Hurricanes and Flooding: Surely EPA Regulations are Suspended?!

09.11.2018

It seems to happen every year. A natural disaster disrupts fall football season, and interstates are full of evacuees gobbling up hotel rooms and squatting in the nearest safety zones. In those times, no one ever thinks of the plant environmental manager trying to decide what to do and how to comply with arcane environmental cleanup and reporting requirements in the event of a spill or explosion. Well, EPA is coming to the rescue... sort of.

On May 31, 2017, EPA issued guidance entitled, "As Hurricane Season Begins: A Reminder to Minimize Process Shutdown Related Releases and to Report Releases in a Timely Manner" ("Hurricane Guidance"). The document provides direction to EHS professionals on compliance with environmental cleanup and release reporting requirements during a hurricane or flooding event. In sum, EPA will not excuse failure to *report* a release or spill due to an act of God, but a facility may be relieved of some or all of its cleanup responsibility if the *release or spill itself* was unpreventable.

A Warning

EPA's Hurricane Guidance first cautions industry not to avoid environmental requirements during a natural disaster. "[A] hurricane is predictable and as a result, lends itself to early preparations for minimizing its effect on a facility." EPA specifically points out that the Clean Air Act (CAA) requires a "general duty to prevent accidental releases of certain [flammable and toxic substances] and… extremely hazardous substances and to minimize the consequences of accidental releases which do occur" for any air emission source. *See* 40 CFR 68.130 (listing covered chemicals) and Hurricane Guidance, Release Minimization Requirements, Col. 2, p.1.

Covered facilities are required under EPA's interpretation of the CAA to assess hazards caused by flooding and high winds before they happen, then take steps to prevent accidental releases and minimize their consequences. Id. In other words, if EPA deems the accidental release to have been reasonably preventable, CAA liability may follow if air pollution control technology is damaged by extreme weather. This is quite a burden.

Release Reporting Requirements

Facilities are not relieved of the obligation to report the spill or discharge of chemicals that occurs during a storm event. Section 103 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and its implementing regulations at 40 CFR 302.4 require the person in charge of any facility to "immediately notify" the National Response Center (NRC) of any release of a hazardous substance if the release (i) is to the environment and (ii) exceeds the chemical's reportable quantity

(RQ) within a 24-hour period. EPA guidance interprets “immediately” to mean a report must be filed within 15 minutes of learning of the release.

The facility must also warn local authorities if the release leaves the property boundaries. Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) provides for immediate notification to the State Emergency Response Commission and Local Emergency Planning Committee when the RQ of any CERCLA hazardous substance or Extremely Hazardous Substance is exceeded and the released substance may affect areas offsite.

The Clean Water Act (CWA) governs the spill or release of oil to Waters of the United States (meaning almost all surface waters). Thus, if a spill or release occurs during a natural disaster, immediate notification to the NRC is required under the CWA where an oil sheen appears on Waters of the United States or when a spill prevention, control, and countermeasures (SPCC) plan for the facility requires reporting. See 40 CFR 110 to 112.

All of these reporting requirements are entrenched in federal law. There is no “act of God” defense for any of them, so hurricanes and flooding do not relieve a facility from its obligation to report a release despite everything else it must deal with during very difficult times.

Cleanup Obligations: Measured Relief

On the other hand, the CWA and CERCLA recognize a defense to cleanup liability if a natural disaster causes contamination, although the defense is difficult to prove. Nonetheless, facilities should not shy away from claiming relief from cleanup liability if the defense applies.

Federal law generally requires a responsible party to clean up any spill or release to the environment. Liability for cleanup is regardless of fault. Section 311(f)(1) of the CWA states that a party may be required to clean up a release of oil or petroleum products to Waters of the United States, while Section 107(a) of CERCLA holds a potentially responsible party liable for a spill or release of hazardous substances to the environment.

Both statutes excuse a party from cleanup responsibility if the release is the result of an “act of God”. See Section 311 of the CWA and Section 107(b) of CERCLA. Proving an act of God defense under either statute is not easy to do even when natural disasters cause the liability. The facility seeking relief must show (1) the act of God was unanticipated; (2) the act of God qualifies as a grave natural disaster; (3) the sole cause of the release is the act of God; and (4) the release resulting for the act of God could not have been prevented by the exercise of due care or foresight. Flooding and hurricanes likely satisfy (2) and (3) because they are “grave natural disasters” and often the “sole cause” of the spill or release. The other elements are not so easily established.

First, some courts now hold that hurricanes and other extreme weather events are not “unanticipated.” Under this view, a facility affected by such an event would fail to satisfy criterion (1). The National Weather Service (NWS) routinely warns and updates communities of impending extreme weather events providing time in most cases to prevent or mitigate a release. As a result, arguing that the disaster could not be anticipated may be an argument that is nearly impossible to win. For example, in *Liberian Poplar Transports, Inc. v. United States*, 26 Cl Ct. 223 (1992), a federal court found a weather warning from NWS sufficient to void the act of God defense for an unanticipated oil release during a hurricane where records showed that the company monitored progress of the storm prior to its impact, but did little to secure oil containers.

For a company to argue successfully that its release could not have been prevented under criterion (4), more must be shown than the facility was not negligent in its preparation for the storm:

To relieve a defendant of its responsibility [under the act of God defense], it is incumbent on him to prove that due diligence and proper skill were used to avoid the damage and that *it was unavoidable*.

"Invoking the Act of God Defense" Env't and Energy Law and Policy J., Vol. 3, Issue 2, p. 19 (Fasoyiro, June 9, 2009) (emphasis added). It is now almost indisputable: If a company has warning and opportunity to prevent a release during weather events, there is no defense to the cleanup under the CWA and CERCLA.

Conclusion and Recommended Strategy

There is nothing a company can do to stop a hurricane or flooding, and there is often little that can be done to prevent damages to a manufacturing plant during such events. However, if the natural disaster is truly unanticipated and the release of oil or chemicals is truly unpreventable, then there may be a defense to liability for cleanup costs associated with the release.

To minimize your plant's risk of liability, take the following steps:

- Step No. 1: Develop a list of all systems at the plant vulnerable to a natural disaster;
- Step No. 2: Review emergency response protocols applicable to manufacturing and pollution control equipment and take all reasonable measures available to prevent a release from this equipment during an extreme weather event; and
- Step No. 3: In the event of a pending natural disaster, document all measures taken to prevent a release, then rely on the documentation to mitigate liability for any release that may occur.

Related People

- Ethan R. Ware – 803.567.4610 – eware@williamsmullen.com

Related Services

- Environment & Natural Resources