Hurricanes & Superfund: Has the Act of God Defense Been Washed Out To Sea?

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The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §9601 et seq., is a strict liability statute with few defenses to liability for Potentially Responsible Parties ("PRPs"). An act of God is one such defense, but the circumstances that might qualify arise so rarely it is seldom invoked. One might assume that a hurricane, especially a Category 4 or 5, would satisfy the act of God defense. Existing caselaw suggests otherwise. In fact, there is not a single published case in which the act of God defense has shielded a PRP from CERCLA liability. Although *In re September 11 Litigation* (2014) indicates that the defense is not entirely dead, its infrequent use and dismal record of success, coupled with technological advances to predict and forecast storm events, one is hard put to imagine a hurricane event satisfying the act of God defense.

Hurricane Harvey's catastrophic destruction in Texas (Category 4, August 26-28, 2017) and Hurricane Irma's subsequent landfall in Florida (Category 4, September 10, 2017) has renewed concerns regarding the impact of these types of events on Superfund sites (i.e. releases of hazardous substances from the sites). EPA identified 13 of 41 sites in Harvey-impacted areas that were flooded or damaged (28 of which showed no signs of damage or excessive flooding).[2] One site in particular, the San Jacinto River Waste Pits Site (east of Houston), a former pulp and paper-mill waste site, contains dioxins and furans that, if released, could pose human health risks.[3] These severe weather events raise the question: does the "act of God" defense under CERCLA insulate PRPs from liability for costs spent to address releases of hazardous substances from sites impacted by hurricanes?

Section 107(b)(1) of CERCLA states that "[t]here shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of hazardous substance and the damages resulting therefrom were caused *solely* by (1) An act of God…".[4] CERCLA narrowly defines an "act of God" 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."[5,6] A 1986 House report explained that, "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.'"[7]

There are few cases involving the act of God defense.[8] What caselaw exists shows that courts have uniformly rejected the act of God defense to CERCLA liability.[9,10]

Moreover, the reasons courts have provided for rejecting the act of God defense in CERCLA call into question whether it will ever be successfully invoked. [11]

The Court in *United States v. Stringfellow,*[12] outlined what other courts have referred to as the "Act of God Test" as follows: (1) whether the event was a grave natural disaster of exceptional, inevitable, or irresistible character; (2) whether the event was anticipated; (3) whether the event was the sole cause of the release; and (4) whether the event's effects could have been prevented or avoided by due care or foresight on the part of the PRP.[13,14,15]

In *Stringfellow*, the United States and the State of California sued owners and operators, waste generators, and waste transporters at a waste disposal site because of the release or threat of release of hazardous substances. As an affirmative defense, defendants argued that heavy rainfalls in both 1969 and 1979 were natural disasters constituting an act of God. The Court denied the affirmative defense finding that the rains were not so "exceptional" as to qualify as an act of God because the heavy 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."[16] In addition, the Court found that these rains were not the *sole* cause of the hazardous substance release.

Similarly, in *United States v. Alcan Aluminum Corp.,* [17] defendant argued that heavy rainfall following Hurricane Gloria in 1985 satisfied the act of God defense. Alcan Aluminum shipped approximately 2 million gallons of oily wastes from its Pittston, Pennsylvania metal smelting facility which were dumped down a borehole.[18] This borehole led to a network of coal mines, caverns, pools, and waterways bordering the Susquehanna River's east bank; in addition, mine workings were drained by the Butler Tunnel, which drained directly into the river as well.

In the 1978-1979 timeframe, 32,500-37,500 gallons of Alcan's used emulsion were dumped down the borehole leading to the mine workings serviced by this tunnel. When Hurricane Gloria struck in 1985, around 100,000 gallons of hazardous substance-contaminated oily wastes were discharged from the tunnel directly into the river. Alcan's used emulsion (containing traces of copper, chromium, cadmium, zinc, and lead) was commingled with the discharged wastes.

In its Motion for Summary Judgment, Alcan argued that any release of hazardous substances was caused solely by Hurricane Gloria, and that the release occurred in tandem with the hurricane's "torrential downpour."[19] Alcan also maintained that the hurricane was "unanticipated" as far north and inland as Pennsylvania. The Court rejected Alcan's act of God defense for three reasons. First, the Court found that "no reasonable factfinder" would find that Hurricane Gloria was the sole cause

of the releases – those two million gallons of hazardous wastes were not dumped into the borehole by an act of God, and if not for the initial disposal, the 100,000 gallons of waste would never have ended up in the Susquehanna. Second, the Court found that the effects of the hurricane "could have been prevented or avoided by the exercise of due care or foresight."[20] Finally, citing *Stringfellow*, the Court found that rainfall is not "the kind of 'exceptional' natural phenomenon to which the act of God exception applies."

The act of God defense has also been rejected in the case of extreme changes in temperature. In *United States v. Barrier Industries*,[21] an "unprecedented cold spell" caused pipe to burst at a hazardous waste site in New York. From 1978 through 1993, the defendant Barrier used hazardous materials to manufacture janitorial chemicals at a New York facility. The facility was condemned in December of 1993, but through January 1994 additional spills were detected. Defendant argued that the January 1994 spills were caused by pipes bursting from unusually cold weather; the Court rejected this defense, stating that "nothing documented on the evidentiary record before the Court remotely suggests that this 'cold spell' falls within the CERCLA definition of an 'act of God.'"[22] Furthermore, the Court found "'substantial undisputed evidence' that numerous other factors antedating the cold weather of January, 1994 causally contributed to the problems at the Barrier site."

Another act of God defense involving a storm was rejected, in *U.S. v. M/V Santa Clara I*.[23] In that case, a cargo ship acting as a common carrier was transporting 25 shipping containers of arsenic trioxide (each holding around 108 barrels) from Chile to the United States to be used in the manufacture of a wood treatment chemical compound. On the evening of January 3, 1993, the ship left Port Elizabeth, New Jersey for Baltimore, Maryland, but encountered a storm 30 miles off the coast. The ship pitched and rolled violently for hours, resulting in damage to both the ship and its cargo. Once the storm subsided, the crew noticed that 21 shipping containers had been lost overboard, and much of the cargo below deck had broken loose. Of the 21 containers lost overboard, four were loaded with the barrels of arsenic trioxide. Of the damaged containers onboard, one containing the chemical was damaged such that some barrels fell overboard. In total, 441 barrels of arsenic trioxide had been lost.[24]

The South Carolina District Court rejected third-party defendant Degesch America's act of God defense holding that the defense was not available to any of the parties since "inclement weather offshore was predicted by the National Weather Service and known by the captain and crew prior to their departure from Port Elizabeth." Further, the Court found that even if the storm was worse than had been predicted, the storm was not the "unanticipated grave natural disaster" which may be considered for such a defense.

The act of God defense under the Oil Pollution Act has not fared any better. In *Apex Oil Company, Inc. v. U.S.,* five of seven Apex barges broke free while being towed and collided with the Mississippi River Bridge, with two of them releasing approximately 840,000 gallons of slurry oil into the Lower Mississippi River (LMR). Apex funded removal activities concerning that 1995 spill, and reimbursed the Oil Spill Liability Trust Fund for costs incurred by the Coast Guard. In 1998, Apex submitted a claim to the National Pollution Fund Center (NPFC) for reimbursement, asserting that under the "act of God" defense it was not liable. Apex claimed that a 1995 flood and subsequent strong and unpredictable currents constituted an "unanticipated grave natural disaster or other natural phenomenon, unavoidable even with the exercise of due care and foresight." Apex even submitted a Coast Guard Incident Report concluding there was no negligence on the part of the pushboat captain and that a prudent mariner could not have foreseen the situation.

The Court relied on the CERCLA "act of God" definition in its decision,[25] stating that "[l]iability under the OPA and CERCLA is strict, and the absence of fault, or the exercise of due care is not a defense."[26] In other words, a defendant is not absolved of liability due to a lack of negligence.[27] Further, the "act of God" defense was rejected because Apex could not establish that the river's conditions were wholly unexpected – rather, the Court found, the current could have been "anticipated and predicted" and, thus, measures could have been taken to avoid the spill.[28]

Although there is no precedent for successfully invoking the act of God defense under CERCLA, the defense may not be entirely dead. The reasoning used in *In re September 11 Litigation*, discussing CERCLA's act of War defense may provide a basis to argue a broader set of facts that could satisfy the act of God defense.[29] In that case, a real estate developer sought to recover remediation costs from owners and lessees of the World Trade Center ("WTC") as well as the owners of the airplanes involved in the September 11, 2001 attacks. After the attacks, the developer began renovating an office building into a business hotel; in 2004, the New York Department of Environmental Conservation and the EPA notified developer Cedar & Washington that interstitial spaces of the building may contain finely-ground substances from the WTC (including concrete, asbestos, silicon, fiberglass, benzene, lead, and mercury) called "WTC Dust."[30] In its decision allowing the defense, the Court applied a broad definition of an act of War and found it was the sole cause of the release because the "September 11 attacks overwhelmed all other causes, and because the 'release' was unquestionably and immediately caused by the impacts."[31]

In its ruling, the Court noted that the acts of War and God are listed in parallel in CERCLA; thus, when showing causation, it makes sense to treat the two the same. The Court found that it would be "absurd" to impose liability on a defendant whose

property was destroyed by an act of God such as a tornado, since a tornado, in scattering everything in its path, is the "sole cause" of the damage it leaves behind ("notwithstanding that the owners of flying buildings did not abate asbestos, or that farmers may have added chemicals to the soil that was picked up and scattered").[32]

Although this explanation of an act of God provides a glimmer of hope that the defense can be utilized successfully, improvements in technology used to forecast weather and climate related events may make it difficult to successfully argue that severe weather events such as hurricanes are unanticipated or could not have been addressed with due care.

Endnotes

1 Jeffrey D. Talbert is a Partner at Preti Flaherty LLP specializing in litigation and environmental law. Special thanks to Meredith Braun and Morgan Surkin for research and assistance with the article.

2 *See EPA Response To The AP's Misleading Story* (https://www.epa.gov/newsreleases/epa-response-aps-misleading-story)

3 *See* Jennifer Dlouhy, *Receding Floodwater Expose Long-Term Health Risks After Harvey*, Bloomberg (2017)

4 42 U.S.C. § 9607(b)(1).

5 42 U.S.C. § 9601(1)(emphasis added).

6 It is also worth noting that both the Oil Pollution Act (OPA) and CERCLA contain identical definitions of an "act of God." See 33 U.S.C. § 2701(1); 42 U.S.C. § 9601(1)

7 H.R.Rep. 99-253(IV), 1986 U.S.C.C.A.N. 3068, 3100

8 *See* Caroline N. Broun and James T. O'Reilly, *RCRA and Superfund: A Practice Guide*, 3d § 14:64 (2017)

9 *See* Frank Leone and Mark A. Miller, *Acts of God, War, and Third Parties: The Previously Overlooked CERCLA Defenses*, 45 ELR 10129 (2015)

10 *See* Steven M. Siros, *Hurricane Harvey and Act of God Defense – Viable Defense or Futile Prayer*, September 2017 (http://environblog.jenner.com/corporate_environmental_l/2017/09/hurricane-harvey-and-act-of-god-defenseviable-defense-or-futile-prayer.html#more)

11 *See* Barry M. Hartman, John P. Krill, and Linda L. Raclin, *Hurricane Katrina: Will Superfund be Used to Create a New Litigation Storm Over Clean Up Costs?*, September 2005

12 *United States* v. *Stringfellow*, 661 F.Supp. 1053 (C.D. CA 1987).

13 *See* Steven M. Sellers, *Are CERCLA Practitioners Prepared for Climate Change?,* Toxics Law Reporter (2015)

14 *See* Joel Eagle, *Divine Intervention: Re-Examining the Act of God Defense in a Post-Katrina World*, 82 Chicago-Kent Law Review 1 (2006)

15 *See* Casey P. Kaplan, *The Act of God Defense: Why Hurricane Katrina & Noah's Flood Don't Qualify*, 26 Rev. Litig. 155 (2007)

16 *Stringfellow at* 1061.

17 *U.S. v. Alcan Aluminum Corp.*, 892 F.Supp. 648, 658 (M.D. Pa. 1995), aff'd, 96 F.3d 1434 (3d Circ. 1996)

18 Id at 658.

19 Id.

20 Citing 42 U.S.C. § 9601(1)

21 *U.S. v. Barrier Industries, Inc.*, 991 F.Supp. 678 (S.D.N.Y. 1998)

22 *Barrier Industries* at 679.

23 *U.S. v. M/V Santa Clara I*, 887 F.Supp. 825 (D.S.C. 1995)

24 *M/V Santa Clara I* at 843.

25 *Apex Oil Company, Inc. v. U.S.*, 208 F.Supp.2d 642, 652 (E.D. La 2002); see also Casey P. Kaplan, *The Act of God Defense: Why Hurricane Katrina & Noah's Flood Don't Qualify*, 26 Rev. Litig. 155 (2007)

26 *Id.*

27 *See* Michael Faure, Liu Jing, and Andri G. Wibisana, *Industrial Accidents, Natural Disasters and "Act of God,"* 43 Ga. J. Int'l & Comp. L 383, 409-10 (2015)

28 *Apex Oil Company, Inc. v. U.S.*, 208 F.Supp. 2d at 657

29 *See* Frank Leone and Mark A. Miller, *Acts of God, War, and Third Parties: The Previously Overlooked CERCLA Defenses*, 45 ELR 10129 (2015)

30 *In re September 11 Litigation*, 751 F.3d 86, 89 (2d Cir. 2014), cert. denied sub nom. Cedar & Washington Assocs. V. Port Auth. Of N.Y. & N.J., No. 14-239, 2014 WL 6724336 (U.S. Dec. 1, 2014)

31 Id. at 93.

32 Id. at 94.