

Environmental Protection After a Disaster: A Right or a Privilege?

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In the wake of disasters, both natural and otherwise, those affected look to their government for assistance and support. In addition to emergency response, rescue, and recovery efforts, citizens also expect their government to provide timely and accurate information on environmental impacts and related risks. We expect our government to ensure the environment is reasonably safe or, at the very least, to evaluate and minimize significant environmental risks, where possible, before residents and nonemergency workers are encouraged to return en masse.

After the attacks of September 11, 2001, the United States Environmental Protection Agency (EPA), the Department of Labor's Occupational Safety and Health Administration (OSHA), and other federal, state, and local governmental agencies collected, evaluated, and disseminated environmental data and offered opinions on the environmental issues associated with living or working in and around the World Trade Center site, including the need for protective measures such as respirators. While the accuracy of this information continues to be debated, it cannot be disputed that government testing, analysis, and opinions played a significant role in determining when and under what circumstances Lower Manhattan, including the financial district, reopened.

Similarly, in response to Hurricanes Katrina and Rita, citizens along the Gulf Coast now look to the government not only to rescue and protect survivors and evacuees, but also for guidance on whether, and under what circumstances, it is safe to return to homes, communities, and places of work.

There is virtually universal agreement that serious environmental problems exist and must be addressed throughout the affected areas. Many agencies have already taken some action, such as water and soil testing. Yet it is far from clear which governmental entities, if any, are *required* to ensure that the public and the environment are protected from contamination and other impacts. Accordingly, the authors have surveyed select federal and state laws to evaluate whether federal or state governments have a *mandatory* duty to investigate and address environmental impacts caused by Hurricanes Katrina and Rita or other future disasters. This article first focuses on the duties imposed on federal agencies under select federal statutes and then addresses duties imposed under state law,

paying particular attention to a unique provision in Louisiana's Constitution.

Most laypersons likely believe government has a responsibility to ensure the environment is safe before letting people return following a disaster. Someone casually reading EPA's Web site might assume EPA is responsible for addressing environmental issues, including public health and safety. For example, on EPA's Hurricane Response 2005 Web site, EPA states that "[i]n emergency situations such as this, EPA serves as the lead Agency for the cleanup of hazardous materials." See www.epa.gov/katrina (visited Mar. 24, 2006). This assertion of a comprehensive lead role seemed particularly clear in the weeks immediately after the hurricanes, when this site specified that hazardous materials included oil and gasoline (leaving the impression that EPA was the lead agency for cleanup of these substances).

Thorough review of EPA's public statements reveals a more ambiguous portrayal of the federal role. At the link Returning to New Orleans, EPA's Web site, www.epa.gov/Katrina, features the Environmental Health Needs and Habitability Assessment issued by a joint task force composed of the Centers for Disease Control and Prevention (CDC) and EPA on September 17, 2005, which provides that "decisions regarding when and how to lift the mandatory evacuation order generally are within the authority of State and local officials" and that "CDC and EPA are neither responsible for addressing all of the environmental health and infrastructure issues identified in the report nor for coordinating resources to attend to them." Although the assessment identifies as one of the "key questions" that guided the task force the issue of which federal, state, and local agencies are responsible for or involved in the various environmental health issues, the assessment does not clearly state who bears these responsibilities, other than to note that housing is a local government matter.

In an even more constrained definition of its role, EPA recently disavowed *any* responsibility to act after a disaster. In opposition to litigation against EPA and its current and former representatives concerning EPA's response to the September 11 terrorist attacks, EPA argues it was not required to act to protect workers or the public from environmental contaminants but that it may choose to voluntarily act in its discretion. Defendants' Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Count I, at 7 n.7, *Benzman v. Whitman*, No. 04-01888 (S.D.N.Y. filed Jan. 14, 2004) (EPA Reply in *Benzman*). EPA also asserted that its actions (and decisions whether or not to act) are not reviewable in federal court.

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On February 2, 2006, Judge Deborah A. Batts found the plaintiffs had not identified any mandatory duty to act in response to the attacks of September 11. The court found that six portions of the NCP relied upon by the plaintiffs (40 C.F.R. § 300.15; 40 C.F.R. § 300.170; 40 C.F.R. § 35.6205; 40 C.F.R. § 300.3(d); 40 C.F.R. §§ 300.400(g)(4), 300.5, and 763.92; and 40 C.F.R. § 300.415(b)(2)) did not mandate EPA action. Accordingly, the court determined that the “regulations asserted by Plaintiffs as the basis for their [Administrative Procedure Act] claim are discretionary in nature and therefore, are precluded from judicial review by § 5148 of the Stafford Act.” *Benzman v. Whitman*, No. 04-01888, slip op. at 53–57 (S.D.N.Y. Feb. 2, 2006) (ruling on motions to dismiss). While other causes of action were dismissed for unrelated reasons, the plaintiffs’ cause of action against former EPA Administrator Christine Todd Whitman in her individual capacity (but not against then-Assistant Administrator Marianne Horinko) alleging a violation of the plaintiffs’ Fifth Amendment due process rights and the cause of action against EPA and former Administrator Michael Leavitt pursuant to the Administrative Procedure Act, also alleging a violation of the plaintiffs’ Fifth Amendment due process rights, were allowed to proceed as such causes of action do not require that any such mandatory duties exist. *Id.* at 47, 59–60 (current Administrator Stephen L. Johnson was not mentioned in the decision). *But see In re September 11th Disaster Site Litigation*, No. 21 MC 100 (S.D.N.Y. Feb. 2, 2006) (Alvin K. Hellerstein, J.) (dismissing plaintiffs’ constitutional claims but not reaching the issue of whether mandatory statutory or regulatory duties exist).

In addition to causing enormous human suffering and destruction, Hurricanes Katrina and Rita caused an environmental disaster of unprecedented proportions. Much of the damage crosses state lines and affects the entire Gulf Coast region or involves sites that are already subject to some federal oversight; as a result, one might argue that a federal role is particularly appropriate.

The high winds and flooding of most of New Orleans and other areas along the Gulf Coast released toxic substances from oil and chemical firms and other industrial sites; businesses and residences; and thousands of submerged vehicles, tanks, and other equipment. The affected area contains more than 150 Toxics Release Inventory facilities that have disposed of tens of millions of pounds of toxic waste in recent years, dozens of hazardous waste sites, and twenty-four Superfund sites. Despite recent testing, it is still unclear to what extent such facilities were damaged by the hurricanes and whether remedial action is necessary. It is known that several major fuel spills and hundreds of smaller ones during and after the hurricanes released more than 8 million gallons of oil into the Mississippi River tributary system. This release approaches the magnitude of the Exxon *Valdez* disaster, which spilled 11 million gallons. Moreover, as sewage treatment plants were knocked out by flooding and loss of power, bacteria levels in floodwater skyrocketed to unsafe levels. Likewise, flooding, loss of power, and low pressure rendered water supplies undrink-

able. See Written Statement of EPA Deputy Administrator Marcus Peacock Before the House Subcommittee on Environment and Hazardous Waste, Sept. 29, 2005, available at www.epa.gov/katrina; NATURAL RESOURCES DEFENSE COUNCIL, AFTER KATRINA: NEW SOLUTIONS FOR SAFE COMMUNITIES AND A SECURE ENERGY FUTURE (2005), available at www.nrdc.org/legislation/hk/hk.pdf.

The releases to the water threaten air quality as well. Some substances released into water may volatilize and become airborne. Contaminated sediments left behind by flood waters could contain lead paint and asbestos from damaged older buildings. When these sediments dry, the contaminants could become airborne. Fires, both planned and unplanned, threaten local air quality.

Finally, the enormous amount of waste materials—structures, vegetation, vehicles, equipment, and the like—will need to be removed and disposed of or recycled. The magnitude of the effort to transport this debris, and to test for potentially contaminated materials, will be huge. The rebuilding will also raise numerous complex environmental issues such as whether, and under what circumstances, the destroyed areas should be rebuilt to resemble prehurricane conditions and what measures are necessary to avoid similar destruction during future storms.

Exemptions in Federal Statutes

Before even addressing whether federal environmental statutes and regulations compel federal agencies to act to protect human health, property, and the environment in the aftermath of hurricanes and other emergencies, it is important to note that many of these laws already provide exemptions from compliance after an emergency. As a result of these exemptions, in the aftermath of a disaster, the normal mechanisms for environmental protection may not be sufficient to prevent releases of pollution and to ensure that the entities releasing pollutants are responsible for cleaning them up. Because discharges resulting from emergencies may not constitute violations of federal environmental law, it is even more important that clear and mandatory responsibility to assess and, if appropriate, mitigate the environmental and public health risks rest with one or more federal agencies.

It has been widely reported that the Clean Air Act (CAA) contains an exemption from emission restrictions from fuel-burning stationary sources when the President specifies a national or regional emergency. See 42 U.S.C. § 7410(f). What the press has reported less frequently is that virtually all major environmental statutes also contain liability exemptions potentially applicable after an emergency such as a hurricane, some of which are applicable without any presidential declaration. For example, the Clean Water Act (CWA) contains liability exemptions for acts of God or war, upsets, and emergencies. See 33 U.S.C. § 1321(f)(1) (acts of God or war); 40 C.F.R. § 122.41(n) (upsets); 33 C.F.R. § 337.7 (emergencies). The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) exempts otherwise responsible parties from liability arising

from releases due to acts of God or war. See 42 U.S.C. § 9607(b). The Endangered Species Act allows prohibited “takes” after specified major disasters, and the National Environmental Policy Act (NEPA) contains emergency exemptions as well. 16 U.S.C. § 1536(p); 42 U.S.C. § 5159; 22 C.F.R. § 161.7(d)(1). See also Comments of the ABA Section of Environment, Energy, and Resources, available at www.abanet.org/enviro/katrina/Whitepaper.pdf (detailing existing and proposed statutory exemptions).

Recently, an even broader emergency exemption from federal environmental law was proposed. Senate Bill 1711, which remains in committee, was the most controversial of several legislative proposals. This bill would have authorized EPA to suspend or alter any statutory or regulatory obligation in its jurisdiction, anywhere in the country, for up to 120 days after Hurricane Katrina, and to extend those waivers of environmental laws for up to eighteen months.

While carefully circumscribed exemptions from some requirements are necessary in the wake of disasters, these statutory exemptions underscore the difficulty of determining who is responsible to ensure environmental issues are appropriately addressed during and after emergencies.

CERCLA

CERCLA is the principal federal law used to clean contaminated sites. 42 U.S.C. §§ 9601 *et seq.* CERCLA is particularly well suited to respond to emergencies such as hurricanes because it is applicable to virtually all environmental media including air, groundwater, surface water, and soil; it applies to a very broadly defined list of substances, including many useful chemicals; and it generally does not require either an intentional release or the release of any minimum quantity to trigger cleanup obligations.

The most relevant portion of CERCLA is Section 104(a), which relates to the government’s response authority. See 42 U.S.C. § 9604(a). While this section provides express *authority* for the government to act, it does not purport to *require* governmental action, even when there is a release presenting an “imminent and substantial danger to the public health or welfare.” Instead, Section 104(a)(1) merely provides that the President is “authorized” to act to address environmental emergencies or threatened emergencies. Section 104(a)(4) contains similar language providing that the President “may respond” to a release constituting a public health or environmental emergency.

There is no question that CERCLA contains ample and wide-ranging powers authorizing the President to act in a variety of ways. If the President does act pursuant to CERCLA’s authority, he has significant powers to compel or conduct investigations and response actions, order emergency procurement, and even acquire private property. See 42 U.S.C. § 9604. However, there is no clear requirement that the President or EPA act to prevent or mitigate the release of a hazardous substance or to protect persons, property, or the environment. In addition to Section 104, nothing in Sections 106, 107, or 113 of CERCLA, the primary sections

used in civil enforcement, require governmental action (except possibly in situations in which the government is itself a responsible party under CERCLA, which are not addressed here).

Other portions of CERCLA, standing alone, do contain “shall” or similar mandatory language. These sections might be cited for the proposition that, under certain circumstances, EPA is required to act. For example, the statute provides that, when implementing the hazard rankings of sites covered by CERCLA, the President “shall” ensure that the human health risks associated with the contamination or potential contamination are appropriately assessed. 42 U.S.C. § 9605(c)(2). In addition, the President “shall” designate in the National Contingency Plan federal officials who “shall” act on behalf of the public as trustees for natural resources. 42 U.S.C. § 9607(f)(2)(A). CERCLA also mandates notification to and coordination with federal and state natural resource trustees. 42 U.S.C. § 9604(b)(2).

However, these isolated provisions, when read in context with Sections 104, 106, 107, and 113, which not only lack requirements for mandatory action but generally contain discretionary words like “may,” likely do not provide a sufficient basis for requiring EPA to undertake response actions in the absence of presidential direction or agency initiative.

Although CERCLA likely does not compel EPA to implement response activities, CERCLA does require that if action is taken, that action must be consistent with the federal regulations known as the National Contingency Plan (NCP), which establish the procedures and standards that must be followed in response actions. CERCLA’s text qualifies its grant of authority twice in Section 104, specifying that “the President is authorized to act, consistent with the national contingency plan” to remove or arrange for the removal of hazardous substances, pollutants, or contaminants or “take any other response measure consistent with the national contingency plan which the President deems necessary.” 42 U.S.C. § 9604(a)(1). Thus, it may be argued that, while EPA is not required to act, once it voluntarily elects to do so pursuant to its authority under CERCLA, its actions are not entirely discretionary but must comply with the NCP.

The NCP establishes procedures and standards for most cleanups under CERCLA and Section 311 of the Clean Water Act (CWA). 40 C.F.R. Part 300. The NCP’s requirements generally include remedial investigations, feasibility studies, and public consultation. For the most part, the NCP does not require specific techniques to be used or contaminant levels to be achieved; rather, these are evaluated and selected during a site-specific determination. See 40 C.F.R. § 300.430.

Oil pollution is one exception; in these cases, the NCP does contain some bright-line requirements. For example, Section 300.310 stipulates that any response action shall begin as soon as possible, shall recover the oil or mitigate its effects, and shall use the methods that are most consistent with protecting public health and welfare and the environment. This section also specifies that sinking agents shall not be used and that oil and contaminated materials recovered

shall be disposed of in accordance with the regional and area contingency plans and other laws. Pursuant to Section 300.322, the on-scene coordinator shall determine in consultation with senior agency officials whether there is a substantial threat and, if so, assess the need for various special cleanup teams and request activation of the regional response team. Furthermore, upon request of the on-scene coordinator, the lead agency or regional response team is required to assist, and the lead agency must make a contractor available on the scene. 40 C.F.R. § 300.322(c)(3).

Similarly, Coast Guard CERCLA regulations, which authorize the Coast Guard to clean up a spill from a vessel, also impose some standards. See generally 33 C.F.R. § 1.01-70. A Coast Guard on-scene coordinator may enter into an agreement with any person to perform a response action, but only “provided that such action will be done properly by such person.” 33 C.F.R. § 1.01-70(e)(5).

Assuming the NCP contained applicable and specific requirements for a given site, the ability to compel compliance with those requirements in the courts is unclear. As a practical matter, it may be difficult to prove that EPA is acting pursuant to its authority under CERCLA as opposed to the authority granted in another statute. Moreover, in the *Benzman* case referenced above, EPA argues that alleged non-compliance with the NCP is not actionable because the NCP itself states that it “does not create in any private party a right to federal response or enforcement action” and does not “create any duty of the federal government to take any response action at any particular time.” 40 C.F.R. § 300.400(i)(3). See also EPA Reply in *Benzman*. It is unclear whether a court would interpret this regulatory language to alter the statutory mandate to adhere to the NCP. Furthermore, in response to an environmental disaster a court may be understandably reluctant to engage in its own analysis of the feasibility and advisability of the cleanup options and order EPA to use a specific process or achieve a particular result. Finally, while portions of CERCLA and the CWA mandate that the President shall act in accordance with the NCP, other portions of the CWA provide that federal agencies shall act in accordance with the NCP or as directed by the President. Compare 33 U.S.C. § 1321(c)(1)(A), with 33 U.S.C. § 1321(c)(3)(A). Such language may permit the President to direct actions that are inconsistent with the NCP, at least with respect to actions taken pursuant to the CWA.

While CERCLA generally does not require EPA to act, it does require the federal Agency for Toxic Substances and Disease Registry (ATSDR), an agency of the Department of Health and Human Services, to take certain steps to protect public health and provide medical care and related assistance to people exposed to toxic substances. Specifically, Section 104(i) of CERCLA mandates that (1) ATSDR must provide medical care and testing to exposed individuals in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, 42 U.S.C. § 9604(i)(1)(D); (2) in cases of public health emergencies, exposed persons are eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service, 42

U.S.C. § 9604(i)(1)(E); and (3) ATSDR must consult on health issues upon request, 42 U.S.C. § 9604(i)(4).

Interestingly, ATSDR’s statutory jurisdiction extends to “toxic substances,” as opposed to CERCLA’s “hazardous substances,” which excludes many petroleum products. While “toxic substances” are not defined in CERCLA, it may well be that Congress intended “toxic” to be broader than “hazardous,” potentially compelling ATSDR to undertake significant responsibilities in response to environmental disasters. Supporting a more expansive reading, ATSDR’s “ToxFAQ” information sheets routinely address petroleum products such as fuel oils and gasoline. See www.atsdr.cdc.gov/toxfaq.html. ATSDR provides more detailed information on all of these substances in its Public Health Statements and Toxicological Profiles (www.atsdr.cdc.gov/phshome.html).

ATSDR is apparently reluctant to accept its broad statutory mandate. In seeming contrast to ATSDR’s statutory duties, ATSDR has stated in informal publications that “ATSDR is an advisory, nonregulatory public health agency” and will not conduct large-scale environmental sampling, enforce regulations, or provide medical treatment and healthcare services. See *What You Can Expect from ATSDR*, www.atsdr.cdc.gov/COM/expect.pdf.

How active ATSDR has been in response to Katrina and Rita is unclear. The Congressional Research Service (CRS) has found that “[w]hile ATSDR has not reported any Katrina-related activity in the early weeks of the response, the agency may be asked by various parties, including affected states and localities, to carry out these activities.” Congressional Research Service, *Hurricane Katrina: The Public Health and Medical Response*, (Sept. 21, 2005), available at fpc.state.gov/documents/organization/54255.pdf. This report also notes that “ATSDR is required to conduct various activities under [CERCLA].” *Id.* at n. 20. The link for Katrina information on ATSDR’s Web site exits the ATSDR Web site and instead links to the Web site of the CDC, a separate unit of the Department of Health and Human Services; a search of ATSDR’s Web site, www.atsdr.cdc.gov, did not reveal any documents related to Katrina. A week following the publication of the CRS report, in testimony to the House Energy and Commerce Subcommittee on Environment and Hazardous Materials, ATSDR described its ongoing contribution to the Hurricane Katrina response. *Hurricane Katrina: Assessing the Present Environmental Status*, 109th Cong. (2005) (statement of Henry Falk, Director, ATSDR/CDC Coordinating Center for Environmental Health and Injury Prevention). In this testimony, Dr. Falk described the “three primary components of ATSDR’s ongoing contribution to the response: (1) Participation in task forces and work groups established by the Administration to assess environmental health needs and related policy issues; (2) Playing an integral role in the CDC Emergency Operations Center, and deploying staff to emergency operations centers in HHS, FEMA and EPA; and (3) Working in the field to assess the potential for exposure to hazardous substances that may adversely impact human health.” *Id.* Dr. Falk testified that CDC/ATSDR staff members “have been deployed into the field or serve as subject

matter experts in the areas of toxicology, sanitation, food and water safety, vector control issues pertaining to aerial spraying of pesticides for mosquito abatement, evacuation center operations, emergency response, epidemiology, environmental engineering and public health infrastructure, community relations, public affairs, and health education,” and are also assisting EPA and the states investigating chemical spills, providing technical assistance about hazardous chemical exposure, assessing Superfund and industrial sites, serving on the FEMA debris removal and health and safety committees, and assisting in establishing temporary basic public health services to New Orleans residents. *Id.*

Department of Homeland Security

It might be suggested that the proper place to look for mandatory environmental responsibilities is not environmental statutes such as CERCLA but rather statutes relating to disaster planning, response, and recovery. The Homeland Security Act of 2002 may be one example of such a statute. Pub. L. No. 107-296, 116 Stat. 2135 (2002). The Act established the Department of Homeland Security (DHS) by consolidating various security and domestic antiterrorism efforts. This department brought together myriad entities, ranging in size and scope from the Coast Guard, U.S. Customs Service, and the renamed U.S. Citizenship and Immigration Services to the Metropolitan Medical Response Team of the Department of Health and Human Services.

The most significant aspect of the Homeland Security Act for disaster response is that it imports the Federal Emergency Management Agency (FEMA) into a Directorate of Emergency Preparedness and Response within DHS. The mandatory duties of this directorate include

helping to ensure the effectiveness of emergency response providers to . . . major disasters; providing the federal response to . . . major disasters; aiding the recovery from . . . major disasters; building a comprehensive national incident management system . . . ; consolidating existing Federal Government emergency response plans into a single, coordinated national response plan; and developing comprehensive programs for developing interoperative communications technology.”

6 U.S.C. § 312. The Homeland Security Act also identifies FEMA’s responsibilities, which are, like those of the directorate, very broadly defined to include developing a “comprehensive, risk-based emergency management program.”

6 U.S.C. § 317.

Despite extremely broad language relating to disaster response, the Homeland Security Act does not explicitly impose mandatory environmental cleanup or monitoring responsibilities. The Act provides that FEMA retains the powers granted to it by the Stafford Act of 1974 and its amendments, 42 U.S.C. §§ 5121 *et seq.*, a statute which provides many powers but creates few duties. 6 U.S.C. § 319. Not only does the Stafford Act fail to establish any mandatory environmental standards, but it explicitly exempts much relief

from review under NEPA. 42 U.S.C. § 5159.

Other disaster response statutes are similar. For example, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which was designed to address disaster preparedness as well as bioterrorism, bolsters the ability of public health systems to respond to disease outbreaks and other emergencies. See 42 U.S.C. § 300hh. Like the Homeland Security Act, it contains a broadly defined duty and authority to undertake numerous activities, but does not explicitly require environmental protection in the aftermath of emergencies. See generally Pub. L. No. 107-188, 116 Stat. 294 (2002) (codified at 42 U.S.C. §§ 247 *et seq.*, 42 U.S.C. §§ 300hh *et seq.*, and scattered sections of Titles 7, 21, 29, 42, and 47).

State Law

As with federal environmental laws, the laws of states along the Gulf Coast (Louisiana, Texas, and Mississippi) generally grant government entities numerous discretionary powers to address environmental contamination, public health threats, and emergencies, but rarely impose affirmative response or investigatory duties on them. State and local municipalities generally have *authority* to address sanitary conditions, but no duty to do so, and the duty to address unsanitary conditions and to pay cleanup costs, even those resulting from disaster, is, in many cases, imposed on a private party, not the government. See, e.g., 30 LA. REV. STAT. ANN. §§ 2025; TEX. HEALTH & SAFETY CODE ANN. §§ 12.001(b)(2); 341.012(a).

Furthermore, to the extent there is an emergency, state governments generally have the authority to suspend otherwise applicable laws and regulations for a period of time, suggesting that, as under federal law, many day-to-day environmental protections may not be available.

While the exception and not the rule, certain mandatory duties do exist under state law. Most notably, the Louisiana Constitution requires some degree of environmental protection:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

LA. CONST. art. 9, § 1. Several other states have environmental provisions in their constitutions: See, e.g., ALA. CONST. art. VIII; CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI; ILL. CONST. art. XI; MASS. CONST. § 179; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. I, § 27; R.I. CONST. art. 1, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII; VA. CONST. art. XI, § 1. See also *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002).

However, the Louisiana constitutional provision differs from those in many other states because the Louisiana Supreme Court has given this provision some teeth.

In *Save Ourselves v. Louisiana Environmental Control Comm'n*, 452 So.2d 1152, 1156 (La. 1984), the Louisiana Supreme Court unanimously held that Louisiana's constitution "imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement fully this policy." The constitutional requirement is not absolute but is "a rule of reasonableness," which requires a balancing of interests, analogous to what is required of federal agencies under NEPA. "Environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." *Id.* at 1157. Because the state environmental agency is the "primary public trustee of natural resources and the environment . . . the agency must act with diligence, fairness and faithfulness to protect this particular public interest in the resources." *Id.* "[T]he commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission." *Id.*

Although the Louisiana Supreme Court has employed Article 9—standing alone—to review state action, commentators disagree on whether this constitutional provision is "self-executing," or whether the provision can only be given force through specific legislative enactments and has no independent legal significance. Compare, e.g., Mathew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1171 (1997) (Louisiana courts have held that the environmental protection provision is self-executing), with Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 400–401 (1998) (Article 9 is a general policy statement rather than a self-executing constitutional right.). Whether or not Article 9 is self-executing, it seems clear that at the very least the Louisiana courts give great weight to the policies expressed in Article 9, and have gone as far as to review and remand state action using Article 9. Moreover, unlike health and environmental statutes or regulations, or even the emergency exceptions to environmental disclosure and review statutes like NEPA, this constitutional requirement presumably is not suspended in times of emergency, although the emergency likely will affect a court's evaluation of what constitutes an appropriate degree of environmental protection.

Louisiana's constitutional provision has been interpreted more broadly than similar constitutional provisions in other states. For example, Pennsylvania's constitution contains a provision similar to that found in Louisiana's constitution:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including genera-

tions yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. 1, § 27. Pennsylvania courts have held that the provision is self-executing. See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973). Holding that Pennsylvania's provision is self-executing has had little practical import, however, as the courts have also said that "Section 27 was intended to allow the normal development of property . . . while at the same time constitutionally affixing a public trust concept to the management of public natural resources in Pennsylvania. The result of our holding is a controlled development of resources rather than no development." *Id.* at 94. The court in *Payne* then set forth a three-pronged test that subsequent courts use to evaluate Section 27 constitutional claims. Unlike in Louisiana, Pennsylvania courts have not overturned state action using the test set forth in *Payne*.

In the end, one could conclude that existing laws do not provide the Gulf Coast's residents and workers, as well as its extensive, unique, and vitally important ecosystems, with adequate protection from environmental degradation caused by recent hurricanes. While many federal, state, and local agencies have contributed and continue to contribute significant resources to the response, which includes attention to many environmental issues, those agencies are acting at their discretion. EPA and other federal agencies disclaim both ultimate responsibility for environmental matters and for oversight of state actions. Yet the need for federal participation is at its strongest under these circumstances, when exemptions from federal environmental laws and regulations during natural disasters may prevent any private parties from being held accountable.

The lack of clearly defined duties, comprehensive standards, and recognized review procedures hinder public participation and may effectively preclude judicial challenge of important decisions. Statutory changes are likely necessary, and thought must be given to which agencies should take the lead in planning for and implementing an environmental response during and after disasters, how plans and responses are formulated and evaluated, what standards are applied, and when and how decisions and actions may be challenged.

In the absence of new legislation, there is substantial danger that environmental issues will be addressed in an ineffective, piecemeal manner, potentially harming the future health of those already acutely affected by these disasters. While environmental protection is by no means the sole or preeminent concern in responding to major catastrophes, it seems beyond dispute that the environment and pollutants must be considered throughout the process. If no governmental agency is in charge of and therefore responsible for such issues, the environment may be given short shrift. Moreover, pushing ultimate responsibility to state and local governments, which likely are most adversely affected by the disasters and may have limited resources, makes no sense and is not appropriate given the magnitude and interstate nature of such disasters. 