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HURRICANE KATRINA AND THE TOXIC TORTS IMPLICATIONS OF ENVIRONMENTAL INJUSTICE IN NEW ORLEANS

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INTRODUCTION

The recent damage to lives and property in New Orleans would not have happened but for Hurricane Katrina's unwelcome visit to that city. The hurricane and its aftermath have tremendous implications for general tort law.1 The English word “tort” is derived from the French word “tort,” which is defined as a harm or wrong.2 A tort consists of a civil wrong that is not a breach of contract, and is granted a remedy under the law.3 A basic principle of tort law is that every person owes a duty to others to function in a way that does not cause harm to another.4 When one breaches that duty, one could be liable for monetary damages if an individual injured as a result of the tort chooses to file a lawsuit.5

This article will discuss a body of law that has been identified as the law of toxic torts. One commentator describes toxic tort law as a modification of traditional tort law; it addresses the hazardous community or workplace conditions resulting from the manufacture and use of toxic substances.6 Toxic tort law differs

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2. Id.
3. Id.
4. Id.
5. Id.
from state to state because state legislatures and courts adopt rules unique to each state. This can create a lack of uniformity in providing plaintiffs with an appropriate remedy for harm suffered.\footnote{See id. at 228 (explaining that state differences in the management of toxic torts litigation contribute to the difficulty in creating a uniform remedy).}

Part I of this article will describe the extent of compensatory damages available in toxic tort litigation. Part II will discuss the environmental justice undertone of Katrina for those seeking toxic tort relief. Part III will evaluate the implications of the Agriculture Street Landfill litigation for post-Katrina toxic tort debris and other hazardous substances. Part III first shows how New Orleans, a predominately African American city, acted as an historical agent of environmental racism by entering into an agreement with federal officials and other local entities that created an environmental justice issue for local residents by approving the construction of a predominantly African American community on top of a toxic landfill. Part III follows the Agriculture Street Landfill class action lawsuit seeking environmental justice from New Orleans, while New Orleans seeks to make third-party defendants liable in the Johnson v. Orleans Parish litigation. Part III then argues that New Orleans and the city's housing authority may be liable for negligent development of the Agriculture Street Landfill Community, even if they are independent contractors. Finally, Part III explores United States v. City of New Orleans, which held that the U.S. Army Corps of Engineers is potentially liable in the Agricultural Street Landfill litigation because Congress expressly created a waiver of the Corps governmental immunity from liability under CERCLA. Part IV contends that creating governmental liability is a useful toxic tort tool for those who seek post-Katrina environmental justice.

I. THE EXTENT OF THE COMPENSATORY DAMAGES AVAILABLE IN TOXIC TORT LITIGATION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), also known as the Superfund,\footnote{Exxon Corp. v. Hunt, 475 U.S. 355, 359 (1986). The Court in Exxon noted: CERCLA imposes an excise tax on petroleum and other specified chemicals. The Act establishes a trust fund, commonly known as “Superfund,” 87.5% of which is financed through the excise tax, and the remainder through general revenues. Superfund money may be used to clean up releases of hazardous substances and for certain other purposes.} is not a universal tool for filing a toxic tort claim.\footnote{ENVTL. L. & POL’Y REV. 223, 227 (1996).}
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Congress did not intend for CERCLA to offer payment to a private person for damages caused by contamination. Instead, Congress passed CERCLA to assist in the speedy cleanup of environmental contamination produced by discharges from hazardous waste.

The two-fold objectives of CERCLA are: first, to cleanup hazardous waste locations, and second, to command those responsible for the contamination to pay for the cost of the cleanup. By denying traditional personal injury and property damages to private plaintiffs as a federal claim in toxic tort cases under CERCLA, Congress substantially departed from the compensatory damage remedy available under general torts principles in standard state law tort claims. For example, Ohio defines compensatory damages as the amount of actual loss experienced by the wronged party, and therefore actual damages and compensatory damage are one and the same. The traditional purpose of such compensatory damages is to make the injured party whole for the harm he or she has suffered. Compensatory or actual damages may be more specifically categorized as consequential damages, which are designed to put the wronged party where he was before the injury. Compensatory damages include "general" and "consequential," or "special" damages. General damages pay the costs to a wronged party for the immediate injury or loss suffered, while "consequential damages are damages that flow from the consequences of the direct injury." In order to claim consequential damages, a party must prove that the losses were reasonably foreseeable before the tortious event occurred.

As a concession for deleting personal injury compensation claim rights from CERCLA, Congress established a study group to suggest changes in the law to decrease the problems that people personally injured by hazardous wastes confront while attempting to recover adequate compensation for the wrong they have suffered. The study group concluded that several impediments


9. Young v. United States, 394 F.3d 858, 862 (10th Cir. 2005).
10. Id.
11. Id.
12. Id.
14. Id.
16. Id.
17. Id.
18. Id.
block a toxic tort plaintiff's right to compensatory damages.\textsuperscript{20} According to the study, high causation benchmarks, demanding and ambiguous burdens of proof, scientific doubt, preventive statutes of limitations, elusive or bankrupt defendants, lack of insurance coverage, and the very expensive cost of litigation all come together to hinder toxic tort plaintiffs from receiving adequate payment for a loss.\textsuperscript{21} A majority of states have taken a position very similar to the federal government by refusing to approve and implement hazardous waste personal injury compensation laws.\textsuperscript{22} Since nearly all the states decline to create statutory claims for toxic tort victims, the lion's share of hazardous waste victims must seek damages exclusively on the basis of common law torts.\textsuperscript{23}

\section*{II. THE ENVIRONMENTAL JUSTICE UNDERTONE OF KATRINA FOR THOSE SEEKING TOXIC TORTS RELIEF}

The concept of equality is embedded in the doctrine of environmental justice.\textsuperscript{24} In New Orleans, the victims of Hurricane Katrina and its aftermath who suffered disproportionately from the impact of the resulting environmental disaster were communities of color.\textsuperscript{25} That story continues to develop. Since Hurricane Katrina struck New Orleans during the late summer of 2005, one environmental justice issue that should be revisited is that of toxic torts. As one commentator maintains, the principles of environmental justice possess universal appeal.\textsuperscript{26} Environmental justice endorses the position that all people, regardless of race, social, or economic status are entitled to equal protection of environmental health, safety, as well as the preservation of the ecological system.\textsuperscript{27} A person is entitled to file a toxic tort lawsuit seeking environmental justice only after some type of injury has taken place.\textsuperscript{28} Plaintiffs involved in environmental justice personal injury litigation who have suffered harm may allege one, or all of the following: fear of a potential

\begin{thebibliography}{9}
\bibitem{20} Id.
\bibitem{21} Id.
\bibitem{22} Id. at 778.
\bibitem{23} Id.
\bibitem{25} Id.
\bibitem{26} See id. ("[P]erhaps the biggest challenge facing environmental justice theorists and practitioners is to translate the principles of environmental justice to China, an economic behemoth just beginning to reckon with the staggering environmental impacts of its meteoric rise on the world scene.").
\bibitem{28} Id. at 260-61.
\end{thebibliography}
personal injury because of the concealed impact of pollution; diminished property value; reduced life style choices (e.g., nuisance, pain and suffering, or economic distress); that an attack of property rights occurred; or monetary damages under tort law rendered to punish the violator.29

An environmental justice plaintiff must overcome many obstacles to be successful under the toxic tort litigation model. Some commentators, though, assert that the impact of a successful toxic tort lawsuit often has little effect in advancing the environmental justice rights of other groups suffering from similar hardships.30 However, others assert that the law of torts is a very useful method for plaintiffs to seek payment for harms suffered as a result of toxic torts. American tort law provides a procedure that plaintiffs affected by environmental hazards may utilize to seek redress and compensation. Class action toxic tort lawsuits serve as a possible effective tool to deter environmental hazards because juries are able to return large monetary judgments hostile to corporate dumpers and polluters.31 Toxic tort litigation is a prospective weapon helpful to poor and minority citizens, the group most repeteadly and most adversely impacted by toxic pollutants.32 This adverse impact is exemplified in the pictures of economically disadvantaged Hurricane Katrina survivors trying to stay alive during the aftermath of Hurricane Katrina's massive destruction in August of 2005. These vivid images made a disheartening, but true statement about the status of race, class, and human rights in America.33 As the world viewed the ugly picture of Katrina's destruction, it should have realized that a "social safety net protecting people from abject poverty in Louisiana, Mississippi, and Alabama was not there before this tragedy and has not emerged in its wake."34 Worse, the methods utilized by the tort reform movement will make it increasingly more difficult for poor and working class Americans to pursue toxic tort relief through litigation.35

29. Id. at 261.
30. Id.
32. Id.
33. See Catherine Albisa & Sharda Sekaran, Realizing Domestic Social Justice Through International Human Rights, 30 N.Y.U. REV. L. & SOC. CHANGE 351, 352 (2006) ("As the rest of the world saw this footage, a provocative secret was revealed: the income inequities and scarcity of resources experienced by poor countries are prevalent here, in the world's richest and most powerful nation, branded as the champion of freedom.").
34. Id.
35. Kroll-Smith & Westervelt, supra note 31, at 183. "Given the incredible cost associated with the development and pursuit of a viable toxic tort case and the fact that plaintiffs are most likely to be poor, plaintiffs' attorneys must
Although the techniques employed by the tort reform movement have had some success in restricting the effective utilization of toxic tort litigation to pay victims and discourage polluters, capping punitive damage awards serves as a devastating tool of tort reform that undermines the role of environmental justice in America. Notwithstanding the considerable challenges created by the tort reform movement, some observers still take the position that the private plaintiff toxic torts lawsuit is increasingly becoming a vital legal tool in the fight for environmental justice in the face of the political manipulation of regulatory law involving environmental hazards.

Lawyers utilizing the toxic tort litigation route to achieve environmental justice must also overcome the potential misuse of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, an opinion by justices lacking experience and training in handling either scientific doubt or ambiguity. The *Daubert* decision requires federal judges to only admit expert evidence that is "scientifically reliable and relevant." One commentator, Ronald Melnick, warns that a judge who lacks experience in addressing the uncertainties surrounding scientific data could reach an erroneous judgment on the reliability and relevance of evidence connecting environmental factors to illness suffered by people seeking environmental justice. An erroneous decision by a judge may well result in an unreasonable exclusion of bona fide and appropriate scientific evidence that is indispensable to a plaintiff's toxic tort lawsuit. Specifically, Melnick states that a defendant's *Daubert* motion to exclude evidence might be granted in toxic torts litigation because scientific information about environmental diseases is frequently incomplete. Melnick argues that incomplete scientific evidence should not result in the exclusion of a plaintiff's evidence in a toxic tort lawsuit because it is not unusual for scientists to reach different conclusions about the same dataset addressing the issue of causation of diseases in people. A *Daubert* motion that dismisses a plaintiff's evidence creates an unreasonable

have confidence in the potential for a significant damage award in order to anticipate covering their expenses." *Id.*

36. *Id.*
37. *Id.*
38. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 32.
44. *Id.*
impairment for the toxic tort litigant seeking environmental justice and a jury that might grant justice if it had access to all of the relevant and reliable scientific evidence. The Daubert decision has indeed created a number of obstacles for toxic tort plaintiffs making an effort to get their cases before a jury of their peers throughout America. Yet, the future of toxic tort litigation will rely on scientific development and the evaluation of scientific data by courts in their gate-keeping role.

The effort to acquire reliable scientific evidence about the toxic levels of contamination caused by Hurricane Katrina has proven controversial. According to Environmental Protection Agency Administrator, Stephen L. Johnson, Hurricane Katrina is the biggest disaster the Environmental Protection Agency (EPA) has ever come across. On September 14, 2005, Johnson informed reporters “that the Gulf Coast was still facing an array of serious health threats, including lack of clean drinking water, astronomically high bacteria counts and unsafe levels of several toxic metals in floodwaters.” Johnson also said it was impossible to provide an assessment of how much time it would take to clean up the Gulf Coast because the extent of the problem could not be determined. Although there were early indications that widespread hazardous waste existed in New Orleans, the EPA said that, up to that point, it had uncovered hazardous levels of only three chemicals in the floodwaters. However, environmental researchers questioned the reliability of the EPA’s testing, because it did not detect benzene or other petroleum products

45. *Id.* at 31-32.
46. *See* Richard W. Clapp & David Ozonoff, *Environment and Health: Vital Intersection or Contested Territory?*, 30 AM. J. L. & MED. 189, 190 (2004) (affirming that the Daubert decision “has led to some major obstacles for plaintiffs attempting to get their cases before juries in many parts of the United States”).
47. *See* id. (maintaining that “the future of toxic tort litigation will rest, in part, on how the courts understand the scientific process and the evaluation of scientific literature, and how they interpret their ‘gate-keeping’ role”).
49. *Id.*
50. *Id.*
51. *Id.* Specifically, reports indicated the following:

Hexavalent chromium and arsenic, which are known human carcinogens, were reported Wednesday in floodwaters in some New Orleans neighborhoods at levels that are unsafe for drinking water. The latest available samples were taken Sept. 4 through Sept. 6. The chromium compound is used in metal plating. Arsenic, found naturally in the Earth’s crust, occurs in pesticides and wood preservatives. Since Sept. 3, the agency has reported unsafe lead levels in floodwaters, including one sample that exceeded the drinking-water standard 15-fold. Lead can damage the brain of a fetus or child if it is ingested.

*Id.*
notwithstanding the fact that "oily sheens [were] observable on the floodwaters." Not surprisingly, experts questioned whether Johnson’s reliance on the EPA tests was justified because there was reasonable doubt about whether the test could adequately assess the hazards present in the area.52

Environmental activists point the finger at federal and Louisiana environmental administrators for misleading the community regarding health risks linked with sediment in the New Orleans vicinity as a result of Hurricane Katrina.53 The Natural Resources Defense Council joined other groups in asking both federal and state environmental officials "to clean up or remove contaminated topsoil, fully inform the public of potential risks, and provide returning residents with clear guidelines on protecting themselves."54 A Louisiana environmental chemist conducted tests on samples from locations in the New Orleans area.55 The tests discovered that arsenic levels throughout New Orleans were in violation of the EPA’s safety limits, in some neighborhoods by a factor of thirty.56 "Samples in some residential neighborhoods near two toxic waste sites found high levels of the DDT and other banned pesticides and cancer-causing petroleum chemicals. Some samples also had high levels of lead."57 The environmentalists accused the EPA of not being honest about the risks to people returning to the city. Environmentalists also claimed that federal and state environmental protection officials failed to retest 144 sites around New Orleans with a prior history of contamination.58

52. Id. Marla Cone reported:
John Froines, director of UCLA’s Center for Occupational and Environmental Health, said just comparing the chemicals to drinking-water standards may not be enough to protect public health. Some, such as toxic ingredients in petroleum products and pesticides, can be absorbed through the skin and others can cause allergic reactions. “There must be over 100,000 volunteers and National Guardsmen and other officials there,” Froines said. “These people are likely to be wading in water, and they may have some of the most significant exposures. We know you can get massive uptake [of some chemicals] through the skin in certain occupational settings. I don’t have a sense that anybody is thinking about that,” Froines said.

53. Bruce Geiselman, Officials Downplayed Risks After Storms, Groups Charge, WASTE NEWS, Dec. 5, 2005, at 21. Activist groups “called upon the U.S. Environmental Protection Agency and the Louisiana Department of Environmental Quality to clean up or remove contaminated topsoil, fully inform the public of potential risks, and provide returning residents with clear guidelines on protecting themselves.”

54. Id.
55. Id.
56. Id.
57. Id.
58. Id. It was further noted that:
If one were to accept the finding of the Louisiana chemist that residents of New Orleans were exposed to harmful toxic torts because of a negligent failure to remove hazardous waste in a timely manner in the aftermath of Katrina, do those exposed have a mass toxic tort claim? Conceivably the most complicated problem involving mass torts is the status of future claimants. "Futures" are those who do not now have claims, because injury has not been sufficiently manifested, but who may well have claims in the future. Toxic tort injuries develop over a period of time impacting some victims with serious effects, while others suffer only moderate effects, and some experience little or no discernible effects. Toxic tort injuries which do readily manifest themselves, like asbestos-related injuries, often present difficult evidentiary and administrative problems. "Toxic torts by definition involve a biological interaction between the allegedly injurious substance and the victim." Biological interactions as a whole are very complex, especially when exposures are relatively small or intermittent. The manifestation of a toxic tort injury may sometimes be weeks, months, or even years from the time of exposure, as in a case involving asbestos. After one has identified an appropriate defendant against whom to file a mass toxic tort lawsuit, only those mass torts "arising from a common cause or disaster" are suitable for class action certification in Louisiana. Toxic tort plaintiffs who suffer harm as a result of

"Residents face a health risk because they can easily inhale contaminated sediment or get it on their skin when they are trying to clean it up," said Dr. Gina Solomon, a physician who led the NRDC research team. If the contamination is not cleaned up, residents could face serious health risks from long-term exposure, including cancer, neurological diseases, and hormonal and reproductive system problems, she said.

Id.

60. Id.
61. Id. at 1902.
62. Id.
63. Id.
64. Id.
65. Id. at 1902-03.
The class action is a nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when the question is one of common or general interest to persons so numerous as to make it impracticable to bring them all before the court.

Id. at 456 (quoting Ford v. Murphy Oil U.S.A., Inc., 703 So. 2d 542, 544 (La. 1997)).
Katrina will be confronted with the ugly legal reality of proving the biological interaction between the purportedly damaging toxic substances is challenging.\(^6^7\) Potential mass toxic torts plaintiffs face stiff proof challenges in the Katrina situation because many injuries will be a matter of gradation and the proof of causation will be "based on probabilistic analysis" that will be subject to an intense challenge by defendant(s).\(^6^8\)

In spite of the major hurdles faced by those seeking to use toxic tort litigation to ensure fair and equal treatment for individuals exposed to harmful levels of toxicity, Katrina plaintiffs should not automatically avoid litigation. Katrina plaintiffs should continue litigating to protect their interest in living in a safe and healthy environment because their only viable option may be to seek either personal damages for toxic tort exposure or environmental cleanup from the appropriate party. Because of a fear that Katrina's floodwater made New Orleans a virtual toxic dump, EPA officials obtained samples from all around the city of biological pathogens and over 100 chemical pollutants, including pesticides, metals and industrial chemicals.\(^6^9\)

Five "Superfund sites" in the New Orleans area, including several of America's worst toxic messes, were flooded by Hurricane Katrina.\(^7^0\) In the flooded regions of Louisiana, Mississippi, and Alabama, thirty-one Superfund sites exist.\(^7^1\) In the areas that have flooded, five oil spills had previously occurred.\(^7^2\) Additionally, hazardous waste railcars may have been flooded, but "federal rail officials say they've had no reports of leakage so far."\(^7^3\) Tests further revealed elevated levels of E. coli and other harmful coliform bacteria in the floodwater.\(^7^4\) It was further shown that New Orleans floodwaters also contained high levels of E. coli exceeding the EPA's safe swimming limit by 109 times.\(^7^5\) Chemical samples taken on September 4 and 6, 2005, by the EPA and the Louisiana Department of Environment Quality further support a characterization of New Orleans as a virtual toxic

\(^6^7\) See Hazard, supra note 59, at 1903 (attesting to the difficulties toxic tort plaintiffs will encounter once they file a lawsuit).

\(^6^8\) See id. (indicating that "proof of causation often is not very definite" and therefore plaintiffs will face difficult causation issues).


\(^7^0\) Id.

\(^7^1\) Id.

\(^7^2\) Id.

\(^7^3\) Id.

\(^7^4\) Id.

\(^7^5\) Id.
These tests consistently revealed high levels of the chemicals hexavalent chromium, arsenic, and lead. Nevertheless, the nature of the toxic torts issue for individuals seeking environmental justice in the Katrina aftermath will be a massive undertaking. The enormous amount of damage and toxic exposure generated by Katrina will not be solved by litigation initiated by concerned citizens seeking a clean and safe place to live in the aftermath of Katrina. In spite of the very toxic nature of the environmental harm done in the New Orleans area and the large scale damages to homes and businesses, an individual or group of individuals must remember that the right to litigate might be a tedious and expensive method to collect damages and/or help establish environmental policy.

No less than 140,000 southern Louisiana homes and businesses were made uninhabitable as a result of the floods and winds produced by Hurricane Katrina. These damaged structures represent the majority of the twenty-two million tons of debris left behind by the storm. The total number of structures that may be condemned and bulldozed may come to 160,000 according to Mike McDaniel, chief of the Louisiana Department of Environmental Quality. The numbers presented by McDaniel come from the Louisiana Department of Environmental Quality’s first general evaluation of damage to the communities impacted by the storm. Katrina destroyed 350,000 cars and other vehicles. Several of these vehicles were under water in New Orleans and St. Bernard Parishes for a number of weeks, and will join one million stoves, refrigerators, and additional appliances that will be disposed of.

McDaniel identified additional environmental issues confronting South Louisiana: “176 low-level radiation leaks, tens of millions of gallons of hazardous materials, such as cleansers and bleach, polluted floodwater that was pumped into Lake Ponchartrain, raw sewage that is still pumping into the Mississippi River.”

Because southern Louisiana has millions of tons of debris of which to dispose, the likelihood is great that residents of Louisiana will be exposed to a toxic harm by methods used to dispose of the toxic waste created by Katrina-related flood and wind damage.

76. Id.
77. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
Some commentators maintain that "[w]inning an environmental struggle is not as simple as securing a lawyer and launching a lawsuit." The plaintiffs, as victims of toxic tort harms related to Katrina, should present an effective message that appeals to the contemporary cultural scene in a manner that attracts good press for their cause as well as outside support and resources. In toxic tort litigation, the lawyer and Katrina plaintiffs pursuing the environmental justice aim of proper disposal of debris will also have a duty to study the political landscape and to identify both friends and foes in developing a successful strategy to achieve their goal. A very limited number of private tort actions exist that residents can pursue against either a governmental or private defendant for conduct relating to toxic tort damage caused by Hurricane Katrina. But, those limited rights should be exercised to force toxic torts defendants to do what the law requires in assisting with the proper cleanup and disposal of disaster-generated waste. Local, state, and federal responders must address unique cleanup questions due to the enormity and amount of environmental harm caused by Katrina on the impacted communities. Katrina created an urgent call to clear debris and control discharges of hazardous substances that endangered health and safety or delayed emergency response operations.

Next, authorities were called on to "determine how and where the huge quantities of Hurricane Katrina-related waste and debris (hazardous and nonhazardous), would be gathered, separated, and ultimately disposed." As one student correctly identified, "[g]iven

85. Toffolon-Weiss & Roberts, supra note 27, at 268.
86. See id. (providing an explanation of how lawyers and protest groups should approach the environmental justice struggle).
87. Id.
89. Id.
90. Id. As reported further in the CRS Report for Congress:

The 109th Congress has been working to address the devastation wrought by Hurricane Katrina in the Gulf States, which is on a scale larger than any experienced by the United States in a single natural disaster incident. In addition to supplemental funding, a number of legislative proposals regarding procedures and requirements for the response and recovery from "super catastrophes" are being debated and considered. This report aims to provide an overview of environmental considerations raised by the immediate and intermediate cleanup tasks across the diverse communities in the affected region, and of federal legal authorities and plans for tackling those tasks. The report also discusses coordinated roles and activities among local, state, and federal
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the potentially hazardous nature of disaster debris at extraordinary quantities, disposal methods raise concerns about potential future liability, should hazardous substances be released into the environment. The question presented of course is: who is responsible for paying for the cleanup of the debris? Courts typically “hold municipalities liable as potentially responsible parties (PRPs) for releases of hazardous substances at sites where municipalities owned the site, disposed of, or arranged for the disposal of, municipal solid waste (MSW), which is known to contain some hazardous substances.” In the post-Katrina era, the wisdom of making municipalities liable for the extraordinary challenge of disaster debris cleanup generated by Katrina may be questioned. A lack of preparedness with regard to disaster debris management is responsible for clean-up delays and environmental issues related to Katrina. The United States Army Corps of Engineers (the Corps), the lead agency for removal of Katrina’s debris, and the City of New Orleans might be liable under CERCLA for the discharge of hazardous substances at sites utilized to dispose of the hurricane’s debris.

Agencies and officials. Finally, the report serves to reference other, more detailed CRS reports and other sources on particular Katrina cleanup activities. Public health and environmental concerns associated with Hurricane Katrina span a wide variety of issues, including air and water quality and hazardous chemical releases. Katrina’s impacts also have environmental implications for other major issue areas, such as energy, transportation, and defense. While this report addresses selected cleanup concerns receiving post-Katrina attention, it is not intended to provide comprehensive coverage of all public health and environmental issues associated with Hurricane Katrina, nor is it within the scope of this report to analyze ongoing legislative and appropriations considerations related to the hurricane disaster response efforts. Id.


92. See id. (“The question is who will have to pay for future cleanup?”).

93. Id.

94. See id. (citing Diana Ng, Note, Debating the Wisdom of Placing Superfund Costs on Municipalities, 69 S. CAL. L. REV. 2193, 2199-2204 (1996) (discussing the arguments against and in favor of limiting CERCLA liability for municipalities)).

95. Id. at 354.

96. Id. The City of New Orleans is still awaiting CERCLA action by the federal government addressing the discharge of hazardous substances from a landfill used to dispose of debris from Hurricane Betsy. See United States v. City of New Orleans, No. 02-3618, 2003 WL 22208578 (E.D. La. Sept. 19, 2003).
III. THE IMPLICATION OF THE AGRICULTURE STREET LANDFILL LITIGATION FOR POST KATRINA TOXIC TORTS DEBRIS AND OTHER HAZARDOUS SUBSTANCES

A. Protagonist New Orleans Creates an Environmental Racism Issue by Approving the Building of a Predominantly African American Community on the Toxic Agriculture Landfill Site

The Agriculture Street Landfill environmental justice legend was launched around 1910, after the City of New Orleans used the site as a municipal waste dump. The site continuously received solid waste for fifty years after this period. The waste was burned on site and buried in the adjacent community. During the 1940s and 1950s, residents in the immediate vicinity of the site voiced that they objected to the “terrible” stench produced by the Agricultural Street Landfill. When the landfill was shut down, it was seventeen feet deep and spanned ninety-five acres. The Housing Authority of New Orleans (HANO) and the Federal Department of Housing and Urban Development (HUD) selected the Agriculture Street Landfill site to build 167 new units of public housing for low income residents. In 1975, the neighborhood that housed the site, Press Park, grew after the Desire Community Housing Corporation (DCHC) constructed sixty-seven single-family homes and an elderly-care facility. The DCHC named these additional properties “Gordon Plaza,” and in 1981, HUD granted the project seven million federal dollars. After the residents of Press Park and Gordon Plaza moved into their homes, they immediately became aware of landfill debris in their yards. This was a reliable warning of the environmental justice problems associated with building homes on the Agriculture Street Landfill. After the residents of the Agriculture Street Landfill community realized that the land both under and bordering their homes was full of dangerous contaminants, residents met with city officials and the representatives of other parties. On May 23, 1985, they proposed to relocate their community. The residents of Agriculture Street soon concluded that both federal and local politicians simply gave “lip service” to their attempt to relocate. The Agriculture Street Landfill residents tried a number of legal

98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id. at 271-272.
104. Id.
105. Id.
106. Id.
strategies to stop the EPA from performing an inadequate cleanup.\textsuperscript{107} Their efforts to stop the EPA from performing a less than adequate cleanup were not successful.\textsuperscript{108} The EPA concluded that the Agriculture Street Landfill was not toxic enough to warrant relocation of the neighborhood consisting mainly of African-American residents.\textsuperscript{109}

Environmental officials have performed many rounds of soil tests at a site near the Agriculture Street Landfill in New Orleans since Hurricane Katrina and implied in April, 2006, for the first time “that some areas of the city could be slated for remediation of lead contamination.”\textsuperscript{110} In April of 2006, Don Williams, of the EPA, alleged that while that test site is in close proximity to the Agriculture Street Landfill Superfund site, the tests suggest the landfill is not responsible for the lead contamination.\textsuperscript{111} As of April 2006, several months after Katrina, Sam Coleman, response director for the EPA, said the EPA wanted to review more information before making a decision about whether to remediate specific sites in New Orleans.\textsuperscript{112} Coleman articulated the position that tests for other contaminants as well as the amount of arsenic in the soil failed to reveal any cause for long-term concern.\textsuperscript{113}

Monique Harden, co-director of Advocates for Environmental Human Rights, a nonprofit, public interest law firm located in New Orleans, is very skeptical of the EPA’s finding on the toxic impact of substances released by Hurricane Katrina in Cancer Alley, the area between New Orleans and Baton Rouge.\textsuperscript{114} The Advocates for Environmental Human Rights continues to work with others to obtain samples of the sediments left behind after

\begin{footnotesize}
\begin{itemize}
\item[107.] Id. at 273.
\item[108.] Id.
\item[109.] Id. Specifically, as Toffolon-Weiss and Roberts note:
\end{itemize}
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\item The EPA did not believe that Agriculture Street was dangerous enough to warrant relocation . . . . Instead it opted to remove two feet of contaminated soil from residents’ yards, replacing it with a “geotextile” (a fine porous plastic mesh) barrier and two feet of clean soil, at a cost of approximately $20 million. With the one–two-foot barrier created by the EPA cleanup plan, all trees in the neighborhood were removed and residents are instructed on which trees they can plant. The plans also restrict residents from making additions to their homes and from building in-ground swimming pools. Despite residents’ protests and opposition from the City of New Orleans, the EPA began cleanup of the site in late 1998, starting with the undeveloped portion of the land surrounding the site and the Gordon Plaza Elderly Apartments . . . .
\end{itemize}
\begin{itemize}
\item Id. (citation omitted).
\item[110.] Amy Wold, EPA Looks at N.O. Soil’s Lead Content Pre-Katrina Problem May Need Remediation, BATON ROUGE ADVOC., Apr. 6, 2006, at B1.
\item[111.] Id.
\item[112.] Id.
\item[113.] Id.
\item[114.] Ben Greenberg, Katrina Hits Cancer Alley, DOLLARS & SENSE, Mar. 1, 2006, at 34.
\end{itemize}
the draining of Katrina's floodwaters.\textsuperscript{115} "We didn't want a replay of what EPA did in New York after 9/11 — claiming that air quality was good when in fact it was very unhealthy."\textsuperscript{116} Wilma Subra, a chemist in Louisiana, took and evaluated sediment samples.\textsuperscript{117} Her sampling analysis and the EPA's tests revealed elevated levels of toxic contamination in the sediment deposits covering yards, streets, and sidewalks in flooded neighborhoods.\textsuperscript{118} Although arsenic and diesel fuel substances were the prevailing contaminants found, the "EPA concluded that...more retesting and analysis was needed. [Advocates for Environmental Human Rights] saw it very differently," said Harden, "and have been demanding that the agency take action to immediately clean up the sediment."\textsuperscript{119}

In the post-Katrina era, it appears that Harden and other environmental activists are now demanding that the EPA clean up New Orleans toxic sites in good faith to protect environmental health.\textsuperscript{120} In the aftermath of Katrina, Harden spoke about some of the specific environmental issues facing the Agriculture Street community, a community of individuals whose homes were built on top of a toxic landfill.\textsuperscript{121} The Agriculture Street subdivision was built in the 1960s and 1970s and was marketed to African Americans.\textsuperscript{122} People who moved into this subdivision did not know their homes were built on top of a toxic landfill.\textsuperscript{123} After Agriculture Street community residents realized they were suffering serious health problems, including cancer, they became aware their homes were built on a toxic landfill.\textsuperscript{124} A study by the state of Louisiana confirmed that Agriculture Street residents possess the highest frequency of breast cancer in the state among women and men.\textsuperscript{125} In 1994, the Agriculture Street community was selected as a Superfund site.\textsuperscript{126} "EPA provided a ridiculous cleanup that involved removing one to two feet of contaminated soil from yards that have 17 feet of soil contaminated with over 150 toxic chemicals and heavy metals. And EPA refused to
temporarily relocate residents who were exposed to toxins during over a year of excavation.”

B. Agriculture Street Landfill Residents Class Action Seeks Environmental Justice from New Orleans while New Orleans Seeks to Make Third-party Defendants Liable: Johnson v. Orleans Parish School Board

The residents of the Agriculture Street landfill filed a class action law suit more than five years ago in an attempt to seek environmental justice from toxic exposure. The named plaintiffs in the Johnson v. Orleans Parish School Board class action lawsuit were either current or former residents of the Agricultural Street Landfill community who purportedly suffered injury. The site contains nearly 190 acres bordered on the north side by Higgins Boulevard, on the east side by Louisa Street, on the south side by Florida Avenue and on the west side by Almonaster Avenue and Peoples Avenue Canal. The Agriculture Street site contains the “Press Park” community, the “Gordon Plaza” development, the “Gordon Plaza Senior Citizens Apartment Complex” and Moton Elementary School. The plaintiffs in the Johnson class are all people who sustained damages through exposure to hazardous and toxic substances in the soil at Agriculture Street Landfill where they lived, worked, and played since the 1970s. Nine of the class representatives testified at trial. The plaintiffs’ claims relate to both present and future illnesses and diseases that may develop because of their exposure to contaminated soil. Further, the plaintiffs were asking for medical monitoring damages as well monetary damages for the diminution of property values caused by the contaminated toxic soil. On the other side, the named defendants in Johnson included the City of New Orleans (City), the Housing Authority of New Orleans (HANO), the Orleans Parish School Board (School Board), and their insurers: National Union Fire Insurance Company of Pittsburgh, Pennsylvania, U.S. Fire Insurance Company, Republic Insurance Company, and

127. Id. “Residents have had to sue federal and state housing agencies and other responsible government agencies for building their subdivision on top a toxic landfill. A few weeks ago, residents won their lawsuit in a state court, but the government defendants are expected to appeal.” Id.
129. Id. at 738.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
South American Insurance Company/Louisiana Insurance Guaranty Association.\textsuperscript{135}

In the early 1900s, New Orleans operated the site as a landfill, collecting and transporting waste mounds, waste pits, waste lagoons, and surface deposits, much of which are alleged to be toxic and/or hazardous. In the 1960s and 1970s, while developing the Agriculture Street landfill site into a residential community, New Orleans and HANO gave contracts for the construction of three residential developments on top of the landfill to different entities, entities that were not parties to the \textit{Johnson} class action suit.\textsuperscript{136} In 1986, the EPA started investigating the Agriculture Street Landfill site, which resulted in the site being placed on the National Priorities List in 1994 as a "Superfund" site.\textsuperscript{137}

In \textit{Johnson}, the class action plaintiffs maintained that the contractors hired by both New Orleans and HANO either failed to take proper corrective measures, or negligently performed their respective duties.\textsuperscript{138} The plaintiffs also alleged that New Orleans and HANO breached their duties to ensure that the contractors they hired performed in a proper manner, and it was because of this alleged breach that the plaintiffs filed the lawsuit.\textsuperscript{139} The plaintiffs claimed they were entitled to medical monitoring and remuneration for their economic losses.\textsuperscript{140} Additionally, the plaintiffs stipulated that their lawsuit was not to be considered as a claim for personal injury.\textsuperscript{141}

In the 2004 version of the consolidated \textit{Johnson v. Orleans Parish School Board}\textsuperscript{142} ("Johnson II") decision, defendants/third-

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.} at 738-39.
  \item \textsuperscript{137} \textit{Id.} at 739.
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.} The trial court defined the following claims the plaintiffs could pursue:
    \begin{enumerate}
      \item Current and former residents who have lived on the site of the former landfill site, as described above, for at least twelve months prior to February 1, 1994;
      \item Current and former business owners and their employees who have operated a business on the former landfill site, as described above, for at least twelve months prior to February 1, 1994;
      \item Current residents who are the owners of record of their homes, or who are buying their homes but have not yet completed their payments; and
      \item Former students and employees of Morton Elementary School who attended or worked at the school on the site of the former landfill for at least twelve months or one full school year prior to February 1, 1994.
    \end{enumerate}
  \item The trial court held that the named plaintiffs met all of the statutory requirements for class certification.
  \item \textit{Id.}
  \item \textsuperscript{142} \textit{Johnson v. Orleans Parish Sch. Bd. (Johnson II)}, 890 So. 2d. 579 (La. App. 4th Cir. 2004).
\end{itemize}
party plaintiffs, the School Board, the city, and HANO unsuccessfully appealed a trial court decision giving the no cause of action and no right of action exceptions to the third-party defendants BFI Waste Systems of North America, Inc., the New Orleans Public Belt Railroad Commission, CFI Industries, Inc., IPC, Inc., and the Port of New Orleans.143

The original plaintiffs filed suit against New Orleans, HANO and the School Board alleging damages as a consequence of the construction of a predominantly African-American community on top of the Agriculture Street Landfill.144 In their suit, the original plaintiffs allege that the defendants developed residential and commercial properties on this site in the 1960s and 1970s, and breached their duty to require those it hired to assist in developing the landfill property. They breached their duty by failing to either remove the hazardous substances from the site, or to warn the plaintiffs of the existence of such substances.145 The defendants identified in this litigation filed third-party demands for direct damages, indemnity, and contribution against the appellees, BFI Waste Systems of North America, Inc., the New Orleans Public Belt Railroad Commission, CFI Industries, Inc., IPC, Inc., and the Port of New Orleans.146 The third-party demands assert that the third-party defendants are the corporate successors to companies that inappropriately hauled and disposed of hazardous items at the landfill site before 1958, when the landfill closed.147 The third-party defendants answered the third-party demands by filing exceptions of no cause of action and no right of action.148 On

143. The court held:
After reviewing the third party demands in this case, we conclude that the trial court did not err in granting the exceptions of no cause of action because the third party demands do not allege facts sufficient to identify a legal duty owed by the third party defendants to the plaintiffs or the third party plaintiffs. According to the facts alleged in the third party demands, the waste disposal or salvaging companies later acquired by third party defendants either caused or contributed to the contamination of the Agriculture Street Landfill with hazardous substances. There are no allegations that the third party defendants knew or should have known that an area designated as a landfill and used by them as such would years later become the site of a residential neighborhood and school. Accepting the allegations of fact in the third party demands as true, the third party plaintiffs have not shown that the third party defendants owed a duty to plaintiffs, and therefore, third party plaintiffs have no claim for contribution or indemnity against the third party defendants. The trial court did not err in granting the third party defendants' exceptions of no cause of action.

Id. at 582.

144. Id. at 580.

145. Johnson, 790 So. 2d. at 739.

146. Johnson II, 890 So. 2d. at 580.

147. Id. at 580-81.

148. Id. at 581.
appeal, the third-party plaintiffs argued that the trial court committed reversible error by granting the third-party defendants’ exceptions of no cause of action and no right of action.\textsuperscript{149} After reviewing the third-party demands in this case, a Louisiana appeals court reasoned that the trial court did not commit error by granting the exceptions because the third-party demands failed to allege enough relevant facts to support a recognizable legal duty owed by the third-party defendants to either the original plaintiffs or the third-party plaintiffs.\textsuperscript{150}

The facts alleged in the third-party demands state that the waste disposal and salvaging companies later hired by third-party defendants either caused or contributed to the contamination of the Agriculture Street Landfill with hazardous materials.\textsuperscript{151} But, there are no allegations in the pleadings of the third-party plaintiffs that the third-party defendants either knew or should have known that a locale selected for a landfill and used by them as a landfill would many years afterwards become the site of a residential neighborhood and school.\textsuperscript{152} Viewing the allegations in the third-party demands as if they were true, the third-party plaintiffs still failed to demonstrate that the third-party defendants owed a duty to the original plaintiffs. As a result, the third-party plaintiffs did not have a claim for contribution or indemnity against the third-party defendants.\textsuperscript{153} The trial court therefore did not make an error when it granted the third-party defendants’ exceptions.\textsuperscript{154} The appellate court in Johnson II remanded the case to the trial court with instructions to allow amendments of the third-party demands within thirty days of this judgment.\textsuperscript{155}

In the 2005 edition of Johnson v. Orleans Parish School Board\textsuperscript{156} (Johnson III) the defendant-appellant School Board and the defendant-third-party-plaintiff-appellant HANO appealed a decision rendered on June 15, 2002, granting the exceptions of no cause of action and no right of action filed on behalf of third-party defendants Edward Levy Metals, Inc. (Levy Metals) and Delta By-Products, Inc. (Delta), and dismissing Levy Metals and Delta from this suit.\textsuperscript{157}

The principal plaintiffs had a residential history in the community at the former Agriculture Street Landfill site.\textsuperscript{158} The

\begin{itemize}
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id. at 582.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id. at 583.
  \item \textsuperscript{156} 897 So. 2d 812, 814 (La. App. 4th Cir. 2005).
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at 815.
\end{itemize}
main demand was based on the assertion that the defendants, New Orleans, HANO and the School Board, failed to correctly seal or otherwise eliminate hazardous substances at the site of the Landfill. The defendants also failed to warn the plaintiffs of these substances before approving, promoting, and developing residential and commercial units as well as an elementary school on top of the landfill. Yet, the Agriculture Street Landfill land was never owned by the City, HANO, or the School Board during the period it operated as a landfill. New Orleans had leased the landfill from the Lemle family. Moreover, Delta managed a salvage facility on some of the Landfill property from 1949 until 1958. Nor did Levy Metals ever own any of the Landfill property, though Edward Levy individually had an ownership interest in the property. However, the class plaintiffs were not contending that the Agriculture Street Landfill operated improperly or violated any standard of care, ordinance, or regulation while it was being used as a landfill. The class plaintiffs claimed instead that the City's and HANO's negligence started in the 1960s after the landfill stopped operating. In addition, the class plaintiffs argued that the School Board's negligence did not begin until 1983, fifteen years after the landfill closed. The source of the third-party demand against Levy Metals and Delta was rooted in the argument that they unacceptably dumped and/or handled waste at the landfill before the time that the negligence alleged in the main demand happened. The legal issues presented in Johnson III were therefore nearly identical to those decided in the earlier Johnson II decision, a controlling decision.

159. Id. at 814.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id. at 815. The court in Johnson III quoted the statement of the case in Johnson II, noting that it was "equally applicable for all material purposes to the instant appeal".

The original plaintiffs in this case are current and former residents of three housing developments in New Orleans. These plaintiffs filed suit against the City, HANO and the School Board alleging damages resulting from the construction of a community on top of a former municipal landfill site known as the Agriculture Street Landfill. According to the suit, in the 1960's and 1970's, these defendants developed residential and commercial properties and an elementary school on this site without first removing hazardous substances from the site and warning plaintiffs of the existence of these substances. Johnson III, 897 So. 2d at 815; Johnson II, 890 So. 2d. at 580.
In *Johnson III*, a Louisiana appellate court accepted the line of argument made in the HANO brief that the third-party defendants, including Levy Metals and Delta Products, salvaged metal and other items from the trash while contracting with New Orleans between 1949 and 1958 and still have property at the Agriculture Street Landfill site. The court held no basis to distinguish the allegations made against the third-party defendants in *Johnson II* from those made against Levy Metals and Delta in *Johnson III*. As a result, the *Johnson III* court adopted the standard of review utilized to review the exception of no cause of action first approved by the *Johnson II* ruling. The *Johnson III* court cited to *Johnson II* and "conclude[d] that the trial court did not err in granting the exceptions of no cause of action because the third-party demands do not allege facts sufficient to identify a legal duty owed by the third-party defendants to the plaintiffs or the third party plaintiffs." Very similar to *Johnson II*, there was not a single allegation that the third-party defendants, Levy Metals and Delta, knew or should have known that a location selected by New Orleans as a landfill would in the future become the site of a residential community and school. The court stated in *Johnson II*, the court "need not decide whether Levy Metals or Delta is included in the definition of proprietor under La. C.C. art. 667 since the plaintiffs fail[ed] to allege that any one of the class members lived in the landfill area during its operation." Under relevant Louisiana law, third-party defendants involved in a toxic tort lawsuit for damages because of exposure to hazardous waste from the Agriculture Street Landfill site may adopt by reference the line of reasoning advanced by additional third-party defendants in their prior exceptions filed in the same lawsuit. Louisiana rules of civil procedure addressing the form of exceptions do not forbid one from fulfilling the content requirements for exceptions as a result of incorporation by reference. Consistent with *Johnson II*, the *Johnson III* court affirmed granting the appellees, Levy Metal or Delta, exceptions of no cause of action and remanded the case to the trial court with instructions to allow amendments to the demands of the third-party plaintiffs.

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168. *Johnson III*, 897 So. 2d at 815.
169. Id.
170. Id. at 816.
171. Id.
172. Id.
173. Id. at 816.
174. Id.
175. Id. at 817.
In the 2006 treatment of *Johnson v. Orleans Parish School Board* (Johnson IV) the School Board made a third-party claim against CFI Industries, Inc. and IPC, Inc. CFI and IPC answered the demands by claiming exceptions of no cause of action and no right of action. The trial court approved the exceptions. The School Board appealed the holding of the trial court.

The *Johnson IV* plaintiffs were either residents or past residents of three residential projects in New Orleans. The plaintiffs initially sued the city, the Housing Authority of New Orleans, and the School Board. The plaintiffs alleged they suffered damages as a consequence of the construction of a residential community on the Agriculture Street Landfill. The plaintiffs argued that the defendants developed urban residential and commercial property on the landfill site without initially removing hazardous substances from the site and failed to warn the plaintiffs that the substances were present. The School Board in *Johnson IV* filed third-party complaints seeking direct damages, indemnification, and contribution from the corporate successors to companies that purportedly disposed of hazardous materials inappropriately at the landfill site before it closed in 1958. These third-party defendants were CFI and IPC, the successors to Letellier Phillips Paper Company. The trial court held the defendants were entitled to the exceptions and the School Board challenged the decision on appeal.

In *Johnson IV*, the Louisiana Appeals Court for the Fourth Circuit affirmed the trial court decision providing for an exception of no cause of action and remanded the case to the trial court with instructions to allow amendment of the third-party complaint so that it may properly state a cause of action. Following the remand, the School Board amended its complaint against CFI and IPC, who both filed exceptions of no cause of action and no right of action to the amended third-party complaint. The trial court granted the post-remand exceptions to CFI and IPC, and the School Board appealed the trial court’s determination.

To determine whether a pleading states a cause of action in Louisiana, a court reviews the pleadings, accepting the properly

176. 929 So. 2d 761 (La. App. 4th Cir. 2006).
177. Id. at 762.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id. at 762-63.
187. Id. at 763.
pleaded facts as if they were true.\textsuperscript{188} At the trial of an exception of no cause of action, the main issue for consideration is “whether, on the face of the petition, the plaintiff is legally entitled to the relief sought.”\textsuperscript{189} The appropriate question for the no cause of action exception is “whether, in light of facts viewed most favorably for the plaintiff and with all doubts resolved in favor of the plaintiff, the petition states a valid cause of action.”\textsuperscript{190}

In \textit{Johnson IV}, the appellate court held that the trial court correctly granted CFI and IPC’s request for the exception of no cause of action by finding the petition did not identify that CFI and IPC owed a legal duty to the School Board. The appellate court concluded that “[a]ccepting the allegations of fact in the third party demands as true, the third party plaintiffs have not shown that the third party defendants owed a duty to plaintiffs, and therefore, third party plaintiffs have no claim for contribution or indemnity against the third party defendants.”\textsuperscript{191} The uncorroborated conclusions of the plaintiff, not backed up by facts, failed to establish a cause of action.\textsuperscript{192} Accordingly, to defeat an exception of no cause of action, the factual allegations, if proven, must at least show that one party owed a legal duty.\textsuperscript{193} The amended third-party complaint alleged that CFI and IPC, as the corporate successors to Letellier Phillips, disposed of items possessing elevated levels of toxicity at the Agriculture Landfill site and that they should have known such conduct would harm both people and the environment.\textsuperscript{194} The factual allegations concerning CFI and IPC, as the corporate successors to Letellier Phillips, were that Letellier Phillips salvaged some items from the landfill. As amended, the third-party demand still failed to allege that a legal duty was owed to the plaintiffs, residents, or former residents of the Agricultural Street Landfill community. Thus, CFI and IPC did not owe a duty to the plaintiffs based on the allegations contained in the amended third-party demand.

According to the third-party plaintiff in \textit{Johnson IV}, each third-party defendant owed a duty to the plaintiffs to use the Agriculture Street Landfill consistently with its designated purpose and to disclose the name of items disposed of at the landfill. The allegations connected to CFI’s and IPC’s predecessor did not involve the deposit or dumping of material at the landfill. The particular allegations regarding Letellier Phillips were stated in the original third-party demand and were incorporated by

\textsuperscript{188} \textit{Id.} at 764.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} (quoting \textit{Johnson II}, 890 So. 2d at 582).
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 764-765.
Hurricane Katrina and Toxic Torts

reference into the amended third-party demand. "These allegations relate to removal of certain materials from the landfill. There are no allegations in the original third-party demand or the amended third-party demand that the removal of materials from the landfill caused damage to anyone." The appellate court concluded that the defendants' factual allegations in both the original and the amended third-party demand failed to show the basis for the School Board's conclusion that CFI and IPC were legally liable to the plaintiff residents for the conduct of a corporate predecessor allegedly occurring between 1948 and 1958.

C. New Orleans and the City's Housing Authority May Be Liable for Negligent Development of the Agriculture Street Landfill Community Even if They were Independent Contractors

In the original Johnson case, the plaintiffs' rather fuzzy toxic tort cause of action against New Orleans, HANO, and the School Board as defendants made it very difficult for those defendants to establish a credible third-party demand against purported third-party defendants for breach of a legal duty. In order to be successful, the original plaintiffs must demonstrate that the negligent breach of a legal duty was the proximate cause of the harm suffered by the plaintiffs from exposure to materials from the Agriculture Street Landfill. The Plaintiffs rather nebulously claimed damages for exposure to hazardous and toxic substances from the Agriculture Street Landfill community as either current or former residents, business owners, employees, or students. It is clear that the plaintiffs had suffered an incredible moral and reprehensible wrong by being encouraged to live on top of a former toxic landfill without any, let alone adequate notice of the toxic nature of the landfill on which their homes sat. Although New Orleans and HANO began the residential development project on the site of the toxic Agriculture Street Landfill, it is difficult to determine whether these well-deserving plaintiffs stated a proper cause of action against the original defendants in their pleadings. While developing the toxic Agriculture Street landfill site, New Orleans and HANO awarded contracts to build three residential projects to entities who were not parties in the Johnson litigation. As a general rule, a principal is not liable for the negligence of an independent contractor while the contractor is conducting contractual duties. Louisiana recognizes two

195. Id.
196. Id.
197. Johnson, 790 So. 2d at 738.
198. Id. at 738-39.
199. See Powell v. Fuentes, 786 So. 2d 277, 281 (La. App. 2d Cir. 2001). In Powell, a patient sued a hospital and emergency room doctor claiming the
exceptions to this general rule: (1) where the job is "ultra hazardous," and (2) where the principal keeps the right to supervise or control the job performance of the independent contractor. "Whether the principal retained the right to control the work is of primary concern." It is essential to determine whether the right to supervise and control the job exists, not whether that right was exercised. The issue of whether a contractor possesses independent contractor status is a factual question to be decided on a case-by-case basis. It is very plausible that the plaintiffs may be able to demonstrate that, in the process of developing a residential community on top of the Agriculture Street Landfill, both HANO and New Orleans reserved the right to control and supervise the work of its contractors, which would defeat any claims that the contracts were independent. If the plaintiffs could show that the city contractors failed to remove ultra hazardous toxic materials from the Agriculture Street Landfill while developing the property, they may have had another basis for challenging any claim by either New Orleans or HANO that the contractors selected to develop the landfill were independent under relevant Louisiana law.

As in Johnson, the plaintiffs may argue that the contractors "failed to take proper corrective measures or negligently performed tasks." The plaintiffs might also argue that New Orleans and HANO hired contractors who negligently failed to perform their task of remediating the toxic Agriculture Street Landfill site before proceeding to develop it for residential use, and further, that the contractors' negligence is derived from a non-delegable duty. It does not appear that the plaintiffs were arguing that New Orleans and HANO were negligent in selecting the contractors for development of the landfill; however, a little more investigation of the facts might well reveal that the defendants were negligent in the selection of the contractor for development of toxic landfill.

Again, like the plaintiffs in Johnson, the plaintiffs in such a case could argue "it was the duty of the [defendants] to ensure that the contractors they hired performed these duties thoroughly and accurately," and that "[i]t is for the alleged breach of this duty that the plaintiffs filed th[e] lawsuit." The plaintiffs' specific legal issue before the court in Johnson should have been whether New doctor negligently failed to remove an external object from her foot, and therefore the hospital should be held liable. The court held there were fact issues concerning whether the doctor was an independent contractor preventing the court from granting the hospital's motion for summary judgment. Id. at 279.

200. Id. at 281.
201. Id.
202. Johnson, 790 So. 2d at 739.
203. Id.
204. Id.
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Orleans or HANO was liable to residents or former residents under the non-delegable duty theory for the negligent failure of its contractors to remediate a toxic landfill before using the land for residential purposes. In analogous circumstances, the Supreme Court of Louisiana stated in *Miller v. Martin* that the Department of Social Services may be held vicariously liable for abuse inflicted by foster parents upon children in the custody of the Department of Social Services because the Department has a non-delegable duty of care and protection that child. The Louisiana Supreme Court's opinion suggested that the court was willing to give a reasonable interpretation of the non-delegable duty in order to impose a *reasonable* duty of care on public officials to protect people from unreasonable harm caused by independent contractors who do business with a governmental entity. Such a non-delegable duties imposes upon a principal entity a duty to provide protection to others or their property. If the principal assigns the performance of that duty to another person, the principal will still be subject to liability for the harm caused by the failure of the other person to perform the assigned duty. In fact, a person who assigns a specific piece of work to a contractor is also liable for the failure of the contractors, who is not the principal's servant or agent, to carry out the terms of the assignment. "It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." The Louisiana Supreme Court's application of the non-delegable duty concept in *Miller* strongly suggests that both New Orleans and HANO may be liable for the negligent conduct of any contractor who failed to remediate the Agriculture Street Landfill site (even when the risk of harm to the residents, especially children and former residents, is too great to transfer it to the contractors).

It is important that lawyers and others involved in identifying relevant toxic tort legal theories for the traditional victims of environmental justice, the poor and racial minorities, make creative use of the law of negligence on behalf of those plaintiffs. An attorney might allege that HANO and New Orleans were the proximate cause of the damage plaintiffs suffered as historical

205. Id.
207. Id. (citing 1 RESTATEMENT (SECOND) OF AGENCY § 214, cmt. b (1958)).
208. Id.
209. Id. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 512 (5th ed. 1984)).
210. See id. (finding that a master may be liable for the actions of his or her servants regardless of whether the servants are acting within the scope of employment).
residents of the old Agricultural Street Landfill site because of a failure to adequately develop the site in the 1960s and 1970s. Indeed, the tort concepts of non-delegable duty and exceptions to the rule of no liability for the principal of an independent contractor, along with the general law of negligence, would serve as very useful litigation tools to hold responsible parties liable for their failure to properly dispense post Katrina resources to the former residents of the environmental justice community on top of the toxic Agriculture Street Landfill.

In 2006, residents of the Agriculture Street Landfill community do not have homes because of the floodwater damage caused by Katrina. Homes in the Agriculture Street community are full of post-Katrina toxic mold. Many of the hazardous contaminants that triggered EPA’s Superfund site designation and were supposed to be trapped underground are now present in the sediment. Although sediment contamination is a typical problem, the EPA refuses to clean up the sediment because reconstruction money is not being spent to enable people to return and rebuild the Agriculture Street Landfill community. As one commentator notes:

Federal spending on Hurricane Katrina is a boondoggle for contractors and government agencies. For example, $3 million of hurricane relief spending went to the Department of Defense for the purchase of ammunition. This is outrageous! Meanwhile, six months after Katrina, we still have communities that look like the hurricane passed yesterday.

If the supporters of environmental justice can demonstrate that the funds intended for debris removal were not utilized to create a reasonably safe environment, or the construction was done in a negligent manner, the law of torts may make the Corps, the EPA, and others liable if they negligently select a contractor who fails to adequately remediate, remove, or otherwise handle the toxic substances.

D. The U.S. Army Corps of Engineers is Potentially Liable in the Agricultural Street Landfill Site Litigation Because Congress Expressly Created a Waiver of the Corps Governmental Immunity From Liability Under CERCLA

The rationale of the United States v. New Orleans opinion provides some useful insight into the potential liability of

211. See Greenberg, supra note 114, at 34 (plotting the steps Louisiana and New Orleans should take post-Katrina cleanup effort).
212. Id.
213. Id.
214. Id.
215. Id.
defendants in removing toxic debris resulting from hurricanes and other disasters. In April of 1999, the court directed New Orleans to grant the United States entrance to the Agriculture Street Landfill site. In 2003, the United States asked the court to renew its claim against the defendants for costs and for those civil penalties provided for under Section 107(a) of CERCLA. CFI filed a counterclaim against the Corps for recoupment against any future costs that it may be obligated to pay as a consequence of the United States' suit against CFI for cleanup costs connected to cleaning the debris the Corps discarded in 1965 at the Agriculture Street Landfill. Under Federal Rule of Civil Procedure 12(b)(1) the United States filed a motion to dismiss CFI's counterclaim against the Corps on the theory that the court lacked subject matter jurisdiction because the United States possessed sovereign immunity. The court denied the motion.

In United States v. New Orleans, the United States alleged that Agriculture Street was owned, operated, or otherwise managed during the sixty-year period by the defendants from 1909-1969. Following Hurricane Betsy's stopover in New Orleans in 1965, the Corps acted under the authority of the Disaster Relief and Emergency Assistance Act (DRA) and under instruction from the President. The Corps performed cleanup operations in New Orleans by gathering hurricane debris and discarding a significant share of that debris at the Agriculture Street Landfill. Beginning October 1, 1980 and ending on December 31, 2001, the EPA carried out cleanup exercises as a reaction to discharges of hazardous substances into the environment, and warnings that additional discharges of hazardous could come from the Agriculture Street Landfill. During this twenty-one year period, the Agriculture Street Landfill had been designated as a Superfund site. The lawsuit dealt with issues first presented in an earlier case, which involved the United States seeking injunctive relief and civil penalties against New Orleans because the city declined to grant the United States the right of entry to the Agricultural Street Landfill site in order to perform remediation.

In New Orleans, the plaintiff made the argument that CFI's counterclaim against the Corps should be dismissed because the Corps' conduct in collecting and disposing of hurricane debris

217. Id. at *1-2.
218. Id. at *1.
219. Id.
222. Id.
223. Id.
constituted a “removal” or “response” action under the relevant provisions of CERCLA, which places its conduct outside of the scope of CERCLA’s “limited” waiver of the government’s immunity. The United States also advanced the proposition that, since the Corps engaged in its hurricane cleanup activities under the DRA, the Corps is entitled to protection from liability for “discretionary” functions as a federal agency. The United States maintained that debris removal and dumping is a discretionary function. According to the court, CERCLA provides that, “notwithstanding any other provision or rule of law, any person who owned or operated, arranged for disposal or treatment, or transported hazardous substances to a disposal site shall be liable for costs of removal or remedial action incurred by the government at such a site.” Under CERCLA, “persons” are identified as “potentially responsible parties” or PRPs. Congress, in CERCLA, defined “person” to include the United States government.

The federal government’s liability under CERCLA is subject to the act-of-God defense to the release, or threat of release of hazardous substances under CERCLA. However, governmental immunity is not a defense under CERCLA. In United States v. Stringfellow, the United States and California sued the owners and operators of a toxic waste disposal site, the generators of waste at the site, and the transporters of waste from the generators to the facilities based on the releases, and threatened release of hazardous substances. Concerned Neighbors in Action, a group of homeowners living in the vicinity, were allowed to intervene in the lawsuit. The defendants in Stringfellow asserted a defense rebuking liability, arguing that the heavy rainfall was a natural disaster constituting an act of God, and

224. Id. at *2.
225. Id.
226. Id. (citing 42 U.S.C. § 9607(a)).
227. Id.
230. New Orleans, 2003 WL 22208578, at *2. CERCLA provides:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this [Act] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under Section 9607 of this title.

42 U.S.C. § 9607(a)(1). “A plain reading of the language is that the government is subject to CERCLA liability just like any private party or nongovernmental entity is subject to CERCLA liability.” United States v. New Orleans, 2003 WL 22208578, at *2.
232. Id.
therefore absolved them of any claims. The court concluded that
the rains were not the kind of "exceptional" natural phenomena
that came within the narrow scope of the act of God defense
provided for under 42 U.S.C. § 107(b)(1).233 The rains were
foreseeable based on normal climatic conditions and any harm
carried by the rain could have been prevented through design of
proper drainage channels.234 Thus, the rains were not the
exclusive cause of the release, and the court declared that the
rains did not establish an act-of-God defense under CERCLA.235
The message from Stringfellow is that not all toxic harm caused by
weather qualifies for the act-of-God defense under CERCLA. In
order to qualify for the act-of-God defense in toxic tort litigation
under CERCLA, the defendant must, at a minimum, demonstrate
that the climatic condition that caused the harm to the plaintiff
was unforeseeable and that, as a result, the defendant should not
be held liable.

Although governmental immunity is not a defense, the United
States has argued that the Corps' removal and disposal of
hurricane debris should be exempt from any waiver of immunity
in CERCLA because the definition of "removal" in 42 U.S.C.
§ 9601(23) contains the phrase "any emergency assistance which
may be provided under the Disaster Relief and Emergency
Assistance Act" (DRA), therefore, it should remain immune from
CERCLA liability for any action that the Corps undertakes under
authority of that act.236 The court rejected the argument made by
the United States that the Corps' removal and disposal of
hurricane debris was exempt from the waiver of immunity under
CERCLA.237 The United States also contended that the DRA
provides that the government is not liable for a claim when
engaging in either a discretionary function or duty of a federal
agency implementing the provisions of the Act.238 The U.S.
contended that because hurricane cleanup was a discretionary
function of the Corps, the federal government had not waived its
governmental immunity under the DRA.

233. Id. at 1061.
234. Id.
235. Id.
236. See New Orleans, 2003 WL 22208578, at *3 (rejecting the government's
argument that CERCLA liability did not apply because of the method of
removal).
237. Id.
238. Id. (citing 42 U.S.C. §§ 5173, 5148 (2000); see also 42 U.S.C. § 5173
(2000) (allowing the President to use Federal agencies to clear debris and
wreckage created by a major disaster); 42 U.S.C. § 5148 (2000) (providing that
"the Federal Government shall not be liable for any claim based upon the
exercise or performance of or the failure to exercise or perform a discretionary
function or duty on the part of a Federal agency or an employee of the Federal
Government in carrying out the provisions of this chapter.").
Assuming that the Corps' cleanup of hurricane debris may be classified as a discretionary function of a federal agency, the language in 42 U.S.C. § 9607(a) would merge with the waiver of immunity in 42 U.S.C. § 9620(a)(1), which provides for an express waiver of "any immunity that the United States may have under any other statute or common law rule." For instance, in *Easton v. Gilbert Southern Corp.*, a federal district court held the waiver of liability in the DRA shielded the Corps from the plaintiff's claim that the Corps stockpiled debris from Hurricane Andrew on Plaintiff's property for a short-term interval. Although the plaintiff in *Easton* sued the Corps for failure to remediate under CERCLA, the case is factually distinguishable from *New Orleans.* In *New Orleans*, the court concluded that no remediation activity was undertaken in *Easton* and that no response costs were incurred under CERCLA and that it was not clear the property was a hazardous waste site, despite the fact the plaintiff alleged the Corps violated CERCLA by removing the debris, which is why the *Easton* court concluded the waiver of immunity provision of CERCLA did not apply.

CERCLA superimposes liability on the Corps as a federal agency, even if it could not be held liable for damages resulting from its actions under waivers of liability under other statutes. For example, under the DRA, though the Corps is not liable to an individual whose property is damaged, or who suffers a personal injury caused by the Corps' cleanup of hurricane debris, this immunity from liability does not apply to the Corps' conduct that falls within the scope of CERCLA, as alleged in CFI's counterclaim in *New Orleans.* Thus, once the court concluded that the United States expressly waived its immunity from CERCLA liability, it decided not to address CFI's argument that a waiver of sovereign immunity was not required for a compulsory counterclaim. Accordingly, the motion to dismiss CFI's counterclaim against the Corps was denied.

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241. *Id.*
242. *Id.* at *3*.
243. *Id.*
244. *Id.*
248. *Id.* at *4*.
249. *Id.*
IV. CREATING GOVERNMENTAL LIABILITY WOULD BE A USEFUL TOXIC TORT TOOL FOR POST-KATRINA SEEKERS OF ENVIRONMENTAL JUSTICE

In the aftermath of Hurricane Katrina, one would think that federal officials would have learned the simple lesson that, because of its location, it is foreseeable that New Orleans is at a high risk of seasonal flooding due to rain or hurricanes, and thus, those federal officials would not supervise the handling or disposing of toxic materials caused by such a disaster irresponsibly. First, as a matter of sound public policy, federal officials should use reasonable care in handling or disposing of toxic materials in New Orleans in order to protect the health and safety of the people, as well as the environment. Second, as a matter of self-interest, federal agencies should appreciate the risk of exposing the public to toxic substances from Katrina-related debris and take steps to ensure protection from environmental liability.

According to a Federal Emergency Management Agency (FEMA) report, the federal government produces a significant risk of impending environmental liability based on its decision to use the reopened Old Gentilly Landfill as a disposal site for Katrina-related toxic materials. The report lends credence to the claims of environmental groups that the city-owned Old Gentilly Landfill Site, which reopened soon after Hurricane Katrina, may develop into a toxic and costly ecological catastrophe very similar to the old Agriculture Street landfill catastrophe that occurred four decades ago. When Hurricane Betsy struck New Orleans in 1965, local officials subsequently cleared storm-related debris and deposited it on top of the then-closed Agriculture Street Landfill. As a result, the site was identified as a Superfund site, a label reserved for America’s most contaminated and potentially dangerous locations. The Old Gentilly Landfill study raises a number of questions about the capacity of the site to appropriately handle the massive amounts of toxic debris it is receiving. The report states that FEMA may be exposed to environmental liability through use of the Old Gentilly Landfill site. FEMA pays for Katrina-related debris removal by employing contractors under the direction of the

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251. Id. The Old Gentilly Landfill Site reopened as a landfill for construction and demolition debris soon after Hurricane Katrina. Id.
252. Id.
253. Id.
254. Id.
The Old Gentilly site will probably become an expensive mess if serious contamination is discovered. Those potentially responsible for the Old Gentilly Landfill site's Katrina-related toxic release include the City of New Orleans, the state of Louisiana, FEMA, the Corps, the EPA, as well as the haulers who have delivered toxic waste to the site. The Louisiana Department of Environmental Quality (DEQ) approved permits for two very controversial construction and demolition (C & D) landfills in East New Orleans following Hurricane Katrina. First, the Old Gentilly Landfill sought a permit for a period that exceeded two years prior to Katrina. Permission was approved one month after Katrina hit by avoiding the normal requirements. Afterwards, FEMA limited the daily intake at the Old Gentilly Landfill because of apprehension regarding placing a considerable amount of debris on top of an old garbage landfill.

In addition, the Corps issued a permit to fill wetlands at the Chef Menteur C & D Disposal site approximately 1.6 miles from the Vietnamese community of Village de L'Est. But, environmentalists maintain that New Orleans already has adequate capacity to handle all eighteen million cubic yards of Katrina-related waste without creating any new landfills. "Two previous efforts for landfills in the Village de L'Est area were stopped because of zoning. New Orleans Mayor Ray Nagin used an emergency order to change the zoning to allow the new Chef Menteur site." Critics contend that Louisiana's DEQ and the Corps failed to consider public input before making decisions

255. Id.
256. Id.
257. Id. Gordon Russell reported the view of a New Orleans attorney regarding the state's responsibility:

I'm more than ever convinced we're doing the right thing in trying to close this landfill," said Joel Waltzer, an attorney for the Louisiana Environmental Action Network, which has filed a suit against the Louisiana Department of Environmental Quality that seeks the revocation of the landfill's permit. "This validates all the concerns we had. The fact that DEQ hadn't looked at all of these issues prior to deciding to allow the hurricane debris to be placed at Old Gentilly is nothing short of outrageous.

Id.
258. Id.
260. Id.
261. Id.
262. Id.
263. Id.
264. Id.
265. Id.
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regarding the landfills. Nevertheless, by April of 2006, officials had decided several tons of Katrina-related waste would be dumped at the new Chef Menteur site on the swampy eastern edge of New Orleans.

More than 1,000 Vietnamese-American families live in Village de L'est, less than two miles from the edge of the Chef Menteur site. These families are not happy about having the remains of the Katrina disaster in their backyard. "Environmental groups are also angry, accusing local and federal officials of ignoring or circumventing their own regulations, long after the immediate emergency has ended." They also argue and warn that the same thing happened after Hurricane Betsy in 1965, and as a result, the Agriculture Street Landfill wound up becoming a Superfund site. Similar to a number of disputes that have occurred since Katrina, the Chef Menteur clash involves politics, money, history, and race. As a result of governmental conduct since Katrina, almost all Louisianans now seem to share a distrust of the government.

In New Orleans, the Vietnamese-American families of Village de L'est are particularly angry at Mayor C. Ray Nagin, an African American who, in February of 2006, exercised emergency powers to put aside zoning regulations for the Chef Menteur landfill.

"Maybe we're not the right kind of people he wanted to return," said the Reverend Vien Nguyen, the pastor of Mary Queen of Vietnam Catholic Church and a chief organizer in the battle against the Chef Menteur Landfill, which opened on April 26, 2006. "As a result of governmental conduct since Katrina, almost all Louisianans now seem to share a distrust of the government."

Adam Babich, director of the Tulane Environmental Law Clinic, observed that public officials in New Orleans and the State of Louisiana have never been attentive about complying with environmental regulations; however, they have been especially lenient since Katrina. This laidback attitude toward environmental health and safety is most apparent when it comes

266. Id.
267. Leslie Eaton, Katrina’s Debris Fuels a Political and Ethnic Fight, INT’L HERALD TRIB., May 9, 2006, at 2. Tens of thousands of houses destroyed by Hurricane Katrina are waiting to be gutted or bulldozed. Id.
268. Id.
269. Id.
270. Id.
271. Id.
272. Id.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
to landfills, according to Babich.\footnote{Id.} The potential toxic tort liability exposure for a Louisiana agency that breaches its duty to protect environmental health and safety by giving very relaxed approval to dump toxic waste in an unsafe landfill is very great. Relevant Louisiana and New Orleans agencies have a duty to comply with their own environmental health and safety law rather than use the post-Katrina debris cleanup as pretext to avoid complying with environmental regulations designed to protect people from toxic exposure.

Plaintiffs who can establish a breach of duty on the part of a relevant governmental agency may seek recovery from that agency under negligence theory provided by state law.\footnote{See \textit{LA. Civ. Code Ann. Art. 2315} (2005) (providing that “every act” by a person that causes damage to another obligates them to “repair it.”).} In deciding whether a plaintiff may succeed on a negligence claim, Louisiana courts use a duty-risk analysis.\footnote{See \textit{Id.}} A duty-risk analysis consists of five elements that the plaintiff must prove: (1) the defendant had a duty to obey a specific standard (the duty element); (2) the defendant failed to comply with the required specific standard (the breach element); (3) the defendant's substandard behavior was a cause-in-fact of the injuries suffered by the plaintiff (the cause-in-fact element); (4) the defendant's substandard behavior was the legal cause of the harm suffered by the plaintiff (the scope of liability element); and (5) the defendant's conduct caused the plaintiff to suffer actual damages (the damages element).\footnote{Id. at 101.} A proper duty-risk analysis first requires recognizing a duty required of the defendant either by statute or rule of law, and second, singling out the behavior of the defendant that breached that duty.\footnote{Id.}

In the near future, toxic torts plaintiffs in New Orleans will be able to establish they have suffered an injury because of the breach by local, state, or federal agencies of the duty to enforce environmental regulations regarding the post-Katrina use of a landfill in the New Orleans area. After the reasonably foreseeable toxic discharges occur as a result of Katrina related waste, post-Katrina plaintiffs should argue that proper good faith by post-Katrina public officials to enforce relevant pre-Katrina environmental regulations for landfill debris disposal would have prevented the toxic discharges.

\footnote{278. Id.} \footnote{279. See \textit{Id.}} \footnote{280. See \textit{Id}. at 101.} \footnote{281. Id.} \footnote{282. Id.}
In July of 2006, the DEQ promised to follow the recommendations of New Orleans officials regarding the future of the contentious Chef Menteur site.283 Yet, DEQ officials rejected the claim that the landfill is unsafe.284 In a strongly worded letter to Mayor Ray Nagin, a DEQ official gave notice that closing the landfill would impair the city's recovery from Hurricane Katrina and may cause the city to spend substantially more money.285 Opponents of the Chef Menteur landfill, however, assert that two recently issued scientific reports support the contention that the landfill is environmentally unsafe. The reports contend that the landfill is a hazard because it contains hazardous household wastes as well as inactive construction and demolition debris.286 The location of the landfill, specifically its proximity to residential neighborhoods with high minority populations, has also sparked environmental justice concerns: "Village de l'Est is a mostly Vietnamese-American community, and much of eastern New Orleans is majority African American."287

Mayor Nagin issued an executive order in February of 2006, opening the Chef Menteur site on the basis of an emergency situation in order to expedite the removal of Hurricane Katrina debris. On July 13, 2006, the mayor announced that he would not renew the executive order when it expires on August 14, 2006.288 In response, DEQ Assistant Secretary Chuck Carr Brown said the DEQ "will revoke its temporary authorization for the Chef Menteur facility to operate."289 Brown made it clear that he strongly opposes Nagin's decision to close the Chef Menteur site.290 "We feel it is our responsibility to [provide notice] of the potential consequences, including significantly impeding disaster clean-up and recovery' for New Orleans" if the Chef Menteur site is closed.291 Brown believes closing the Chef Menteur landfill will increase illegal dumping in Orleans Parish as well as increase costs and cause delays because Katrina debris will have to be trucked to landfills farther away. Opponents of the Chef Menteur landfill contend Brown's advice is exaggerated because, with proper planning, other landfills in New Orleans have the capacity to take in the large amount of debris generated by Katrina.292 Joel Waltzer, an attorney who represents the Louisiana Environmental

283. Bruce Eggler, DEQ Will Abide by Landfill Decision but Closing Site is a Mistake, Official Says, NEW ORLEANS TIMES PICAYUNE, July 26, 2006, at 1.
284. Id.
285. Id.
286. Id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
292. Id.
Action Network and the Coalition for a Strong New Orleans East, said his clients agree with the decision to close the Chef Menteur landfill. Waltzer accuses the DEQ of failing “to address real concerns raised by the scientific community” concerning the true safety of the landfill at Chef Menteur.

John Pardue, director of the Louisiana Water Resources Research Institute at LSU, said DEQ must establish stricter standards for debris landfills in order to “meaningfully protect the environment and surrounding communities.” The DEQ must require more rigorous tests than the June 2006 tests the DEQ used to conclude that the Chef Menteur landfill is actually safe, Pardue said. Indeed, an investigation of the Chef Menteur landfill by LSU geologist and hydrologist Paul Kemp led him to recommend that “fairly continuous pumping” was needed at the site to stop contaminated groundwater from escaping.

Those who wage the environmental justice battle on behalf of those exposed to toxic harms due to Hurricane Katrina-related debris in landfills and elsewhere must not forget to frame their basic battle for environmental justice in terms of the legal duty that negligence law, as well as state and federal law, impose on those involved with handling toxic debris. Although litigation may not be enough to advance the greatest amount of environmental justice for the victims of environmental racism, it can serve as the starting point of a good fight. Compelling evidence reveals that public officials in Louisiana breached the duty owed to the general public to protect health and safety by unnecessarily exposing residents to toxic harms. Litigating toxic torts claims in New Orleans is a necessary endeavor until lawmakers adopt responsible public policies that will protect our most vulnerable citizens from reasonably foreseeable acts of injustice caused by toxic harms. Where the government has waived its immunity to liability in toxic torts litigation, those attacking environmental injustice in post-Katrina New Orleans must not hesitate to use the courthouse as a proper venue for justice when public officials are otherwise reluctant to protect the environmental health of residents in the New Orleans area.

CONCLUSION

An editorial written by Professor Hari Osofsky in the Register-Guard vividly and accurately describes how Hurricane Katrina exposed the preexisting environmental injustice that

293. Id. at 3.
294. Id.
295. Id.
296. Id.
297. Id.
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existed in New Orleans. Less than ten days after Hurricane Katrina struck New Orleans on August 29, 2005, Professor Osofsky demonstrated an excellent understanding of the environmental injustice policy issues raised by Katrina’s impact. According to Professor Osofsky, the majority of citizens who felt the strongest adverse effects were African American. Residents looking for shelter in the New Orleans Superdome as Katrina approached, crying over drowned relatives, and walking in toxic waters were predominately African American. Hurricane Katrina placed America’s environmental justice failure on international display. Poor African Americans have suffered unreasonably from exposure to toxic substances in the post-Katrina environment because of a combination of environmental, social and economic injustice. Notwithstanding advance knowledge of the approaching hurricane, New Orleans residents who were too poor to leave the city were not evacuated, but instead were given less than adequate housing in the Superdome and Convention Center. Yet, experts might take years to decide who is to blame for this failure.

The convergence of injustices displayed in Katrina’s aftermath is not exclusive to natural disasters. The U.S. Council on Environmental Quality Studies acknowledged the unequal allocation of environmental benefits and burdens. A lack of personal funds, as well as racial discrimination in housing, often keep the poor and racial minorities from preventing the toxic substance producers from dumping in their back yard. Efforts to correct these inequities face many challenges, as evidenced when Tulane Law School’s Environmental Clinic was severely criticized because it assisted low-income, African-American community challenges to the location proposed by a chemical plant. Nevertheless, until national, state and local policymakers are ready to adopt effective public policies that protect the poor from predictable environmental injustices, it is indeed both proper and necessary to stand up for the victims of post-Katrina toxic exposure injustice with litigation. I only wish we had public

299. Id.
300. Id.
301. Id.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
307. Id.
policymakers wise enough to take proactive measures to protect citizens from unreasonable toxic exposure and encourage responsible disposal of toxic debris generated by Katrina. If big businesses understood that protecting the community from unreasonable toxic exposure, while disposing of toxic debris related to Katrina, is good for business in the long run, New Orleans would be a much safer environment for families to return to today.