be an exhaustive list; it focuses primarily on pollution regulations and waivers rather than scheduling, siting, and natural resource issues. Nevertheless, some of the questions are sufficiently broad that they might be raised regarding such issues.

1. What authority would waiver legislation provide that the President and the EPA Administrator don't already have — both through existing emergency and waiver authority in environmental statutes, and enforcement discretion? In the short term, the answer would appear to be very little. As discussed above, the Clean Water Act's permit requirements did not prevent the discharge of contaminated floodwater into Lake Pontchartrain. Regulatory requirements do not appear to have inhibited the cleanup and disposal of debris. The Clean Air Act has not prevented the waiver of regulations affecting fuel distribution or the open burning of debris. Recognizing this, the waiver authority provided in the bills discussed above appears to be focused on a medium term, in which decisions regarding reconstruction will be made. Of the five bills, one (H.R. 3836) covers an indeterminate period during which reconstruction is undertaken as a result of Hurricane Katrina, while the other four provide authority for 18 months (S. 1711) or two years (S. 1765/S. 1766, H.R. 3958). The bills do not address the longer term in which the facilities granted waivers or

¹⁵ In addition to Rep. Shadegg, Rep. Barton and Sen. Inhofe have introduced legislation to expedite the construction of new refining capacity (H.R. 3893 and S. 1772 respectively). These bills are not directly related to recovery from Hurricane Katrina, and so are not discussed in this report. H.R. 3893, which passed the House October 7, 2005, would modify the permitting process for refineries, but the changes would be permanent (rather than waivers) and are not directly related to recovery from Hurricane Katrina.

¹⁶ Information on refinery status was obtained from the U.S. Department of Energy's "Final Gulf Coast Hurricanes Situation Report (#46)," dated January 26, 2006, available at [http://www.electricity.doe.gov/documents/gulfcoast_report_012706.pdf].

emergency permits would operate. Do they envision waivers or exemptions that would expire at the end of the 18-month or two-year reconstruction period? Or do they intend to provide permanent waivers for facilities constructed during that window? If the latter, how would permanent exemptions for some facilities be reconciled with tighter standards imposed on other facilities built before or after the post-Katrina period?

2. If additional waiver authority were granted, would it apply only to the four states directly affected by Hurricane Katrina, to other states in which a major disaster has been declared, or to any of the 50 states? If the waiver authority applied to any of the 50 states, some might see opportunities for abuse, unless the potential waiver authority were closely circumscribed. On the other hand, if expedited authority were provided only in the four states immediately affected by Katrina, some might see this as providing incentives to locate new refinery capacity or other development in areas likely to experience future hurricane and flood damage. The five bills described above generally apply in the area affected by Hurricane Katrina and to repairs of damage or reconstruction made necessary by the hurricane.¹⁷

3. What agencies (and related statutes) would be singled out for additional waiver authority, if such authority were to be granted? For example, if environmental regulations are viewed as impeding recovery efforts, is it only the environmental programs administered by EPA, or would the Department of the Interior, Commerce Department, and Council on Environmental Quality be included?¹⁸ S. 1711 takes the former approach; H.R. 3836 addresses two additional laws outside the jurisdiction of EPA¹⁹; while S. 1765/S. 1766/H.R. 3958 apply to all applicable federal laws and regulations.

4. What about state and local requirements? State and local requirements concerning air quality, water quality, and other environmental requirements may be as significant in regulating recovery efforts as the federal laws that could be waived. And in most cases, federal environmental laws are delegated to and administered by the states, under parallel state statutes and regulations. Would Congress's waiving of federal laws pre-empt a state's determination to enforce its own requirements?

5. If additional waiver authority were to be granted to the President or to the EPA Administrator, what limits should there be on the laws and regulations that could be waived or modified? For example, S. 1711 and S. 1765/S. 1766/H.R. 3958 would appear to allow waivers that would permit ocean dumping of residue and debris or

¹⁷ Other legislation, not directly tied to hurricane relief, such as the bill to expedite refinery construction approved by the House on October 7, 2005 (H.R. 3893), would apply anywhere in the United States.

¹⁸ The Department of the Interior administers regulations affecting oil and gas drilling. Interior's Fish and Wildlife Service together with the Commerce Department's National Marine Fisheries Service (NMFS) implements the Endangered Species Act. NMFS also administers fisheries regulations. The Council on Environmental Quality administers the National Environmental Policy Act, and its environmental impact assessment requirements.

¹⁹ The two additional laws are the National Historic Preservation Act and the National Environmental Policy Act.

filling of wetlands, with no opportunity for public review. While some might see such actions as expedient, others might point to potential consequences for the health of the fishing industry and for the ability of the ecosystem to buffer future storms.

6. In addition to possibly limiting or specifying which laws are being waived, should waiver authority be made less than total? For example, the federal agencies and departments being allowed to waive regulations could be directed to assure compliance with the requirements that otherwise would apply to the “extent practicable.” Or they could be directed to consult with the agencies administering the laws that are being waived before taking actions, thereby possibly avoiding needless harm. The five bills are silent on this issue.

7. The bills generally are silent as to what role, if any, courts are to play in reviewing agency grants of the waivers discussed here.

Conclusion

Existing authorities in environmental laws have allowed a number of waivers to provide flexibility in dealing with the impacts of Hurricane Katrina. Congress now faces questions for the longer term as it considers legislation that would provide for waivers of environmental regulations for reconstruction. As Congress considers such legislation, what is lacking are specific examples of the types of activity that would constitute essential components of reconstruction but that might not be permitted or could be delayed under current law and regulations.

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