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## Hurricane Sandy and Environmental Stewardship

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*Special to the Legal*

During the last week of October, the National Weather Service made increasingly alarming predictions about the path of Hurricane Sandy. After causing deaths and severe property damage in Haiti and Cuba, the Frankenstorm, as some called this Halloween-week hurricane, was expected to travel up the Atlantic coast of the United States. The Atlantic coast experiences storms following this path from time to time. But this was not to be an ordinary event. As computer models further warned, after pummeling the southern Atlantic coast from off-shore, Sandy would turn sharply toward the mid-Atlantic coast and cause tidal surges, flooding and high winds as it made landfall.

Based on these warnings, government agencies and the private sector took precautions. New Jersey Governor Chris Christie ordered evacuations of shore communities while authorities in Philadelphia and New York City closed their public transit systems. New York City released water from the Neversink Reservoir located on a tributary to the Delaware River to increase its capacity to retain stormwater runoff and to prevent spilling. The Pennsylvania Department of Environmental Protection (PADEP) warned natural gas companies to secure their sites. Many businesses closed operations and protected their equipment to avoid safety risks to their employees and damage to their facilities. These actions may have prevented many deaths, injuries and chemical releases.

Notwithstanding the considerable preparations made in advance of the storm, Sandy's effects were severe and, in some instances, devastating. Tidal surges flooded many New Jersey shore communities and areas of New York City, destroying homes and businesses. Millions of people lost power; many are likely to remain off the grid for weeks. Some hospitals were evacuated. Roads and bridges were affected. Some loss of life occurred, although thankfully not nearly to the extent as occurred in other hurricanes such as Hurricane Katrina in which over 1,600 Gulf Coast residents died.



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The cost of this catastrophic event is still being tallied, but some estimates reach staggering sums such as \$50 billion, of which insurance reportedly may cover approximately 50 percent.

### ENVIRONMENTAL IMPACTS

The environmental impacts of Sandy, while not yet fully known, are significant. Twelve wastewater treatment plants in New York state reported flooding and 10 facilities reported discharging partially treated or untreated sewage during or following the storm. Power outages in Maryland likewise caused sewage overflows; one sewage treatment plant reported releasing 20 million to 25 million gallons of sewage mixed with stormwater. Other problems at treatment plants may yet to be discovered or reported. For example, facilities that remained operational may have been unable to handle the quantity of sewage, stormwater runoff and infiltration entering the sewage system, leading to bypasses and discharges of raw sewage. Other wastewater facilities may have suffered a loss of biological treatment. Similarly, at drinking water treatment facilities, drinking water may have become contaminated by flooding or loss of power.

Other environmental effects, particularly to shore communities, included the destruction of residences, commercial facilities, boats and vehicles. Each of the residences destroyed in the flood typically contained household hazardous materials such as cleaning solutions, paints and pesticides that may have been released or moved by flood waters. The large quantity of construction and demolition waste generated from the destroyed residences is mounting. This debris includes asbestos-containing

materials such as roof shingles, siding and flooring, electronic waste such as computers and televisions that contain heavy metals, and white goods such as refrigerators, dishwashers, air conditioners and other large appliances.

Spillage of oil and chemicals also poses major risks. As of November 1, more than 630 storm-related spills had been reported to the New York State Department of Environmental Conservation (NYDEC). News reports revealed that the rupture of an oil storage tank at a Motiva facility spilled over 300,000 gallons of diesel fuel into the Arthur Kill waterway. Streams containing contaminated water and sediments overflowed onto neighboring properties. Smaller releases of petroleum products from impacted industrial facilities, commercial buildings with flooded utility systems and elevators, transit systems with inundated tunnels, displaced transformers and railcars, and crushed cars, boats and other vehicles were also reported.

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### ADDRESSING ENVIRONMENTAL IMPACTS

The disposal of storm debris created by Sandy's destructive force and by the resulting flooding and cleanup presents environmental challenges. Particularly in hard-hit areas such as the New Jersey shore, the volume of debris may exceed the capacity of local landfills. Good environmental practices favor the recycling of as much of this waste as possible, and the handling of all waste in a manner that does not pose a risk to workers and residents.

In light of the magnitude and composition of the debris, government leadership to encourage recycling is critical. To its credit, PADEP

has taken the first steps. It has suggested that downed trees and other woody debris be removed from the homeowner's property and adjacent creeks and streams and sent to local composting services. It has encouraged homeowners to segregate household hazardous wastes, white goods, tires, propane tanks and other similar items and store them for separate collection. This process may facilitate the recovery of freon and other ozone-depleting substances and the recycling of metals. Following this lead, many companies have looked for opportunities to recycle waste materials while ensuring that runoff and sedimentation controls, pollution control devices and other environmental equipment are operational. As a result, scrap yards and recycling facilities that remain open have experienced increased deliveries.

## ENVIRONMENTAL AGENCY FLEXIBILITY

During times of emergency, it is not surprising that some would prefer to dispense with environmental laws that may slow restoration or limit restoration options. In the wake of Hurricane Katrina, the American Bar Association's Section of Environment, Energy and Resources (ABA SEER) cautioned that existing environmental laws contain sufficient flexibility, and that the bills proposing to waive application of environmental laws would unnecessarily compromise environmental protection and put vulnerable communities at further risk. The bills were never enacted. Several federal environmental statutes protect regulated entities from liability for discharges or releases caused by an "act of God." For example, under § 311 of the Clean Water Act, a discharge of oil or hazardous substances that is caused solely by an act of God does not impose liability. Section 311(a)(12) defines an act of God as "an act occasioned by an unanticipated grave natural disaster." Courts have generally construed this provision narrowly and required the discharger to demonstrate that it could not have avoided the harm. This defense may be applicable to discharges caused by storm surges, flooding or high winds during Hurricane Sandy if precautions were taken but overcome by the power of the storm. But whether courts will consider a hurricane predicted long in advance of its arrival as "unanticipated" remains to be seen.

The Clean Water Act and corresponding state programs ordinarily require a discharger of a pollutant to obtain a National Pollutant Discharge Elimination System (NPDES) permit. The initial removal of water carrying oils and chemicals from tunnels, buildings and other flooded areas has been conducted with high capacity pumps. Some waters may be pumped into trucks and transported to treatment facilities, but larger quantities are pumped directly into waterways, an action

triggering NPDES permitting requirements. In this emergency situation, however, obtaining a permit may be impractical.

To allow expedited removal of these flood waters, the NYDEC issued emergency declarations suspending permit requirements for the discharges of floodwaters in New York City and certain surrounding counties. But environmental stewardship remains important. NYDEC noted that all reasonable measures should be taken to collect and properly dispose of fuel oil or other recoverable material before pumping out a structure. In addition, any significant spills must first be reported to NYDEC and treated or disposed before discharging to the New York City sewer system. Although in this instance the state took the lead, in the past the Environmental Protection Agency has also relaxed permitting requirements, citing the president's authority under § 311(c)(1)(A) of the Clean Water Act to ensure immediate removal of discharged oils and hazardous substances.

Like NYDEC, PADEP has also acted flexibly to accommodate the storm-related emergency. PADEP has waived the state portion of tipping fees for disposal of storm debris and authorized its regional offices to approve temporary storm debris staging areas, extend landfill hours and allow disposal facilities to increase the daily volumes of wastes that they may receive and dispose. PADEP has also authorized alternative leachate storage and treatment management options. PADEP will also not prohibit processing or disposal facilities in Pennsylvania from accepting flood and storm debris from counties that have not designated the facilities in their county plans. Segregation of household hazardous wastes and special handling waste at the disposal facilities can make a substantial contribution to recycling efforts.

The EPA has also demonstrated its flexibility to adjust environmental requirements to meet emergency needs. Damaged petroleum storage facilities and harm to pipeline operations along the East Coast from Virginia to New Hampshire prevented the distribution of adequate supplies of reformulated gasoline (RFG). In response, EPA Administrator Lisa Jackson determined pursuant to her authority under the Clean Air Act that "an extreme and unusual fuel supply circumstance" exists that could not have been foreseen or prevented and is not attributable to a lack of prudent planning. She therefore waived the federal RFG requirements to allow sale of conventional gasoline in the affected areas and combinations of blend stocks for oxygenate blending through November 20. Similarly, Jackson exercised her authority under the Clean Air Act to waive federal clean diesel fuel requirements to allow use of home

heating oil in highway vehicles, non-road vehicles and non-road equipment designated by New Jersey, Pennsylvania and New York for emergency response.

Many other federal laws contain exemptions or authorizations for the EPA to grant waivers in emergency situations. A compendium of these provisions may be found in a submission by ABA SEER to the EPA following Hurricanes Katrina and Rita (<http://bit.ly/Uyu93G>).

While waivers expressly authorized by environmental laws can eliminate many impediments to prompt cleanup, environmental agencies may also use their enforcement discretion to facilitate hurricane response. For example, in response to fuel shortages created by Hurricane Sandy, the EPA's Office of Enforcement and Compliance Assurance issued a "no action assurance" stating that it will not enforce violations of the Clean Air Act's new source performance standards or New Jersey's state implementation plan where high sulfur home heating oil is used instead of ultra-low sulfur diesel fuel in stationary emergency diesel generators and pumps primarily in service for the public interest. As a result, wastewater treatment facilities, drinking water treatment facilities, solid waste disposal facilities, fuel providers, nursing homes, hospitals and other similar facilities utilized available home heating oil to power generators and pumps without being subject to Clean Air Act penalties.

Images of President Obama and Christie working closely as supporting partners to respond to the devastation underscored the seriousness of the storm. Public statements from New York Governor Andrew Cuomo and New York City Mayor Michael Bloomberg emphasized the importance of taking long-term mitigation and adaptation measures to respond to the increasing frequency and severity of storm events. As a result of Hurricane Sandy, the words "climate change," largely absent from recent political dialogue, reared their head. While the importance of long-range planning for future storm events should not be minimized, immediate attention to responding to Hurricane Sandy in a manner fostering good environmental stewardship is essential to avoiding long-term environmental harms. •