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[Environment & Energy](#)

A petrochemical oil refinery in Texas

Photographer: Sharon Steinmann/Bloomberg

# Liability Elusive for Air Pollution Released During Texas Storms

March 8, 2021, 4:01 AM

- Emissions from Texas facilities rose above maximum limits
- Legal liability for spike difficult to pin down, lawyers say

Holding petrochemical plants and industrial facilities legally accountable for belching millions of pounds of extra pollution into Texas skies in the wake of natural disasters like the recent winter storms that pummeled the state is a difficult task.

Though legal challenges aren't out of the question, lax enforcement and longstanding legal shields offer solid defenses for more than 200 Texas facilities that released benzene, carbon monoxide, and sulfur dioxide during massive power outages caused by last month's deep freeze.

"These emissions were not permitted, but there are terms in almost all clean air permits that acknowledge accidental releases," University of Houston law professor Victor B. Flatt said. "In other words, the regulatory system actually is designed to regulate that."

Estimates from Texas environmental groups like Air Alliance Houston [place](#) the excess emissions violations from last month at 3.5 million pounds.

What's more, Texas Gov. Greg Abbott (R) [green-lit](#) suspension of certain environmental enforcement measures during the storm, [including](#) rules on air pollution control.

## Reporting Emissions

Facilities are required to report the excess emissions within 24 hours—which can be caused by flaring excess gas or malfunctioning equipment during sudden start-up or shut-downs—to the Texas Commission on Environmental Quality, or TCEQ.

Companies must then justify the event was unavoidable and that “prompt action” was taken to mitigate the fallout. TCEQ officials then decide whether to pursue enforcement actions like penalties, the state agency told Bloomberg Law.

“Texas Commission on Environmental Quality is dedicated to supporting air quality for the health and safety of all Texans and does all it can to support air quality within the boundaries of state law,” TCEQ said in a statement.

Though regulations may require facilities to report excess emissions over their permit limits, that doesn’t necessarily mean they can be held liable if provisions in the permits give room for excess pollutants in some situations, said Makram B. Jaber, a partner at McGuireWoods in Washington.

## **Repeat Offenders**

Major emissions releases beyond normal permit levels have become the norm after extreme weather events in Texas, like the pollution dumps reported after Hurricanes [Harvey](#) and [Laura](#).

Some of the same facilities that released excess pollution during Harvey reported violations during Winter Storm Uri as well, according to Air Alliance Houston.

And communities of color and working class neighborhoods at the fenceline of these facilities continue to suffer from these pollution spikes on top of surviving the extreme weather, Bakeyah Nelson, executive director of Air Alliance Houston, said in a statement.

“Corporations repeatedly engage in behaviors that put the most vulnerable communities in harm’s way, and the state rarely holds them accountable, choosing to protect profits over people,” she said.

Valero Energy Corp., one of the companies who reported emission spikes from their Texas refineries, didn’t respond to requests for comment on the excess emissions or calls for increased preparation in the face of extreme weather. Another company who reported leaks, Exxon Mobil Corp, said they had no comment.

Refineries had to shut down quickly to “conserve electricity to allow for power generation for human needs” during the storm, Todd Staples, president of the Texas Oil and Gas Association, said in a statement.

“The industry continues to invest in innovation and technology that protect and improve air quality in Texas and is collaboratively working with partners, neighbors and regulators to support cleaner, stronger, and better Texas communities,” he added.

## **Affirmative Defense**

Texas energy facilities can shield themselves from liability after pollution dumps if they can prove the emissions stemmed from unavoidable or unexpected circumstances, like sudden start ups or shut downs.

This affirmative defense allows facilities to emit with impunity over normal limits, said Elena Craft, senior director for climate and health at Environmental Defense Fund—one of the environmental groups that [analyzed](#) the extra emissions after last month's winter storms.

“That is really kind of a fundamental flaw with how the state environmental agency is regulating these industries,” she said.

A 2015 Obama-era rule sought to quash this defense, but the Trump administration [exempted](#) Texas through another rulemaking finalized in 2019. The move was met by legal [action](#) from environmentalists.

The affirmative defense is supposed to protect companies against civil penalties, but not injunctive relief, noted Robert Ukeiley, senior attorney at the Center for Biological Diversity.

Citizens and groups could potentially bring enforcement actions like citizen suits under the Clean Air Act against polluters to enforce their permits, which would come down to factual disputes over whether companies had taken reasonable steps to anticipate events and stem the pollution.

The challenge there would be proving companies could reasonably prepare for the massive storm that left the state's water and electricity systems in shambles, though Ukeiley said that the argument is not “insurmountable.”

“They had warning, they knew what was coming, they knew that releases would occur,” said Flatt, from the University of Houston. “And their excuse was, ‘Well, we did what we were supposed to do.’”

## **‘Realm of Possibilities’**

The federal Clean Air Act also preserves common law claims in cases where harm is incurred, though tort lawsuits seeking damages would be an uphill battle.

Groups could argue that companies were not sufficiently prepared to control their operations and mitigate pollution despite growing evidence that severe storms are becoming more common thanks to climate change. But in this case, they'd be seeking damages as opposed to just enforcement of the permits.

It's uncharted territory, but not unthinkable.

“Can one imagine this kind of litigation? Sure,” Jaber said. “It's in the realm of possibilities.”

The battle in those potential challenges would be proving the common law claims aren't preempted by federal law.

That's a question that is also being tested in a different context: the thicket of climate misinformation tort litigation brought against oil companies by U.S. cities, states, and counties.

Ultimately, increased enforcement measures would be a more feasible option beyond the courts, said the University of Houston's Flatt.

"I feel like we are moving into new territory," Flatt said. "What we're gonna see, hopefully, in the Biden administration, is increased enforcement through the regulatory system."

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