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ENVIRONMENTAL CONTAMINATION

On August 29, 2005, Hurricane Katrina devastated the Louisiana and Mississippi Gulf Coast region and New Orleans. Less than one month later, Hurricane Rita devastated the southwest Louisiana and southeast Texas coastal areas. In the wake of these historic storms, litigation of historic proportions has already begun.

Litigation following natural disasters is nothing new. What is new and unprecedented in the post-Katrina/Rita situation is the scope of the disasters and how it will impact the social policy issues inherent in the litigation. In cases involving less monumental disasters, such as localized flooding from a heavy rainfall, the social policy issues often are not as apparent or profound. When entire cities and regions are destroyed, however, these policy issues come to the forefront and require careful consideration by the courts.

The following articles address two issues that are already surfacing in pending litigation: the ''act of God'' defense under select environmental statutes, authored by Esteban Herrera Jr.; and the ''act of God defense'' to traditional tort liability, written by Glenn M. Farnet.

In the Wake of Katrina: The 'Act of God' Defense Under Select Environmental Programs Applicable in Louisiana

BY ESTEBAN HERRERA JR.

In the wake of two hurricanes, many Louisiana industries, businesses, and citizens are left with a monumental task of cleaning up the damages caused by the storms. Many Louisianians also face the somewhat unknown future of what potential liability lies ahead under various environmental statutes and programs. After the storms, the State of Louisiana and the federal government temporarily eased many requirements under various environmental regulatory programs so that

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immediate actions could be taken to preserve property and protect lives. Significant questions remain, however, as to how these agencies are going to use their enforcement discretion in the future with respect to events that occurred during and after the storms.

The ''act of God'' defense is found in many state and federal environmental statutes. However, prior to Hurricanes Katrina and Rita, the defense was not extensively litigated. After seeing the power of Category 4 and 5 hurricanes, and the destruction they can cause, state and federal agencies and courts likely will need to address whether and in what circumstances will the Act of God defense relieve potential liability under various spill response statutes and programs for events caused by these storms.

The following is a brief review of the act of God defense under select environmental statutes applicable in Louisiana.

A. Review of Act of God Defense Under Select Federal Statutes

1. OPA

The Federal Oil Pollution Act[2] (''OPA'') generally provides that a responsible party for a vessel or a facility is liable for removal costs and damages resulting from a discharge of oil, or a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines.[3] OPA provides for only three defenses to imposition of liability for removal costs and damages, one of those being an ''act of God'' defense.[4] OPA defines the term ''act of God'' to mean an ''unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight.'' OPA further provides that the defense is available only if the ''discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by'' the act of God.[5]

One case interpreting the OPA act of God defense is *Apex Oil Company v. United States of America*, 208 F. Supp. 2d 642 (E.D. La. 2002). In *Apex Oil Company*, several barges broke loose from their tow and collided with spans of the Mississippi River bridge, resulting in the spill of approximately 840,000 gallons of slurry oil into the river. The pushboat operator attempted to recover from the Oil Spill Liability Trust Fund response costs it incurred in responding to the spill. The claim was denied by the agencies managing the fund, as well as the federal court in New Orleans. The operator argued that the 1995 flood in the Mississippi River had caused ''strong and unpredictable currents in the Vicksburg, Mississippi area,'' and therefore constituted an act of God under OPA. In rejecting the argument, the court found that the conditions of the river were both anticipated and predicted. The court also said that ''apparent'' causes of the incident were the fault of the operator in using an underpowered tug and in attempting to negotiate the bridge in the face of intensifying currents. [6]

2. CERCLA

Under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''),[7] certain persons can be found liable for remediation of releases or threatened releases of hazardous substances.[8] CERCLA provides, however, that if the ''release or threat of release of a hazardous substance and the damages resulting therefrom'' is caused solely by an act of God, there is no liability. CERCLA's definition of an ''act of God'' is identical to OPA's definition of the term. The legislative history on this particular defense in CERCLA may be instructive as to its scope:

> The defense for the exceptional natural phenomenon is similar to, but more limited in scope than, the traditional ''act of God'' defense. It has three elements: the natural phenomenon must be exceptional, inevitable, and irresistible. Proof of all three elements is required for successful assertion of the defense. The ''act of God'' defense is more nebulous, and many occurrences asserted as ''acts of God'' would not qualify as ''exceptional natural phenomenon.'' For example, a major hurricane may be an ''act of God,'' but in an area (and at a time) where a hurricane should not be unexpected, it would not qualify as a ''phenomenon of exceptional character.''[9]

In fact, most reported cases applying the defense have not allowed it to be used to defeat liability under the statute. For example, in *U.S. v. Barrier Industries, Inc.*, 991 F. Supp. 678 (S.D.N.Y. 1998), the court held that ''an unprecedented cold spell'' was not an act of God responsible for the bursting of pipes that led to a spill of a hazardous substance. The court found that the government had proven, with ''substantial undisputed evidence,'' that ''numerous other factors antedating the cold weather . . . causally contributed to'' the incident.[10]

In *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987), the court concluded that heavy rainfall was ''not the kind of 'exceptional' natural phenomenon'' to which the ''act of God exception applies.'' The court held that ''the rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels.''[11] Again, the court engaged in a comparative fault analysis and found the defendant's actions or inactions to be a causal factor in the incident.

In *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648 (M.D. Pa. 1995), *affirmed*, 96 F.3d 1434 (3rd Cir. 1996), approximately 2 million gallons of oily wastes containing hazardous substances were dumped down an air shaft or borehole leading to a network of coal mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Penn., in the late 1970s. In September 1985, heavy rains from Hurricane Gloria caused the re-

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[2] 33 U.S.C. 2701-2761.

[3] 33 U.S.C. 2702(a).

[4] 33 U.S.C. 2703.

[5] 33 U.S.C. 2703(a). Moreover, the act of God defense is not available if the party failed to report the incident as required by law, failed to ''provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities,'' or failed to comply with certain orders issued under the Clean Water Act or the Intervention on the High Seas Act ''without sufficient cause.'' 33 U.S.C. 2703(c).

[6] 208 F. Supp. 2d at 657.

[7] See 42 U.S.C. 9601.

[8] 42 U.S.C. 9607(a).

[9] H. R. Rep. 99_253(IV), 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 3068, 3101, 1985 WL 25940.

[10] 991 F. Supp. at 679.

[11] *Id.*

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lease of approximately 100,000 gallons of oily waste contaminated with hazardous substances from one of the tunnels into the river. The defendant argued that the release was caused by a torrential downpour of rain associated with the hurricane, and that the hurricane was ''unanticipated'' that far north and inland. Rejecting the argument, the court found that the hurricane was not the sole cause of the release. The court blamed the defendant for unlawfully dumping the wastes into the mine shafts, finding that ''the exercise of due care or foresight would have militated against dumping hazardous wastes into mine workings that inevitably lead to such a significant natural resource as the Susquehanna River.''[12]

Finally, in *United States v. M/V Santa Clara*, 887 F. Supp. 825 (D.S.C. 1995), the court found that the act of God defense was not available to defeat claims being pursued under CERCLA against the defendant for remedial costs incurred as a result of spills from drums of magnesium phosphide and drums of arsenic trioxide. The ship had been ''buffeted about by raging seas'' off the coast of New Jersey resulting in hundreds of barrels containing these hazardous substances being lost overboard. The court said the bad weather had been predicted by the National Weather Service and known by the crew.

The court found that ''even if the evidence demonstrated that the storm was worse than predicted,'' the storm was not the type of ''unanticipated grave natural disaster'' or ''other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.''[13]

3. Clean Water Act—Oil and Hazardous Substance Spills

In certain circumstances, the federal Clean Water Act (''CWA'') imposes liability on the owner or operator of a vessel or facility for removal costs incurred by the government in response to a spill of oil or hazardous substances into the navigable waters.[14] An ''act of God'' can be a defense to this liability. The CWA defines an act of God to be ''an act occasioned by an unanticipated grave natural disaster.''[15]

[12] 892 F. Supp. at 658.
[13] 887 F. Supp. at 843.
[14] See, *e.g.*, 33 U.S.C. 1321(f).

B. Review of Act of God Defenses Under Select Louisiana Environmental Statutes

1. Louisiana's ''Superfund'' Statute

The Louisiana Environmental Quality Act (''LEQA) sets forth many of the environmental programs enacted by the Louisiana Legislature. Chapter 12[16] of LEQA contains Louisiana's version of CERCLA and imposes liability on certain persons for remedial costs incurred by the state in responding to discharges of hazardous waste or hazardous substances that present an imminent and substantial endangerment to health or the environment.[17] An act of God is a defense to liability under Chapter 12 of LEQA. However, LEQA does not define the term ''act of God,'' and there are no reported cases interpreting how the defense is to be applied in particular cases. Further, unlike CERCLA and OPA, Chapter 12 does not provide that the incident has to be caused ''solely'' by the act of God in order for the defense to apply.

2. The Louisiana Oil Spill Prevention and Response Act

The Louisiana Oil Spill Prevention and Response Act[18] imposes liability in certain circumstances for response costs incurred by the state in responding to oil spills. The Act also requires a responsible person to notify the state of the spill and take certain remedial actions. Interestingly, the act provides that the person will not be liable if the discharge resulted ''solely from an act of God. . .'' **or** ''an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act or omission.''[19] Unfortunately, there are no cases interpreting these defenses or explaining how the two are different.

C. Conclusions

Many hurdles likely will continue to exist with respect to the application of the act of God defense under these and other environmental statutes and programs. It is anticipated that agencies and courts will continue to closely inspect a person's actions or inactions, looking for contributing causes to an incident. Still, these statutes and past events leave room to argue whether governmental actions should be instituted to recover response or remedial costs resulting from the effects of Hurricanes Katrina and Rita. Here are some thoughts:

- Could a person or facility truly have done much if anything against the power of these two storms: their sustained winds and powerful storm surges?
- Did other environmental factors (e.g., wetlands loss, subsidence, and erosion) beyond the defendant's control alter or affect the defendant's ability to prevent an incident from happening?
- If a facility did what it could to ''button down the hatches,'' are courts still going to find that 120-150

[15] 33 U.S.C. 1321(12).
[16] La. Rev. Stat. 30:2271-2283.
[17] See *e.g.*, La. Rev. Stat. 30:2276.
[18] La. Rev. Stat. 30:2451, *et seq*.
[19] La. Rev. Stat. 30:2481.

mph sustained winds and/or 15-20 foot storm surges are not ''exceptional natural phenomenon?''

- Did Congress really mean to say that ''major hurricanes'' are not a ''phenomenon of exceptional character?'' What about two major hurricanes within one month of each other?
- Many facilities along the Louisiana coast prepared for the effects of hurricanes. How much preparedness are courts going to find is sufficient for a finding that the defendant exercised reasonable care prior to the event? What standards are going to be used in reviewing those actions?

These and many other questions remain in the aftermath of Hurricanes Katrina and Rita.

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