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WILL HURRICANE KATRINA FURTHER DEFINE THE "ACT OF GOD" DEFENSE?

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I. Introduction

Hurricane Katrina was perhaps the worst natural disaster in American history.

Hurricane Katrina made landfall at 6:10 am on Monday August 29, 2005, in lower Plaquemines parish near the town of Buras, as a Category Four hurricane, with sustained winds of over 140 miles per hour. Only hours earlier, the National Hurricane Center reported that Katrina had been recorded as Category Five storm, then the third strongest Atlantic storm in recorded history, with 175 miles per hour sustained winds.

The National Oceanic and Atmospheric Administration (NOAA) later reported that Katrina-related storm surges topped 25 feet.[2]

Katrina's tidal surge and winds destroyed nearly everything in its path as it moved from Buras northward. It passed just east of New Orleans and then made a second landfall on the southwest coast of Mississippi, unleashing another massive tidal wave and destroying nearly everything there for miles inland. As Katrina passed New Orleans and into Mississippi, its counter-clockwise winds pushed Lake Pontchartrain's waters southward toward New Orleans.

The levees surrounding New Orleans breached or failed, flooding approximately eighty percent of the city with flood waters up to twenty feet deep.[3] Southeast Louisiana and southern Mississippi suffered widespread catastrophic damage.

Less than three days before Katrina made landfall, the National Hurricane Center had projected landfall in the eastern portion of the Florida panhandle, several hundred miles to the east of the actual landfall. It was not until late evening on Friday August 26th that forecasters revised their projections to target the New Orleans area as the center of probable landfall. Thus, emergency preparedness officials in Southeast Louisiana had to stage the Exodus of over one million people in a period of less than 48 hours. Virtually all of Southeast Louisiana was ultimately subject to mandatory evacuation orders, leaving homeowners and businesses precious little time to batten down, secure and leave. In the end, the overwhelming force of Katrina made nearly useless many of the precautions taken.

Nearly four weeks later, another major storm, Hurricane Rita, tore through the Gulf on a track two hundred miles east of Katrina's, this time pounding ashore along the coast lines of Southwest Louisiana and Southeast Texas.

The Mineral Management Service (MMS) later reported that 3050 of the 4000 platforms it administers in the Gulf were in either Katrina's or Rita's path. More than one hundred offshore facilities were destroyed and another fifty platforms suffered serious damage. Also, MMS reported on October 4, 2005, a week after Rita, that 90% of Gulf oil production and

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[2] *See,* Technical Report 2005-01, NOAA's National Climatic Data Center, *Hurricane Katrina, A Climatological Perspective, Preliminary* Report, October 2005.

[3] *Id.*

72% of Gulf gas production was still shut in.[4]

Inland, Katrina knocked out of commission refineries in the New Orleans area; Rita did the same in the Lake Charles, Louisiana, and Beaumont, Texas areas. Near New Orleans, oil storage tanks were pushed – or floated off – from their bases, or washed away or totally crushed or otherwise destroyed, some not to be found. Tank contents were spilled out and washed by Katrina's surges hundreds of feet and, in some cases, even a mile away.

The U.S. Coast Guard reported that along the Mississippi River there were six major spills of over one hundred thousand gallons (one of over one million gallons), three medium spills of over ten thousand gallons and 127 minor spills; all totaled – Katrina accounted for more than eight million gallons spilled and eight miles of shoreline impacted.[5] Following the disaster, landowners and fisherman filed class action lawsuits against the facilities who suffered the releases.

Who is responsible for these spills? Could facility operators have prevented these spills? Could they have taken additional precautions? And, would those additional steps have protected those tanks such that the tanks – and the resulting spills – would have been spared Katrina's wrath? Was there anything anyone could have done to prevent oil spills in the face of Katrina? Or, were the spills a result of an act of God?

This article reviews the judiciary's narrow interpretation of the "Act of God" defense under federal legislation, state law, and maritime law and questions, in light of the unique circumstances of Hurricane Katrina, whether courts may reconsider their reluctance to apply the defense to Katrina-related spills.

II. THE "ACT OF GOD" DEFENSE

Federal courts have for years narrowly construed the "Act of God" defense established in federal environmental statutes. Although Congress has provided for the defense, courts have routinely refused to apply it to spills and releases resulting from extraordinary events by finding some act of human agency as a contributory cause of the event at issue. Maritime and Louisiana state law, however, have given a somewhat more liberal application of the defense.

A. Common Law Application

The "Act of God" Defense has been accepted by courts in negligence and strict liability cases for more than three centuries. English common law addressed the "Act of God" defense in the case of *Coggs v. Bernard*,[6] wherein Justice Powell reasoned that a bailee is liable for damage resulting from his neglect, "but not such accidents and casualties as happen by the act of God…." Nevertheless, the distinction between acts of God and negligent acts of man has been the subject of much debate for centuries. Early common law jurisprudence wrestled with this distinction in cases ranging from strict liability of common carriers to cases involving reservoir failures. In general, British jurists and American counterparts have attempted to limit acts of God to those events truly without human fault.[7]

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[4] *See*, Mineral Management Service Press Release, "*Interior Secretary Gale Norton Reports on Gulf of Mexico Energy Status*," October 4, 2005.

[5] *See*, US Coast Guard Press Release, "*Southeast Louisiana Post-Hurricane Pollution Recovery Continues*," October 21, 2005.

[6] *Coggs v. Bernard*, 92 Eng. Rep. 107, 108 (1703).

[7] *Nugent v. Smith*, 1 C.P.D. 423, 444 (1876) (an accident must be caused exclusively and directly by natural causes, and it "could not have been

As early as 1868, American courts have construed the "Act of God" defense as excluding the idea of human agency.[8] The court stated it is not an act of God, "if it appears that a given loss has happened in any way through the intervention of man."[9] Overall, the "Act of God" defense has generally failed in American jurisprudence when the event reasonably should have been anticipated in light of past knowledge, or if antecedent negligence on the part of the defendant worsens the situation.[10]

B. Maritime Law

Maritime law recognizes the "Act of God" defense in the absence of human fault. The "Act of God" defense applies only when: (1) the accident is due directly and exclusively to natural causes without human intervention, and (2) no negligent behavior by the defendants contributed to the accident.[11] In *The Majestic*,[12] the United States Supreme Court defined the act of God as "a loss happening in spite of all human effort and sagacity." Courts have further expanded the definition of an "Act of God" to include "any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented;" and "a disturbance…of such unanticipated force and severity as would fairly preclude charging…[Defendants] with responsibility for damage occasioned by the [Defendant's] failure to guard against it in the protection of property committed to its custody."[13] Maritime law, however, limits the application of the "Act of God" defense to "events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."[14]

Maritime cases have recognized hurricanes as acts of God.[15] The "Act of God" defense under federal admiralty law as applied to hurricanes was explained in *Skandia Insurance Co. v. Star Shipping AS*:[16]

> Notably, hurricanes, such as Hurricane Georges, are considered in law to be an "Act of God." Even though storms that are usual for waters and the time of year are not "Acts of God," a hurricane that causes unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge, is a classic case of an "Act of God." However, forecasting the tracks, speeds and tidal surges of a hurricane is one of the most challenging and difficult tasks encountered by meteorologists, and despite aircraft, land, and shipboard reconnaissance, weather satellites, and other data sources, exact hurricane paths and associated flooding are rarely predicted with precision.[17] Instead, hurricane tracks exhibit "humps, loops,

prevented by any amount of foresight and pains and care reasonably to be expected from him.").

[8] *Polack v. Pioghe*, 35 Cal. 416 (1868).

[9] *Id*. at 423.

[10] Binder, Denis, "Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law" 15 Rev. Litig. 1, 1996.

[11] *Terre Aux Boeufs Land Co., Inc. v. JR Gray Barge Company*, 00-2754, (La.App. 4 Cir. 11/14/01); 803 So. 2d 86.

[12] 166 U.S. 375 (1897).

[13] *Terre*, supra, at 91.

[14] *Id.*; (citing, *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir. 1989).

[15] *Id*; (citing, 1A C.J.S. Act of God at 757 (1985); and *Compania De Vapores Inso S.A. v. Missouri Pacific R.R. Co.*, 232 F.2d 657, 660 (5th Cir. 1956).

[16] 173 F.Supp.2d 1228 (S.D.Ala. 2001)

[17] *See William J. Kosch, Weather for the Mariner*, 151 (2d ed. 1977).

> staggering motions, abrupt course and/or speed changes, and so forth [,]" which in turn, alter flood predictions. *Id.* As a result, determining liability for losses resulting from "Acts of God" are highly fact-specific and the court's ultimate conclusions should turn on whether the weather conditions were foreseeable as "U.S. courts do not find foreseeable risks to be perils of the sea."[18]

A defendant may be found negligent but still be exonerated from liability of the "Act of God" if it would have produced the same damage, regardless of that negligence, because the defendant's negligence was not the proximate cause.[19] Accordingly, regardless of the type of "heavy weather," "it is certain that human negligence as a contributing cause defeats any claim to the 'Act of God' immunity [,]" because an "Act of God" is not only one which causes damage, but one as to which reasonable precautions and/or the exercise of reasonable care by the defendant, could not have prevented the damage from the natural event.[20] Indeed, an "Act of God" will insulate a defendant from liability only if there is no contributing human negligence and the defendant has the burden of establishing that weather conditions encountered constituted an uncontrollable and unforeseeable cause by "Act of God."[21]

In *Terre Aux Boeufs Land Co., Inc. v. JR Gray Barge Company*,[22] the Louisiana Fourth Circuit agreed with the trial court that Hurricane George was an act of God that caused a barge to go aground onto landowner's property. The appellate court agreed that "no amount of prudence or care on the part of the defendants could have prevented the property damage by the stranding of the barge on [plaintiff's] property."[23]

U.S. v. Pittsburgh Plate Glass Company[24] is another example in which the court determined a hurricane was an act of God. The United States brought suit to recover expenses incurred for removal of sunken barges. The court upheld the District Court's ruling that Hurricane Besty was the inevitable cause of the sinking, and no human skill or precaution could have prevented it. The court found no evidence indicating negligent mooring, tending or surveillance of barge.

Similarly, another court found Hurricane Betsy to be an act of God in *In the Matter of Marine Leasing Services*.[25] There, the winds were reportedly over ninety miles per hour in the Baton Rouge area during the storm and hundreds of barges were set loose on the Mississippi River. The court indicated that no precaution or preparation which cargo carriers could have reasonably been expected to make would have prevented the sinking of the barges.[26] In fact, the court noted, "No fleet of barges, no matter how well secured, was able to withstand the fury of the storm."[27]

C. Louisiana Tort law

The Louisiana Supreme Court has defined an act of God as, "a providential occurrence or extraordinary manifestation of the forces

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[18] *See* *Thyssen, Inc. v. S.S. Eurounity,* 21 F.3d 533, 539 (2d Cir. 1994).

[19] *See* *Warrior,* 864 F.2d at 1553 (citing to *Glisson v. City of Mobile,* 505 So.2d 315, 319 (Ala.1987)).

[20] *See Gilmore and Black, The Law of Admiralty* at 163-64.

[21] *See, Freedman & Slater, Inc. v. M.V. Tofevo,* 222 F.Supp. 964 (S.D.N.Y.1963).

[22] *Supra*, note 8.

[23] *Id.*, at 93.

[24] 421 F.2d 255 (5th Cir. 1973).

[25] 328 F.Supp. 589 (E.D. La. 1971).

[26] *Id.*, at 597.

[27] *Id.*

of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care or by the use of those means which the situation renders reasonable to employ."[28] Generally, if an injury occurs as a result of an act of God, the defendant is ordinarily not responsible for failing to take precautions against an extraordinary force. Nevertheless, if an act of God is concurrent with a defendant's misconduct, which constitutes a "substantial factor," the defendant may be liable.[29]

Louisiana courts have recognized inclement weather to be acts of God, including storms with winds of 35 to 40 miles per hour.[30] Yet, any negligence which constitutes a "substantial factor" will bar the defense. In *Southern Air Transport v. Gulf Airways*,[31] defendant's plane rolled along a ramp and collided with and damaged plaintiff's plane during a severe thunderstorm.[32] The Louisiana Supreme Court found that the act of God, i.e, the thunderstorm, was not the sole cause. Rather, the court concluded that the defendant should have set the parking brakes to prevent damage to the other plane. Plaintiff provided expert testimony that opined that the plane would not have rolled if the brakes would have been set.

D. Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[33] was enacted to address the releases of hazardous substances. Pursuant to CERCLA, the EPA may take actions to clean up hazardous substances that have been released or where they are threatened to be released. CERCLA permits the federal government to mandate private parties to assume cleanup actions. However, those who incur clean up costs may seek recovery of those costs from liable parties, as well as, contribution between private parties.

CERCLA imposes liability for potentially responsible parties (PRPs), which include the following:

> Present owners and operators of the facility.
>
> Past owners or operators who owned or operated the facility at the time hazardous substances were deposited or disposed of at the facility.
>
> Any person who by contractual agreement or otherwise arranged to have waste taken to a facility for disposal or treatment where a release or threatened release occurs.
>
> Any person who selects and transports hazardous waste to a facility for disposal or treatment.

Pursuant to CERCLA, an "Act of God" is defined as "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."[34] In order to succeed under the "Act of God" defense, the potentially responsible party must prove by a preponderance of the evidence that a

[28] *Southern Air Transport v. Gulf Airways*, 40 So. 2d 787 (La. 1949).

[29] *Sarden v. Kirby*, 660 So. 2d 423 (La. 1995).

[30] *LM Barnett v. Duraso*, 479 So. 2d 675 (La.App. 3 Cir. 1985); *Fournier v. City of New Orleans*, 533 So. 2d 1044 (La.App. 4 Cir. 1989).

[31] *Supra*, note 20.

[32] *Id.* at 789.

[33] 42 U.S.C. §9601, *et seq*.

[34] 42 U.S.C. §9601(1).

natural disaster/phenomenon was the sole cause of the occurrence and ensuing damage. It must also prove that the innocent defendant acted with due care under the circumstances.[35] The difficulty in establishing the defense is that a grave natural disaster must be the *sole* cause of the damage and defendant could not have reasonably anticipated the event.[36]

In *Apex Oil Company, Inc. v. U.S.A.*,[37] the District Court provided guidance on the Congressional intent of the "Act of God" defense in CERCLA:

> Congressional intent is clearly that the "exceptional natural phenomenon" (i.e. the act of God) defense be construed as much more limited in scope than the traditional common law "Act of God" defense. The discharger's burden of proof on the defense of "exceptional natural phenomena" is much more onerous than that required for common law or traditional "act of God" defense. The legislative history of CERCLA includes the following explanation regarding the *singular* "defense for exceptional natural phenomena." 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.'[38]

CERCLA's terms are broadly defined. Courts have broadly construed the statute in order to give effect to its remedial purposes. Nevertheless, an otherwise responsible party may escape liability upon a showing by preponderance of the evidence that the release and the resulting damages were caused solely by an act of God, act of war, or the acts or omission of a third party unrelated to the defendant.[39] As the following cases illustrate, proving the "Act of God" defense is a difficult task to accomplish.

In *U.S. v. Alcan Aluminum Corp.*,[40] the defendant's used oil emulsion was commingled with other oily wastes containing hazardous substances, which discharged from a mine tunnel into the Susquehanna River in the wake of Hurricane Gloria. Defendant argued that Hurricane Gloria caused one hundred thousand gallons of oily waste contaminate to be discharged into the river. The court rejected Alcan's "Act of God" defense for three reasons. First, no reasonable fact finder could conclude that Hurricane Gloria was the sole cause of the release and resulting response costs.

The court reasoned, "Two million gallons of hazardous waste were not dumped into the borehole by an act of God, and were it not for the unlawful disposal of this hazardous waste Hurricane Gloria would not have

[35] 42 U.S.C. §9607(b).

[36] *See*, *U.S. v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (defense rejected because act of God not sole cause); *U.S. v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 658 (M.D. Pa. 1995); *U.S. v. Barrier Industries, Inc.*, 991 F. Supp. 678, 679 (S.D.N.Y. 1998) (spills of hazardous substances caused by bursting of pipes occasioned by unprecedented cold spell were not caused by act of God).

[37] 208 F.Supp. 642 (E.D. La. 2002)

[38] *Id.* at 652-653 (emphasis added) (citing H.R. Rep. 99-253(IV) 1986 *U.S.C.C.A.N*. 3068, 3100)

[39] 42 U.S.C. §9607.

[40] 892 F. Supp. 648 (M.D. Pa. 1995), *judgment aff'd*, 96 F.3d 1434 (3d Cir. 1996).

flushed 100,000 gallons of this chemical soup into the Susquehanna River."[41] Second, the court determined that the effects of Hurricane Gloria could have been prevented or avoided by the exercise of due care or foresight. The court justified its view by stating, "[The] exercise of due care or foresight would have militated against dumping hazardous wastes into a mine tunnel that inevitably led to such a significant resource as the Susquehanna River."[42] Third, the court followed the decision of *U.S. v. Stringfellow,*[43] ruling, "heavy rainfall is 'not the kind of 'exceptional' natural phenomenon to which the act of God exception applies.'"[44]

The Court found contributing human negligence in the very method in which the waste was discarded. Essentially, the court's denial of the "Act of God" defense was twofold. First, the court based its decision upon the unlawful disposal of the hazardous waste -- but for the unlawful disposal, Hurricane Gloria would not have flushed one hundred thousand gallons of "chemical soup" into the river. The dumping also could have been avoided if the defended had exercised due care and foresight by not dumping hazardous wastes into a mine tunnel that led to the river. Second, heavy rainfall was not considered an "exceptional natural phenomenon" required by the "Act of God" defense.

In *U.S. v. Stringfellow*[45], the court held that heavy rainfall was not a natural disaster such that it could be considered an act of God to avoid liability for the release of hazardous substances. The court found that the rains were not the kind of "exceptional" natural phenomenon to which the "Act of God" defense applies.[46] The Court stated:

> Heavy rainfall was not an exceptional natural phenomenon and was not "act of God" within the meaning of defenses to payment of response costs incurred as result of release of hazardous substance from toxic waste disposal site, where rains were foreseeable based on normal climatic conditions, and where harm caused by rain on toxic waste disposal facility could have been prevented through design of proper drainage channels.[47]

The Court struck down the "Act of God" defense based upon every element of its definition provided in CERCLA. The Court denied the defense for the following reasons: foreseeability of the rain; the extent of storm; and other, multiple causes of the release.[48] The rainstorm was not of an "exceptional" natural phenomenon to which the "narrow" "Act of God" defense applies, and the rains were foreseeable.[49] The Court alluded to other causes of the release by stating that the storm was not the sole cause, but it failed to identify the other causes. Furthermore, the presence of human negligence can be inferred from the Court's reasoning that the harm could have been prevented by the design of proper drainage.

In *U.S. v. M/V Santa Clara*,[50] the "Act of God" defense was deemed inapplicable where containers of arsenic trioxide and magnesium phosphide were lost overboard during a storm. The Court relied on evidence that the National Weather Service predicted inclement weather offshore, and

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[41] *Id*. at 658.

[42] *Id.*

[43] 783 F.2d 821.

[44] *Id.*, (citing 661 F.Supp. 1053, 1061 (C.D. Cal. 1987)).

[45] 661 F.Supp. 1053, 1061 (C.D. Cal. 1987).

[46] *Id.* at 1061.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] 887 F. Supp. 825 (D.S.C. 1995).

such information was known by the captain and crew prior to their departure.[51] The Court went one step further by stating, "[e]ven if the evidence demonstrated that the storm was worse than predicted, this court finds that the storm the M/V Santa Clara I encountered was not the type of 'unanticipated grave natural disaster' or 'other natural phenomenon,' necessary for the "Act of God" defense.[52]

Jurisprudence illustrates an interpretation of "Act of God" defense so narrow that courts could continuously circumvent the defense by finding some act by man which would negate the "sole" cause requirement. Clearly, it is difficult to escape liability on such a defense. Moreover, with advanced technology and meteorology, inclement weather is foreseeable to a certain extent. Albeit hurricanes are generally foreseeable, the exact path and strength are not. In fact, they are highly unpredictable. Nevertheless, the jurisprudence interpreting CERCLA makes it difficult for a defendant to present a successful argument challenging foreseeability. The success of the "Act of God" defense hinges on the underlying facts.

E. Oil Pollution Act

The Oil Pollution Act of 1990 ("OPA")[53] addresses a variety of issues associated with preventing, responding to, and paying for oil pollution. OPA provides, in pertinent part:

[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon navigable waters or adjoining shorelines … is liable for the removal costs…that result from such incident.[54]

OPA allows a PRP the right to seek reimbursement from the Oil Spill Liability Trust Fund, for the removal costs and damages incurred, just as CERCLA provides a method of reimbursement from the Superfund. In addition, an act of God is an enumerated affirmative defense.[55] The act of God definition in OPA is identical to that of CERCLA: "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."[56]

In *Apex Oil Company v. US*, the court compared the OPA with CERCLA and found both to be strict liability statutes that, absent fault or exercise of due care, there is no defense.[57] In *Apex*, the oil company brought an action against the U.S. and appealed the denial of its reimbursement claim of an oil spill clean-up, which stemmed from an accident involving the company's barge. The company claimed that a 1995 flood, along with exceptionally strong and unpredictable currents in the Vicksburg area, constituted an unanticipated grave natural disaster or other natural phenomenon, unavoidable even with the exercise of due care and foresight.[58]

[51] *Id.,* at 843.

[52] *Id*.

[53] 33 U.S.C. § 2702, *et seq*.

[54] 33 U.S.C. § 2702(a)

[55] 33 U.S.C. § 2703(a) (A responsible party will not be held responsible for removal costs and damages if that party is able to establish, by a preponderance of the evidence, that the incident or threat was caused solely by an act of God, an act of war, or the act or omission of a third party).

[56] 33 U.S.C. § 2701(1).

[57] 208 F. Supp. at 653.

[58] *Id.* at 645.

The National Pollution Fund Center ("NPFC") rejected Apex's defense, and the district court upheld the decision. NPFC cited a number of reasons for denying Apex's claim for recovery costs, concluding that Apex's decisions played some part in the allision. The analysis focused on the following pertinent factors: (1) whether the circumstances constituted an unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character; (2) whether the effects of the natural phenomenon could have been prevented by the exercise of due diligence and foresight; and (3) whether the grave natural disaster or other natural phenomenon was the sole cause of the discharge. In the final analysis, Apex failed all three inquiries.[59]

NPFC ultimately held that Apex could have prevented or avoided the problems at the allision site during the flood stage by utilizing a higher-powered tug that could safely maneuver the strong currents that were predicted.[60] Furthermore, even assuming that the flood and strong associated currents were an act of God, the NPFC director concluded that Apex was not entitled to recover because it failed to show that the damage was caused entirely by an act of God. The NPFC observed:

> Apex chose not to interrupt its normal navigation in the face of floods, which Apex admitted it knew about. Further, Apex chose to transit the flotilla into this riskier environment with an underpowered tug to tow the barges. This underpowered tug was the proximate cause of the discharge of oil.… The facts reflect that the Apex decision to navigate into higher and faster waters with an underpowered tug contributed to the discharge.[61]

Apex is yet another decision in which the "Act of God" defense was denied on the basis that the negligent act of man contributed to the accident, despite the extraordinary event. Just as courts interpreted the "Act of God" defense pursuant to CERCLA, courts addressing OPA's "Act of God" defense are equally reluctant to allow parties to escape liability and to recover costs from the Congressionally-established cleanup fund, finding that the extraordinary event was not the "sole" cause of the release.

F. The Federal Water Pollution Control Act (Clean Water Act)

The Federal Water Pollution Control Act (also known as the "Clean Water Act") ("CWA")[62] establishes the basic structure for regulating discharges of pollutants into the waters of the United States. Prior to the Exxon Valdez spill and the ensuing enactment of OPA, section 1321 of the CWA governed the release of oil into US waterways.

Section 1321 of the CWA imposes strict liability upon an owner or operater of a facility or vessel unless it can prove that one of the exceptions applies.[63] The CWA defines an act of God as "an act occasioned by unanticipated grave natural disaster."[64] To qualify as an "Act of God" defense the alleged occurrence must satisfy each element of the definition: (1) unanticipated, (2) grave, (3) natural, and (4) disaster. Unlike CERCLA, the CWA third party

[59] *Id.*, at 647.

[60] *Id.*

[61] *Id.*, at 648.

[62] 22 U.S.C. §1251.

[63] *Sabine Towing & Transp. Co. v. United States*, 229 Ct.Cl. 265, 268, 666 F.2d 561 (1981).

[64] 33 U.S.C. §1321(a)(12).

defense does not include due care and negligence limitations.[65]

In *Sabine Towing & Transportation Co., Inc. v. United States*,[66] the court held that neither a spring runoff of melted snow, nor an unknown water object which was struck by a vessel was an act of God so as to relieve liability for oil spill cleanup costs. The Court, in its reasoning, relied on Congressional intent to assess the extent to which the act of God should be recognized as a defense. Ultimately the court determined that, "Common-law cases on acts of God, to the extent that they embody judicial decisions on allocating the burden of mishap, should not be used to determine the allocation that Congress intended in the 'act of God' exception to liability for oil spillage in navigable water."[67] The court looked to Congressional committee notes that stated:[68]

> The term "act of God" is defined to mean an act occasioned by an unanticipated grave natural disaster. This definition varies from that of the Senate definition and, under this definition, only those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict would be included. Thus, grave natural disasters which could be anticipated in the design, location, or operation of the facility or vessel by reason of historic, geographic, or climatic circumstances or other phenomena would be outside the scope of the owner's or operator's responsibility.

Based on the foregoing, the court ultimately held that the "Act of God" defense as defined in the CWA is to be strictly construed.[69] As such, an "act of God" is applicable if it results solely from a grave natural disaster and if that grave natural disaster is wholly unanticipated.

The Court discussed each requisite of the act of God definition. It interpreted the CWA as requiring the "disaster" in question to be the cause and not the effect of an accident.[70] Furthermore, the court reasoned that "unanticipated" within the definition of act of God exception cannot be read to cover regular and frequent conditions, like freshets, where the dangers are expected and where the losses are normally worked into the cost of doing business.[71]

In *Liberian Poplar Transports, Inc. v. United States*,[72] oil discharged into a river when a thunderstorm occurred as oil was transferred to vessel. The captain of the vessel checked the weather conditions prior to the commencing of transfer and found no reports of severe weather.[73] Thereafter, the crew did not monitor the radio for weather conditions but contended that a third mate on watch observed no signs of the impending storm as late as thirty minutes before the storm hit.[74]

The thunderstorms were not deemed to come within the CWA act of God exception. In its reasoning, the Court first turned to the statute, legislative history, and case law construing the "Act of God" defense of the

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[65] *Lincoln Props v. Higgins*, 823 F. Supp. 1528 (E.D. Cal. 1992).

[66] *Supra*, note 51.

[67] *Id.*, at 564.

[68] *Id.*, citing Conf. Rep. No. 940, 91st Cong., 2d Sess., reprinted 1970, *U.S. Code Cong. & Ad. News* 2712, 2722.

[69] *Id.*

[70] *Id.*, at 565.

[71] *Id*.

[72] 26 Cl.Ct. 223 (1992).

[73] *Id*., at 224.

[74] *Id*.

CWA.[75] According to legislative history an act of God encompassed:[76]

> Only those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict….Thus, grave natural disasters which could not be anticipated in the design, location, or operation of the facility or vessel…would be outside the scope of the owner's or operator's responsibility.

The court reasoned that if the crew had monitored the radio for weather conditions they could have anticipated and taken precautions against storm.[77] The plaintiff's contended that the storm was not well forecasted, not visually foreseeable and not anticipated by the ship's watch. The court, nevertheless, explained the anticipation inquiry is not a subjective test.[78] It noted that the storm was forecasted at least a half-hour before it hit and a storm watch was issued an hour before it struck. Therefore, the Court concluded that storm could have been anticipated, which negated the "Act of God" defense.

Another CWA case is *Virgin Islands Water and Power Authority v. U.S.*,[79] wherein the "Act of God" defense was raised based upon Hurricane Hugo. Hurricane Hugo struck the Virgin Islands causing major damage. Virgin Islands Water and Power Authority ("VIWPA") filed suit for reimbursement of removal expenses incurred when a fuel leaked into Christian Harbor. VIWPA contended that Hurricane Hugo caused a retaining wall encircling a fuel tank to collapse, which caused a six-inch storm drain pipe to strike and break the tank's inline thermometer, thereby allowing fuel to escape through the broken thermometer.[80] Fourteen thousand barrels of Number Six fuel oil spread to the harbor. Although a court did not rule on the "Act of God" defense, it stayed the federal proceeding for further administrative review. Subsequently, reportedly, the government and VIWPA settled with the government issuing a reimbursement for costs incurred.

With the exception of the duty of care requirement provided in CERCLA and OPA, the "Act of God" defense is interpreted no differently under CWA. The act of God must be the "sole" cause of the release, and each of the four requisites – unanticipated, grave, natural, and disaster – must be established.

III. CONCLUSION: HOW WILL COURTS ADDRESS CLAIMS RELATED TO HURRICANE KATRINA?

Until now, the "Act of God" defense has met with both resistance and skepticism by courts and the federal administrative tribunals charged with guarding the federal spill funds. Courts have been reluctant to allow defendants in commerce to avoid liability for harm caused by that commerce to the environment or to others' property. In cases involving commerce, the courts have shifted the burden heavily upon the commercial actor, almost creating a strict liability regime.

Some human agency can be found in virtually any spill event. A complete defense to liability is entertained only in the most extraordinary of circumstances. In this way,

[75] In dicta, the court stated that common-law cases construing the act of God defense, to the extent they involve judicial decisions on allocating the burden of mishap, should not be used in determining the allocation that Congress intended in the act of God exception. *Id.*, at 226.

[76] *Id.* (citing, Conf. Rep. No. 940, 91st Cong., 2d Sess., reprinted in 1970 *US Code Cong. & Admin. News* 2712, 2722.)

[77] *Id.*.

[78] *Id.*

[79] 30 Fed.Cl. 236 (1994).

[80] *Id.*, at 237.

courts have maintained the viability of the defense while at the same time not created precedent to open the proverbial "flood gates."

Similarly, guardians of the "public fisc" have only reluctantly parted with their precious spill trust fund dollars. Administrative rulings routinely deny the "Act of God" defense. In several instances, valid claims for reimbursement have been denied only to be resolved by closely guarded settlements. Again, the government is reluctant to create any precedent that would encourage claims against the trust fund.

Nevertheless, Congress allowed for the application of the "Act of God" defense to otherwise strict liability spill occurrences. And, while Congress may have intended that it be applied sparingly, it is a real defense to liability that must be given real, not feigned, consideration.

That one could anticipate hurricanes in the Gulf of Mexico in August and September belies the fact that man-made structures and well-thought out and implemented safety plans were absolutely no match for this most destructive natural force. While each claim for federal trust fund dollars and each defense to property damage must rise or fall on its own facts, administrative agencies and courts will – or should – be hard pressed to conclude that human agency could have prevented the total destruction of tanks, vessels, platforms and pipelines which in turn resulted in oil and chemical spills, unless they are of the view that no one should have built such structures along the Gulf of Mexico where they would be prone to damage by hurricanes. Courts and administrative agencies must give a more sympathetic consideration of the "Act of God" defense, more than has been the case to date, in addressing Katrina-related claims.

Congress must also step in and address the cost of remediating Katrina-related spills. Administrative agencies charged with doling out trust fund dollars for reimbursement can only do so if the fund is solvent. Courts will be reluctant to put pressure on these agencies and uphold the "Act of God" defense and award recoveries if these trust funds are not sufficiently solvent. Current Congressional hurricane relief packages being considered do not address the CERCLA or OPA trust funds.

Hurricane Katrina was an unprecedented natural disaster. It caused unprecedented damage to property, to natural resources and the environment, and to lives. Claims for recovery of cleanup costs and for cleanup damages will be brought on many levels. Local and state governments' ability to address the damage caused already is strained. Insurers will also be put to the test, and courts will be asked to give rulings on claims that were perhaps completely unanticipated. Government at all levels – the courts included – will be faced with difficult public policy decisions in response to Katrina to determine how will the burden of paying for the cost of Katrina be allocated.

Whether Katrina results in the creation of exceptions to the current "rules," new rules altogether, or more of the same, is yet to be seen. And, as Rita followed Katrina, what is in store next year and thereafter?