

LSU Journal of Energy Law and Resources

Volume 10
Issue 2 *Summer 2022*

8-11-2022

Post-Hurricane Oil Spills: The Act of God Defense and Liability Under the Oil Pollution Act of 1990

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Repository Citation

Hannah Greer, *Post-Hurricane Oil Spills: The Act of God Defense and Liability Under the Oil Pollution Act of 1990*, 10 LSU J. of Energy L. & Resources (2022)

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**Post-Hurricane Oil Spills: The Act of God Defense
and Liability Under the Oil Pollution Act of 1990**

*Hannah Greer**

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INTRODUCTION

As a tropical storm develops into a hurricane and media outlets warn citizens to prepare, fear resonates among locals, businesses, and cities alike. To mitigate the blunt force impact of the hurricane and alleviate that fear, communities prepare by employing various safeguards. In 2005, the city of New Orleans anticipated the devastating impacts of Hurricane Katrina as the storm surge was predicted to surpass the levees bordering the city. In preparation for the storm, a mandatory evacuation was ordered, emergency shelters were set up, massive truckloads of food and water were staged at various locations, and physical safeguards were built into

the New Orleans infrastructure.¹ Despite the measures taken, the National Weather Service's predictions that Hurricane Katrina would bring suffering to Louisiana unfortunately came to fruition.² Hurricane Katrina left approximately 80% of New Orleans and the surrounding areas submerged.³ Consequently, such flooding ushered its own array of adverse effects: citizens who opted to remain were stranded on the roofs of their homes; clean water was obsolete; power outages lingered for weeks; over 1,000 individuals lost their lives; and thousands upon thousands of citizens were stripped of their entire livelihoods.⁴ The effects of Hurricane Katrina illustrate that even extensive preparation cannot always combat a hurricane's catastrophic damages, the extent of which is often unpredictable.

Similarly, oil and gas industries institute their own hurricane preparedness measures. Designed with hurricanes in mind, oil platforms are built to withstand both gale force winds and severe wave action.⁵ Environmental safeguards are built into the offshore oil rigs and platforms to prevent the discharge of oil from potential storm damage.⁶ However, as evidenced by Hurricane Katrina, no amount of preventative measures is absolute. Hurricane Katrina and its successor, Hurricane Rita, together destroyed five offshore drilling rigs, 109 oil platforms, and more than 400 oil pipelines.⁷ Hurricanes Katrina and Rita effectuated the release of 10.8

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* J.D./D.C.L., 2022, Paul M. Hebert Law Center, Louisiana State University. The author extends her gratitude to Professors Joseph Bockrath and Edward Richards for their time, encouragement, and insight into the writing process. Additionally, the author expresses her gratitude to the Journal of Energy Law and Resources Volume IX and X editorial boards for their careful edits and contributions during the writing and production process.

1. H.R. REP. NO. 109-377, at 63–65 (2005).

2. *Id.* at 73.

3. *Id.* at 73–74.

4. *Id.*

5. NAT'L OCEAN INDUS. ASS'N, HURRICANES AND THE OFFSHORE OIL AND NATURAL GAS INDUSTRY 2 (2018), <http://www.noia.org/wp-content/uploads/2018/05/2018-Hurricane-Fact-Sheet-Web.pdf> [<https://perma.cc/H427-Z87Y>]. A gale is a powerful wind that is rated according to the Beaufort Scale, which rates wind force on a 0–12 scale. See *Beaufort Scale*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/beaufort-scale/> [<https://perma.cc/E94N-SCE5>] (last visited Nov. 15, 2021).

6. *Id.*

7. Alexander C. Kaufman, *Hurricane Laura Hit the Oil and Gas Industry When It's Down. But Don't Expect a Reckoning*, HUFFPOST (Aug. 27, 2020, 3:59 PM), https://www.huffpost.com/entry/hurricane-laura-oil_n_5f47f6cdc5b6cf66b

million gallons of oil into Louisiana's coastal and inland waters.⁸ While the sufficiency of hurricane preparedness measures can be debated time and time again, Hurricanes Katrina and Rita illustrate how some natural disasters may just be an "act of God."

The concept that an event is so beyond anticipation that it must be characterized as an act of God originated in the common law but has developed a stronghold in the liability regime of various federal environmental statutes.⁹ To evade or limit liability, a party can argue that their actions are excused if the underlying event constitutes an act of God.¹⁰ Specifically, under the Oil Pollution Act of 1990 (OPA), an entity whose facility discharged oil can potentially evade liability by arguing an act of God prompted the oil spill.¹¹ Although the act of God defense provides a pathway to evade liability, the OPA was enacted with the intent of expanding liability for those responsible for the discharge of oil.¹² The OPA provides a means to assess the extent of damages caused by oil spills and impose financial responsibility on the parties responsible.¹³ However, the OPA has fallen short of its intended goals, as responsible parties have consistently escaped liability even when the underlying event did not meet the statutory definition of an "act of God."

Hurricane Katrina occurred over 16 years ago, and to this day, not a single party responsible for the Katrina-era oil spills has been held liable

2b4cb6b; Hurricane Katrina made landfall on Tuesday, August 23, 2005, and Hurricane Rita made landfall on Sunday, September 18, 2005. *See id.*

8. Joan Meiners, *How Oil Companies Avoided Environmental Accountability After 10.8 Million Gallons Spilled*, PROPUBLICA (Dec. 27, 2019, 6:00 AM), <https://www.propublica.org/article/how-oil-companies-avoided-environmental-accountability-after-10.8-million-gallons-spilled> [<https://perma.cc/VE2A-VEFY>].

9. *See* Kenneth T. Kristl, *Diminishing the Divine: Climate Change and the Act of God Defense*, 15 WIDENER L. REV. 325, 327 (2010) (discussing the history of the "Act of God" defense).

10. *See* 33 U.S.C. § 1321; *see also id.* § 2701; 42 U.S.C. § 9607(b).

11. 33 U.S.C. § 2703(a)(1); *see also id.* § 2701(32) (demonstrating that under the OPA, the term "responsible party" refers to the owner or operator of a vessel from which oil is discharged).

12. *See Apex Oil Co. v. United States*, 208 F. Supp. 2d 642, 654 (E.D. La. 2002).

13. 33 U.S.C. § 2702(a) ("[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.").

under the OPA.¹⁴ While the OPA seemingly paves way to the conclusion that responsible parties must have established that Hurricanes Katrina and Rita were acts of God, the reality is much more obscure. The statutory requirements of the act of God defense are stringent.¹⁵ In fact, the OPA's act of God defense has never been successfully invoked.¹⁶ Both a plain language reading of the OPA's act of God defense and consistent rejection of the defense by various courts illustrate the shortcomings inherent in its construction.¹⁷ This Comment will analyze several OPA provisions and relevant jurisprudence in evaluating why liability has yet to be successfully imposed on the parties responsible for the Katrina-era spills under the OPA in light of the fact that these companies are not escaping liability through the act of God defense.

Procedurally, the OPA applies when a party institutes a claim for removal costs and/or damages against the party responsible for a spill.¹⁸ A Natural Resource Damage Assessment (NRDA) must first be completed by natural resource trustees before judicial action for natural resources damages is initiated.¹⁹ Likewise, a causal link between the source of the discharge and the damages incurred must be established before initiating any other relevant damage claim.²⁰ To this day, not a single assessment of the damages to natural resources has been completed following Hurricanes Katrina and Rita. Consequently, "no restoration plans have been developed for the impacted ecosystems, fish, birds, or water quality."²¹ Such delay has halted the damage claims process, allowing oil companies to avoid liability for over 16 years and potentially escape massive liability altogether. To put an end to this continued circumvention of liability, a

14. See Meiners, *supra* note 8.

15. See 33 U.S.C. § 2701(1) ("[A]ct of God' means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight.").

16. See Sarah Quiter, *Viability of the "Act of God" Defense in a Superstorm World*, HUNTON NICKEL REP. BLOG (Oct. 5, 2017), <https://www.huntonnickelreportblog.com/2017/10/viability-of-the-act-of-god-defense-in-a-superstorm-world/> [<https://perma.cc/L5GJ-5UHY>].

17. See 33 U.S.C. § 2701(1).

18. See *id.* § 2702(a).

19. *Id.* § 2717(f)(1); *Natural Resource Damage Assessment (NRDA)*, MDEQ, <https://www.mdeq.ms.gov/restoration/nrda/> [<https://perma.cc/L3EH-7YSU>] (last visited Oct. 23, 2021) (explaining that natural resource trustee is a person or agency entrusted under the OPA to restore injured natural resources and lost services resulting from an incident involving the discharge of oil).

20. *Id.*

21. Meiners, *supra* note 8.

revision to the current “Period of limitations” provision in the OPA could expedite the damage claims process, which in turn would render the OPA consistent with its intended purpose: to expand liability.

Part I of this Comment will discuss hurricanes in general and the resulting oil spills. Part I will also analyze post-hurricane oil spill response efforts and provide a general overview of the OPA, its claims procedure, and its defenses to liability. Part II will present the primary focus of this Comment: why liability for the Katrina-era spills has never been imposed under the OPA. This section will begin with an analysis of the OPA’s act of God defense and explore whether a hurricane fits within the statutory definition of an act of God. After reaching the conclusion that a hurricane does not constitute an act of God under the statute, Part II will address the apparent difficulty in imposing liability on responsible parties under the OPA for post-hurricane oil spills notwithstanding the fact that a hurricane is not an act of God. Specifically, this section will evaluate the OPA’s “Period of limitations” provision and explain why the current language contributes to courts’ refusals to hold oil companies liable for the 2005 oil spills from Hurricanes Katrina and Rita. Additionally, Part II will evaluate why the rising number and impact of hurricanes justifies the need for a more efficient and expedited means of imposing liability on responsible parties. Finally, Part III of this Comment will propose a solution to the problem: a statutory five-year period after an oil spill by which damage assessments must be conducted.

I. BACKGROUND

A. Hurricanes and Their Relationship to Oil Spills

As a thunderstorm develops off the west coast of Africa, it has the potential to evolve into a hurricane if certain factors are present.²² Travelling across the Atlantic and drawing energy from warm ocean waters, its circulation becomes more organized and wind speeds increase, evolving from a tropical disturbance into a tropical depression, then from a tropical storm into a full-fledged hurricane.²³ Its entry into the Gulf of Mexico signals to the Gulf Coast states that some physical damage will likely accompany the oncoming—and steadily strengthening—hurricane. Specifically, Louisiana, Texas, Mississippi, Alabama, and Florida are

22. *How Hurricanes Form*, UCAR CTR. SCI. EDUC., <https://scied.ucar.edu/learning-zone/storms/how-hurricanes-form> [<https://perma.cc/F6LW-JT29>] (last visited Oct. 6, 2021).

23. *Id.* Hurricanes thrive in the warm Gulf waters because the Gulf Stream, a warm Atlantic current, flows directly through the Gulf of Mexico. *See id.*

unfortunately all too familiar with hurricanes' damaging effects.²⁴ The greater the categorical classification of the hurricane,²⁵ the greater the damage that the Gulf Coast states in its path can expect. The extent of infrastructural devastation to communities and individuals' homes cannot be minimized, but the destruction hurricanes wreak on the oil and gas industry also cannot be ignored.

Over 11,000 oil refineries and platforms are located in and around the Gulf of Mexico.²⁶ Consequently, as a powerful hurricane develops in the Gulf, the risk of those refineries and platforms sustaining significant physical damage is both real and imminent. One-third of the platforms and two-thirds of the pipelines in the Gulf of Mexico were located in the direct path of Hurricane Katrina.²⁷ Thus, the subsequent release of over 10.8 million gallons of oil was not surprising.²⁸ Included in such releases were the Murphy and Shell Oil Company spills.²⁹ The Murphy oil spill was the largest of the Katrina-era spills with 819,000 gallons of oil spilling into residential areas and canals in St. Bernard Parish.³⁰ The Shell Oil Company spill was much smaller at nearly 25,000 gallons, but its oil reached the shoreline and coastal marshes.³¹ In addition to the spills from facilities and pipelines in the near-shore and offshore environments, numerous vessels carrying petroleum products were grounded or sank because of Katrina's impacts.³²

In 2017 after Hurricane Harvey, the United States ("U.S.") Coast Guard reported that 22,000 barrels of crude oil, gasoline, diesel, drilling

24. See, e.g., *List of United States Hurricanes*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_United_States_hurricanes [<https://perma.cc/EC6J-NYDC>] (last updated Oct. 9, 2021). Since the twentieth century, there have been 8 Category two or higher hurricanes to hit Alabama, 53 to hit Florida, 24 to hit Louisiana, 11 to hit Mississippi, and 29 to hit Texas. *Id.*

25. Hurricanes are classified on a 1–5 scale based on their wind speed. See *id.*

26. *Map of Offshore Oil Rigs in the Gulf of Mexico*, DRILLING MAPS, <https://www.drillingmaps.com/Gulf.html> [<https://perma.cc/9H28-AY6W>] (last visited Oct. 5, 2021). "In and around" refers to those oil refineries that are located physically in the Gulf of Mexico, as well as those refineries that are located on land but are no farther north than Baton Rouge, Louisiana, and Austin, Texas.

27. John C. Pine, *Hurricane Katrina and Oil Spills: Impact on Coastal and Ocean Environments*, 19 OCEANOGRAPHY 37–39 (2006), http://libres.uncg.edu/ir/asu/f/Pine_John_2006_Hurricane_Katrina.pdf [<https://perma.cc/NR28-JFVA>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

wastewater, and petrochemicals spilled from refineries, storage terminals, and other facilities.³³ Hurricane Laura struck southwest Louisiana in August 2020, and within two days the Coast Guard's National Response Center received 31 reports of oil and chemical spills.³⁴ Just 43 days after Hurricane Laura devastated the region, Hurricane Delta struck an area 13 miles east of Laura's landfall, exacerbating Hurricane Laura's oil spills.³⁵ Approximately one year later at the end of August 2021, Hurricane Ida ravaged southeastern Louisiana. Within two weeks following Ida, over 2,300 oil spills were reported to the Coast Guard.³⁶

B. Post-Hurricane Oil Spill Response Efforts

The nature and chemical composition of oil, combined with its potentially devastating environmental effects when spilled, incentivizes oil spill response teams to initiate clean-up efforts promptly after the discharge into the Gulf. Oil contains petroleum hydrocarbons that are known to be toxic—and even deadly—after prolonged exposure.³⁷ If the oil reaches coastal marshes and wetlands, plants and grasses may absorb the oil, rendering the area uninhabitable for wildlife.³⁸ If the oil sinks into the marine environment, it poses the risk of “killing or contaminating fish

33. Emily Flitter & Richard Valdmanis, *Oil and Chemical Spills from Hurricane Harvey Big, but Dwarfed by Katrina*, THOMSON REUTERS (Sept. 15, 2017, 6:20 AM), <https://www.reuters.com/article/us-storm-harvey-spills-idUSKCN1BQ1E8> [<https://perma.cc/BE24-3LSW>].

34. Julie Dermansky, *Hurricane Laura's Aftermath: Miles of Oil Sheen in Louisiana's Wetlands*, RESILIENCE (Sept. 10, 2020), <https://www.resilience.org/stories/2020-09-10/hurricane-lauras-aftermath-miles-of-oil-sheen-in-louisianas-wetlands/> [<https://perma.cc/JAF8-8LPB>].

35. Nicole Bonaccorso, *Photos Reveal Extensive Oil Sheen Left by Hurricanes Laura and Delta*, WEATHER CHANNEL (Oct. 22, 2020), <https://weather.com/photos/news/2020-10-21-louisiana-delta-laura-oil-spills-photos> [<https://perma.cc/9SPM-8KU9>].

36. Mark Schleifstein & Tristan Baurick, *Hurricane Ida Oil Spills 'Mind-Boggling,' but Likely Not as Bad as Katrina, Rita*, NOLA.COM (Sept. 13, 2021), https://www.nola.com/news/environment/article_bca326b0-1250-11ec-b0d6-fba f7548a8d0.html [<https://perma.cc/28W4-55N7>].

37. Larry West, *5 Environmental Consequences of Oil Spills*, TREEHUGGER (Nov. 11, 2020), <https://www.treehugger.com/environmental-consequences-of-oil-spills-1204088#:~:text=%205%20Environmental%20Consequences%20of%20Oil%20Spills%20,mammals%20such%20as%20whales%2C%20dolphins%2C%20seals%2C...%20More%20> [<https://perma.cc/PG93-ZPA8>].

38. *Id.*

and smaller organisms that are essential links in the global food chain.”³⁹ Due to oil’s composition as a liquid less dense than water, when oil spills occur, they “coat everything they touch and become unwelcome but long-term parts of every ecosystem they enter.”⁴⁰ For birds, oil coats their feathers, diminishing their ability to fly and destroying their natural insulation.⁴¹ Oil can clog the blowholes of dolphins and whales, inhibiting their ability to breathe.⁴² Oil can also coat the fur of otters and seals, which leaves them vulnerable to hypothermia.⁴³ Further, if clean-up efforts are not promptly initiated after the spill, the oil can become trapped beneath the land’s surface.⁴⁴ Illustrating the severity of this consequence, a 2007 study found 26,000 gallons of oil still trapped in the sand along the Alaska shoreline from the 1989 Exxon Valdez oil spill.⁴⁵ Oil spills can also have considerable economic effects on tourism and fishing for the surrounding area.⁴⁶

When the time comes to initiate oil spill clean-up efforts, the companies responsible for the spills are conspicuously absent. Instead, various state and federal authorities bear the burden of oil spill clean-up efforts. At the state level, the Louisiana Oil Spill Coordinator’s Office (LOSCO) heads all programs related to oil spills in Louisiana.⁴⁷ When oil spills into a waterway, a chain reaction of events follows.⁴⁸ First, upon observance of a spill, parties can contact the U.S. Coast Guard, who will subsequently log the spill into the National Response Center Database.⁴⁹ Information on the spill is relayed to LOSCO if the spill falls within LOSCO’s jurisdiction.⁵⁰ At the federal level, the Environmental Protection Agency and the U.S. Coast Guard govern oil spill clean-up efforts. In addition to the clean-up responsibilities imposed on various state and federal entities, the OPA requires that federal and state agencies work with

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. West, *supra* note 37. In fact, after the Ixtoc 1 oil spill in 1979, oil washed up on the shore of previously pristine beaches in Mexico and caused the loss of hundreds of millions of dollars in tourism revenue for up to five years following the disaster. *Id.*

47. *About Us*, LA. OIL SPILL COORDINATOR’S OFF., <http://www.losco.state.la.us/about.html> [<https://perma.cc/DM5L-BWBC>] (last visited Oct. 6, 2021).

48. *See* Meiners, *supra* note 8.

49. *Id.*

50. *Id.*

the companies responsible for the spilled oil to conduct a preliminary assessment of the damages to natural resources.⁵¹

Also at the federal level, the National Oceanic and Atmospheric Administration's Office (NOAA) of Response and Restoration (OR&R) heads environmental response, assessment, and restoration of natural resources following oil spills in national coastal waters.⁵² NOAA developed the Damage Assessment, Remediation, and Restoration Program (DARRP) to carry out the NRDA process under the OPA.⁵³ OR&R is a central component of DARRP which "hold[s] polluters financially accountable for the cost of assessing and restoring the environment."⁵⁴ The trustees outlined in the OPA are also responsible for assessing the extent of damages to natural resources and determining how to restore and compensate for those damages.⁵⁵ After funds are recovered from the responsible parties, the recovered sums are used to reimburse the costs incurred by the trustees, and any extra money must be deposited into the Oil Spill Liability Trust Fund (OSLTF).⁵⁶

C. Liability for Oil Spills: The Oil Pollution Act of 1990

After the damaging environmental effects of an oil spill have been rectified, eligible entities can potentially recover clean-up costs incurred or compensation for damages sustained from the spill.⁵⁷ However, the same sense of urgency that accompanies oil spill clean-up efforts is not as pressing when it comes to imposing liability on the potentially responsible parties ("PRPs") for oil spills. A party can pursue various avenues to seek

51. *Id.*

52. *Oil Spill Assessment and Restoration*, NOAA OFF. RESPONSE & RESTORATION, <https://response.restoration.noaa.gov/environmental-restoration/oil-spill-assessment-and-restoration.html> [<https://perma.cc/XPN7-7QBA>] (last updated Apr. 21, 2016).

53. *Id.*

54. *Id.*

55. *Natural Resource Damages: A Primer*, ENV'T PROT. AGENCY, <https://www.epa.gov/superfund/natural-resource-damages-primer> [<https://perma.cc/KA N7-ZM2W>] (last visited Oct. 5, 2021); *see also* 33 U.S.C. § 2706 (stating that under the OPA, the trustees of such natural resources are federal trustees, state trustees, Indian tribe trustees, and foreign trustees. The president of the U.S. or another authorized representative of any state, Indian tribe, or foreign government shall act on behalf of the public, Indian tribe, or foreign country to assess natural resource damages).

56. *Id.*; *see also* 33 U.S.C. § 2706(f).

57. *See* Oil Pollution Act of 1990, 33 U.S.C. § 2701; *see also* Louisiana Oil Spill Prevention and Response Act of 1991, LA. REV. STAT. § 30:2451.

recovery of clean-up costs incurred or damages sustained from the spill. However, the scope of this Comment is concerned with the federal law governing oil spill liability, specifically the OPA.⁵⁸

Prior to the enactment of the OPA, the Federal Water Pollution Control Act of 1972 (FWPCA) was the primary source of legislation addressing oil spill liability.⁵⁹ However, the 1989 Exxon Valdez Oil spill revealed the FWPCA's shortcomings.⁶⁰ On March 24, 1989, Exxon Valdez released over 11 million gallons of oil in Alaska, and the cost of removing such an enormous amount of oil exceeded the liability limit under section 311 of the Clean Water Act.⁶¹ Thus, the OPA was enacted with the intent to expand liability for those responsible for oil spills.⁶² The current liability provision of the OPA provides:

Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.⁶³

Thus, a party that discharges oil or poses the risk of discharging oil may be liable for certain removal costs and damages associated with the spill. To impose such liability, the OPA's explicit claims procedure must first be followed.

D. Claims Procedure Under the Oil Pollution Act of 1990 and the Oil Spill Liability Trust Fund

Before a claim for removal costs or damages under the OPA can be instituted, it must first be determined who the proper parties are to bring the claim. An OPA claim for removal costs can be brought by any party that incurred costs associated with removing the oil.⁶⁴ On the other hand, the classification of damages incurred will determine who can bring an

58. See 33 U.S.C. § 2701.

59. Jay Angle et al., *Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990*, 19 PENN ST. ENVTL. L. REV. 403, 406 (2011).

60. *Id.*

61. Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917, 925 (2011).

62. *Id.* at 926.

63. 33 U.S.C. § 2702(a) (emphasis added).

64. *Id.* § 2702(b)(1).

OPA damages claim. A claim for damages to natural resources can be instituted by a trustee acting on behalf of the U.S., a particular state, an Indian tribe, or a foreign entity.⁶⁵ A claim for damages to real or personal property, subsistence use, or profits and earning capacity can be instituted by any party with a possessory interest in the damaged thing.⁶⁶ A claim for damages to revenue can be instituted by the U.S. government, a state, or a political subdivision of a state.⁶⁷ Lastly, a claim for damages to public services can be brought by the state or its political subdivisions.⁶⁸

All OPA claims to recover removal costs or damages must first be presented to the PRP.⁶⁹ The purpose of this requirement is to promote settlement efforts and, ideally, avoid litigation.⁷⁰ If the PRP denies liability or the parties fail to settle the claim within 90 days from the date the claim was presented to the PRP, the claimant may either file suit against the PRP or submit a claim to the OSLTF.⁷¹ The claimant cannot be reimbursed by the OSLTF if litigation is pending on the claim in question.⁷²

If a party files suit under the OPA to recover removal costs or damages from the PRP, the party must also comply with the OPA's "Period of limitations" provision.⁷³ Under OPA section 1017(f)(2), an action to recover oil removal costs must be commenced within three years of the removal action.⁷⁴ The significant environmental impacts of unmanaged oil spills incentivize parties to commence oil removal efforts in a timely manner. Thus, any concern over whether such removal cost claims will be commenced is minimal. On the other hand, the OPA's "Period of limitations" provision regarding damages claims is far broader, leaving room for the passage of substantial periods of time before a party may institute their damage claim against a PRP.⁷⁵ Under section 1017(f)(1)(B), a claim for damages to natural resources cannot be brought until the NRDA has been completed.⁷⁶ The primary objective in compensating for

65. *Id.* § 2702(b)(2)(A).

66. *Id.* § 2702(b)(2)(B)–(C), (E).

67. *Id.* § 2702(b)(2)(D).

68. *Id.* § 2702(b)(2)(F).

69. *Id.* § 2713(a).

70. Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 558 (2000).

71. 33 U.S.C. § 2713(c).

72. Angle et al., *supra* note 59, at 408.

73. 33 U.S.C. § 2717(f).

74. *Id.*

75. *Id.*

76. *Id.*

natural resources damages is to assist in restoring “the natural resources to their condition before the damage and to compensate the public for the lost use of those resources.”⁷⁷ Under the NRDA, “[t]rustees design a recovery plan that is paid for or implemented by any responsible parties.”⁷⁸ After completion of a comprehensive assessment on the value of the affected plants, soil, water, and wildlife, the trustee can seek compensation from the responsible party, but if they refuse to pay the trustee can either sue the responsible party or present the claim to the OSLTF.⁷⁹ If the trustee opts to file suit against the responsible party, the trustee has three years to do so.⁸⁰ Under OPA section 1017(f)(1)(A), a claim for damages of any other kind cannot be brought until “the date on which the loss and the connection of the loss with the discharge in question are *reasonably discoverable* with the exercise of due care.”⁸¹ Once reasonable discovery is made, the party has three years to file suit.⁸²

In the alternative, a claimant can opt to present their claim to the OSLTF.⁸³ The OSLTF is a “funding source to pay for removal costs and damages resulting from oil spills or substantial threats of oil spills to navigable waters of the United States.”⁸⁴ The OSLTF is financed by a per-barrel excise tax on domestic crude oil and imported petroleum products.⁸⁵ The OSLTF has two primary components: the Emergency Fund and the remaining Principal Fund.⁸⁶ The Emergency Fund is reserved for federal on-scene coordinators to respond to discharges and initiate NRDA.⁸⁷ The remaining Principal Fund comprises a much larger portion of OSLTF

77. KRISTINA ALEXANDER, CONG. RSCH. SERV., R41396, THE 2010 OIL SPILL: NATURAL RESOURCE DAMAGE ASSESSMENT UNDER THE OIL POLLUTION ACT 1 (2010).

78. *Id.*

79. *Id.*

80. *Id.*; Meiners, *supra* note 8.

81. 33 U.S.C. § 2717(f)(1)(A) (emphasis added).

82. *Id.*

83. *See id.* § 2713(b).

84. UNITED STATES COAST GUARD, U.S. DEP’T HOMELAND SEC., OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS 1 (2006), https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf [<https://perma.cc/9D78-QC8B>]; *see also* 26 U.S.C. § 9509 [hereinafter OSLTF].

85. *The Oil Spill Liability Trust Fund (OSLTF)*, UNITED STATES COAST GUARD, https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/ [<https://perma.cc/PQF7-F8P5>] (last visited Oct. 3, 2021).

86. *Id.*

87. *Id.*

funds as it is used to pay for the claims presented to the agency.⁸⁸ Only a select few entities have the ability to present a claim to the OSLTF.⁸⁹ According to OPA section 1013, a claim for damages or removal costs can only be presented to the OSLTF by a responsible party, a governor, a U.S. claimant if a foreign offshore unit discharged the oil, or any potential claimant notified by the President pursuant to OPA section 1014(c).⁹⁰ A responsible party can only present a claim for removal costs or damages if they demonstrate that they qualify for a defense to liability under section 1003 or a limitation of liability under section 1004 of the OPA.⁹¹

E. Defenses to Liability Under the OPA

Under OPA section 1003, a PRP is not liable for removal costs or damages if they establish that the discharge of the oil was caused *solely* by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party.⁹² While the OPA section 1003 defenses underlie a responsible party's ability to present a claim to the OSLTF, such defenses also provide the PRP a potential avenue to evade liability for the damages and costs associated with the oil spilled from their facility or vessel.

The act of God defense originated in the 1785 English case of *Forward v. Pittard* in which Lord Mansfield defined an act of God as "something in opposition to the act of man."⁹³ According to Lord Mansfield's definition, the law presumes man is responsible for an incident unless it can be proven that the incident could not have been caused by man's intervention.⁹⁴ This definition suggests two essential elements exist within the act of God defense: (1) some act of nature and (2) no involvement of human action.⁹⁵ The requirement that some act of nature be present indicates that any form of human interference is likely to result in a court's rejection of the act of God defense.⁹⁶ Lord Mansfield's definition of an act of God is reflected in several federal environmental laws today.⁹⁷

88. *Id.*

89. 33 U.S.C. § 2713(b)(1).

90. *Id.*

91. *Id.* § 2708(a).

92. *Id.* § 2703(a) (emphasis added).

93. See Kristl, *supra* note 9, at 327–29.

94. *Id.* at 329.

95. *Id.*

96. Laurencia Fasoyiro, *Invoking the Act of God Defense*, 4 ENVTL. & ENERGY L. & POL'Y J. 1, 2 (2009).

97. See 33 U.S.C. § 1321; see also *id.* § 2701; 42 U.S.C. § 9607(b).

The FWPCA, the OPA, and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) all contain act of God provisions allowing parties to avoid liability when an event is completely out of their control.⁹⁸ CERCLA defines an act of God as “an *unanticipated* grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.”⁹⁹ The OPA mirrors the CERCLA definition of act of God verbatim.¹⁰⁰ This language contained in the OPA’s definition of an act of God forms the foundation of this Comment.

II. ANALYSIS OF THE PROBLEM

A. Does a Hurricane Qualify as an Act of God Under the OPA?

A party responsible for the discharge of oil can, in theory, avoid financial responsibility for the damages linked to the release of such oil by invoking one of the OPA section 1003 defenses. While there are three section 1003 defenses, the scope of this Comment is primarily concerned with the act of God defense—specifically, the defense’s application to Gulf Coast hurricanes.¹⁰¹ For a hurricane to qualify as an act of God certain elements must be satisfied, namely the hurricane must be (1) unanticipated; (2) a grave natural disaster or other natural phenomenon of an exceptional, inevitable, or irresistible character; (3) the sole cause of the discharge of the oil; and (4) of a nature in which it could not have been prevented by the exercise of due care or foresight.¹⁰² The jurisprudence has interpreted the defense as it relates to various natural phenomena; cases applying the defense specifically to hurricanes, however, are lacking.¹⁰³

98. Kristl, *supra* note 9, at 341.

99. 42 U.S.C. § 9601(1) (emphasis added).

100. The only difference between the OPA and CERCLA definition of act of God is a comma after the word “character” in the CERCLA definition which is absent in the OPA’s definition. *Compare* 33 U.S.C. § 2701(1), *with* 42 U.S.C. § 9601(1).

101. *See* 33 U.S.C. § 2703(a).

102. *See id.* § 2701(1).

103. *See* *Apex Oil Co. v. United States*, 208 F. Supp. 2d 642 (E.D. La. 2002); *see also* *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *United States v. J.R. Nelson Vessel, Ltd.*, 1 F. Supp. 2d 172, 176 n.2 (E.D.N.Y. 1998); *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648 (M.D. Pa. 1995), *aff’d*, 96 F.3d 1434 (3d Cir. 1996).

The first requirement is that the hurricane must be unanticipated.¹⁰⁴ The jurisprudence has consistently employed a narrow interpretation of the unanticipated requirement, noting that essentially any level of foreseeability defeats it. For example, in *Apex Oil Co.*, strong river currents pushed the plaintiff's river barges into concrete bridge spans, causing the discharge of approximately 840,000 gallons of oil into the Mississippi River.¹⁰⁵ The plaintiffs submitted a claim to recover the removal costs incurred by invoking the OPA's act of God defense.¹⁰⁶ The plaintiffs argued they were entitled to the act of God defense because the currents were a result of the river's flood stage levels.¹⁰⁷ The U.S. District Court for the Eastern District of Louisiana rejected Apex's defense, holding the natural disaster was not unanticipated since Apex was aware of the flood stage condition and strong river currents.¹⁰⁸

In *Stringfellow*, the plaintiffs brought suit under CERCLA for the release of hazardous substances, but the defendants claimed heavy rainfalls in 1969 and 1979 were natural disasters qualifying as acts of God.¹⁰⁹ The District Court for the Central District of California rejected the defendants' act of God defense because the rains were foreseeable based on normal climatic conditions; thus, the unanticipated requirement was not satisfied.¹¹⁰

A hurricane's chances of satisfying the "unanticipated" requirement are slim bearing in mind various considerations. A hurricane can be tracked during its earliest developmental stages prior to the storm's landfall.¹¹¹ In the time between the initial storm sighting and landfall, news outlets continuously update citizens in the area on the development of the storm. Individuals and entities likewise prepare their homes, communities, and infrastructure for the storm's impact. Modern forecasting technology allows individuals and companies alike to both anticipate and mitigate hurricane impacts. Such modern forecasting technologies render an assertion that a storm is ever "unanticipated" essentially void, as the very purpose of such forecasting technologies is to foresee the expected damage. In addition to forecasting technologies' role in effectively

104. See 33 U.S.C. § 2701(1).

105. *Apex Oil Co.*, 208 F. Supp. 2d at 645.

106. *Id.*

107. *Id.*

108. *Id.* at 657.

109. *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

110. *Id.*

111. *National Hurricane Center Forecast Process*, HURRICANES: SCI. & SOC'Y, <http://www.hurricanescience.org/science/forecast/forecasting/forecast-process/> [https://perma.cc/SND3-J9TD] (last visited Nov. 8, 2021).

nullifying the “unanticipated” requirement, climate change’s effect on the frequency and intensity of hurricanes suggests that the continued and frequent occurrence of hurricanes is on the horizon.¹¹² Thus, in a Gulf Coast state like Louisiana where hurricanes develop nearly annually, the rise in global temperatures will further exacerbate the frequency and intensity of the hurricane season. While a hurricane could potentially constitute an unanticipated natural disaster in a landlocked state such as Kansas or Missouri, the same cannot be said for a Gulf Coast state where hurricanes are inevitable.¹¹³ Therefore, as long as a hurricane can be anticipated and predicted, courts remain unlikely to allow application of the act of God defense.¹¹⁴

The second requirement of the act of God defense is that the hurricane be a grave natural disaster or other natural phenomenon of an exceptional, inevitable, or irresistible character.¹¹⁵ The case law has established that mere rainfall is neither a grave natural disaster nor a natural phenomenon of an exceptional character.¹¹⁶ In *Alcan Aluminum*, the U.S. District Court for the Middle District of Pennsylvania faced the question of whether the defendant was entitled to CERCLA’s act of God defense when oil was discharged from a mine tunnel in the wake of the 1985 Hurricane Gloria.¹¹⁷ The court rejected the act of God defense, finding that heavy rainfall was not of a sufficiently exceptional character to constitute an act of God.¹¹⁸ Hurricane Gloria made landfall in Connecticut as a Category 1 storm on the Saffir-Simpson Hurricane Wind Scale, suggesting that even 74–95 mile per hour winds are not of an exceptional-enough character to qualify as an act of God.¹¹⁹ Similarly, in *Stringfellow*, the court held that the mere rainfall was not the type of exceptional natural phenomena to which the

112. *RCRA as a Tool for Environmental Justice Communities and Others to Compel Climate Change Adaptation*, 131 HARV. L. REV. 2409, 2410 (2018).

113. See, e.g., *List of Louisiana Hurricanes (2000–present)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List_of_Louisiana_hurricanes_\(2000%E2%80%93present\)](https://en.wikipedia.org/wiki/List_of_Louisiana_hurricanes_(2000%E2%80%93present)) [<https://perma.cc/6NBP-9G74>] (last updated Feb. 28, 2022). For example, since 2000, at least 28 tropical storms or hurricanes have impacted Louisiana. *Id.*

114. Fasoyiro, *supra* note 96, at 7.

115. See 33 U.S.C. § 2701(1).

116. See *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 650 (M.D. Pa. 1995).

117. *Id.*

118. *Id.* at 658.

119. See Adriana Morga & Sophia Tewa, *A Look Back at the Worst Hurricanes in Connecticut History*, CTPOST, <https://www.ctpost.com/extreme-weather/article/look-back-worst-hurricanes-Connecticut-history-12955707.php> [<https://perma.cc/4HBU-PUDS>] (last updated Aug. 22, 2021, 10:25 AM).

defense applied.¹²⁰ Lastly, in *J.R. Nelson Vessel*, the U.S. sought recovery for the costs incurred in cleaning up an oil spill under the OPA.¹²¹ The defendant responded by invoking the act of God defense, but the U.S. District Court for the Eastern District of New York rejected application of the defense because the storm was not of a sufficiently exceptional magnitude to qualify as an act of God.¹²²

Based on the *Alcan Aluminum*, *Stringfellow*, and *J.R. Nelson Vessel* decisions, mere rainfall is neither a grave natural disaster nor an exceptional natural phenomenon pursuant to the OPA's definition.¹²³ With a hurricane, heavy rainfall is the common denominator amongst Category 1 and 2 hurricanes, so it can be inferred that the higher the categorical classification of the hurricane, the more likely the hurricane is to meet the grave natural disaster requirement.¹²⁴ However, according to the House of Representatives Report on CERCLA, "a major hurricane may be an 'act of God', but in an area (and at a time) where a hurricane should not be unexpected, it would not qualify as a 'phenomenon of exceptional character.'"¹²⁵ Consequently, the anticipation that accompanies a Gulf Coast hurricane defeats the act of God defense's grave natural disaster requirement.

The third requirement of the act of God defense is that the natural disaster must be the sole cause of the oil spill.¹²⁶ The common definition of the term "solely" is "without an associate," suggesting no other contributing factor to the cause of the natural disaster is present.¹²⁷ Louisiana jurisprudence interpreting "sole cause" has ruled in a manner consistent with the common definition of "solely."¹²⁸ In *Alcan Aluminum*, the court noted that Hurricane Gloria was not the sole cause of the oil spill because Alcan Aluminum's prior unlawful disposal of oil contributed to

120. *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

121. *United States v. J.R. Nelson Vessel*, 1 F. Supp. 2d 172, 176 n.2 (E.D.N.Y. 1998).

122. *Id.*

123. *Alcan Aluminum*, 208 F. Supp. at 653; *Stringfellow*, 661 F. Supp. at 1061; *J.R. Nelson*, 1 F. Supp. 2d. at 176 n.2.

124. *Saffir-Simpson Hurricane Wind Scale*, NAT'L HURRICANE CTR. & CENT. PAC. HURRICANE CTR., <https://www.nhc.noaa.gov/aboutsshws.php> [<https://perma.cc/HT5C-4YYZ>] (last visited Nov. 8, 2020).

125. H.R. Rep. 99-253(IV), at 71 (1985).

126. *See* 33 U.S.C. § 2701(1).

127. Fasoyiro, *supra* note 96, at 13 (quoting *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1198 (5th Cir. 1989)).

128. *See, e.g., Alcan Aluminum*, 892 F. Supp. at 658; *see also Apex Oil Co. v. United States*, 208 F. Supp. 2d 642, 657 (E.D. La. 2002).

the “chemical soup” in the Susquehanna River.¹²⁹ In *Apex Oil Co.*, the court rejected the act of God defense on the grounds that the river currents were not the sole cause of the oil spill.¹³⁰ *Apex* had attempted to transport the barges with a tug that did not have enough engine power to move against the current.¹³¹ Thus, the insufficient engine power was cited as a contributing factor of the oil spill.¹³²

The determination as to whether the hurricane is the sole cause of an oil spill involves an inquiry into the nature of the storm and the scope of human intervention.¹³³ Courts generally “look[] for some physical action taken by a defendant that caused them to fail the due care prong.”¹³⁴ The case law stands for the proposition that any human interference contributing to the incident is likely to result in the court’s rejection of an act of God defense.¹³⁵

Addressing the final requirement, if the damage caused by the natural disaster could have been prevented by the exercise of due care of foresight, then a party is not afforded the act of God defense.¹³⁶ Determining whether the harm could have been prevented requires an inquiry into the specific measures, or lack thereof, taken by the responsible party. For example, in *Apex Oil Co.*, the court noted that the tug captain chose to navigate under the bridge with his tug and tow even though the tug was underpowered.¹³⁷ Consequently, the tug captain failed to exercise due care by choosing to navigate under the bridge with an underpowered tug.¹³⁸ Similarly, in *Stringfellow*, the court noted that the harm caused by the rain could have been prevented through the design of proper drainage channels.¹³⁹ Therefore, there was a lack of due care, and the defendants failed to meet the requirements for application of the act of God defense.¹⁴⁰ To succeed in establishing that a hurricane is an act of God, the injured party must prove that the damages were caused exclusively and directly by the natural cause of the storm. Any form of human participation, whether by neglect

129. *Alcan Aluminum*, 892 F. Supp. at 658.

130. *Apex Oil Co.*, 208 F. Supp. 2d at 657.

131. *Id.*

132. *Id.*

133. See Casey P. Kaplan, *The Act of God Defense: Why Hurricane Katrina & Noah’s Flood Don’t Qualify*, 26 REV. LITIG. 155, 178 (2007).

134. *Id.* at 177–78.

135. See Fasoyiro, *supra* note 96, at 2.

136. See 33 U.S.C. § 2701.

137. *Apex Oil Co.*, 208 F. Supp. 2d at 657.

138. *Id.*

139. *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

140. *Id.*

or active intervention, humanizes the occurrence, which in turn relinquishes the availability of the act of God defense.¹⁴¹

If any one of the four requirements is not met, then a hurricane cannot be considered an act of God for purposes of the OPA defense. Based on the foregoing analysis, the chances a hurricane will ever meet the statutory definition of act of God are slim. In addition to a plain language interpretation of the defense's language, the legislative history also supports the exclusion of hurricanes from the defense.¹⁴² The legislative history indicates that the OPA was enacted to amend, expand, and strengthen pre-existing statutes addressing oil spill liability and clean up.¹⁴³ The court's persistent rejection of the act of God defense is consistent with the OPA's legislative history as such rejections signify that, in theory, liability would always accompany a PRP's discharge of oil assuming another OPA defense is inapplicable. If courts encompassed a Gulf Coast hurricane within the defense, it would be contrary to the "unanticipated" requirement and inconsistent with the legislature's goal to expand liability.

If courts continue to rule and reason in a manner consistent with the foregoing cases, the availability of the act of God defense going forward appears obsolete. Consequently, if no other OPA defense is satisfied, then under the OPA's strict liability regime liability for clean-up costs and damages is to be imposed on the PRP. However, realistically the plain language of the OPA's liability provision has proven itself ineffective in meeting the Act's intended goals.

B. Why OPA Liability is Difficult to Impose on Responsible Parties for Post-Hurricane Oil Spills

Hurricane Katrina struck southeastern Louisiana over 16 years ago. The massive storm surge and wind speed overwhelmed the New Orleans levees, causing extensive flooding and displacement throughout parishes in southeastern Louisiana. While the physical damage to New Orleans and its infrastructure was immeasurable, Hurricane Katrina's wrath extended far beyond physical damage to the city's infrastructure.¹⁴⁴ Three weeks after Hurricane Katrina, Hurricane Rita made landfall.¹⁴⁵ Together the two

141. See Fasoyiro, *supra* note 96, at 19–20.

142. See *Apex Oil Co.*, 208 F. Supp. 2d at 654.

143. *Id.*

144. Sue Sturgis, *The Katrina Oil Spill Disaster: A Harbinger for the Atlantic Coast?*, *FACING S.* (Aug. 28, 2015), <https://www.facingsouth.org/2015/08/the-katrina-oil-spill-disaster-a-harbinger-for-the.html> [<https://perma.cc/5J7P-LU2V>].

145. Meiners, *supra* note 8.

hurricanes caused an estimated 10.8 million gallons of oil to spill onto land and into waterways spanning from Louisiana to Alabama.¹⁴⁶ Because of the close temporal proximity between the two hurricanes, “oil let loose by Katrina was pushed farther inland . . . and debris from the first storm caused damage to oil tankers rocked by the second.”¹⁴⁷ The first responder for oil spills, the U.S. Coast Guard, received 540 separate reports of oil spills in Louisiana waters.¹⁴⁸

Although the OPA was enacted to expand liability for those parties responsible for the discharge of oil,¹⁴⁹ somehow none of the 140 suspected PRPs associated with the spills caused by Hurricanes Katrina and Rita have been fined or cited for any environmental violations.¹⁵⁰ Shortly after Hurricanes Katrina and Rita, the LOSCO began its preliminary assessment of damages caused to Louisiana’s natural resources, but a notice of intent to restore the habitat was never released because an NRDA was never completed.¹⁵¹ Thus, if an NRDA is never completed, a public notice is never filed. Because a notice of restoration was never filed after Hurricanes Katrina and Rita, over 400 oil spills have remained unevaluated and unresolved for more than 16 years.¹⁵²

While no single reason can definitively account for this lapse in time, several factors shed light on the underlying cause of the delay in the oil spill damage assessment process. First, in the immediate aftermath of a hurricane, restoration efforts are centered on restoring power and cellular service, arranging shelters for displaced citizens, ensuring an adequate food and water supply, and clearing roadways of debris. Following Hurricane Katrina, the majority of the nation’s attention was focused on the “human misery set into motion by Katrina.”¹⁵³ Thus, diverting attention to a secondary issue, such as assessing the damage caused by an oil spill, took a backseat to the more immediate concerns.

Second, five years after Hurricane Katrina, the devastating BP oil spill occurred, dumping 4.1 million barrels of oil into the Gulf of Mexico.¹⁵⁴ Although the LOSCO launched their assessments of the Hurricane Katrina

146. *Id.*; Sturgis, *supra* note 144.

147. Meiners, *supra* note 8.

148. *Id.*

149. See Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 TUL. MAR. L.J. 1, 5 (2011).

150. Meiners, *supra* note 8.

151. *Id.*

152. *Id.*

153. *Id.*

154. ALEXANDER, *supra* note 77, at 1.

and Rita oil spills, the 2010 BP oil spill knocked the agency off track in processing the Katrina-era spills,¹⁵⁵ impeding LOSCO's ability to fully assess the damages caused by the Hurricane Katrina-era spills.¹⁵⁶

Third, thousands of oil platforms, rigs, and refineries, all with various owners, are located in the Gulf of Mexico. Thus, when oil is discharged from an offshore facility, the process of linking the damage caused by the spill to the specific source of the discharge can be difficult and time-consuming, especially when the disruption is caused by a catastrophic hurricane. In the case of the BP oil spill, only one party was responsible for the release of the oil, easily linking the damages incurred to the source of the discharge in a timely manner. On the other hand, the unpredictable nature of a hurricane renders any platform, refinery, rig, vessel, or tank holding or transporting oil at risk of succumbing to the blunt force of the hurricane and discharging oil. Therefore, linking oil spill damages to the specific source of the discharge in the aftermath of a hurricane can be a far more difficult process when compared to the 2010 BP oil spill.

While the factors underlying a delay in the NRDA process can be attributed to causes beyond human control, the environmental and economic consequences of such a delay are concerning. First, while limited data on the state of the natural resources prior to Hurricanes Katrina and Rita is available, the passage of over 16 years renders the ability to conduct a complete ecological damage assessment today nearly impossible.¹⁵⁷ The oil that once fouled Louisiana's waters during the summer of 2005 has long since dispersed or settled into the marsh land, and the affected plants and animals no longer exist.¹⁵⁸ While time cannot be reversed to rectify the issues triggered by Hurricanes Katrina and Rita, the 2005 spills demonstrate the danger in allowing years to pass without a completed NRDA. If an NRDA could not be completed then, how could we expect a comprehensive analysis of the spill's effects on natural resources today?

Second, because no statutory constraint outlines a required NRDA completion date, the very language of the Act promotes a responsible party to potentially evade financial responsibility.¹⁵⁹ As seen in OPA section 1017, a suit for damages caused by the oil spill cannot be instituted until an NRDA is completed, but the Act does not contain language outlining

155. Meiners, *supra* note 8.

156. See Kimberly Amadeo, *What Affects Oil Prices? Three Critical Factors*, THE BALANCE (Jan. 12, 2022), <https://www.thebalance.com/how-are-oil-prices-determined-3305650> [<https://perma.cc/ZR2H-XX6K>].

157. Meiners, *supra* note 8.

158. *Id.*

159. See 33 U.S.C. § 2717(f).

when such an assessment must be completed.¹⁶⁰ Consequently, the pending NRDA's have essentially paused the progression of natural resource damage claims. If one were to attempt to complete an NRDA today for the 2005 oil spills, hurdles would impede the investigation, documentation, and substantiation of claims.¹⁶¹ The absence of an NRDA completion date requirement has its own set of consequences.

If a party is unable to commence a suit due to the absence of a completed NRDA, then the party can present its claim to the OSLTF.¹⁶² However, the OSLTF is neither an infinite nor consistently financed source. The OSLTF has a \$500,000,000 cap for natural resource damages.¹⁶³ While this number may seem substantial at first glance, “[t]he cost of oil pollution removal and damages in the [U.S.] has skyrocketed since 1990.”¹⁶⁴ Even small oil discharges can result in significant financial burdens on the OSLTF if responsible parties do not pay.¹⁶⁵ Although the excise tax on crude oil has increased in recent years to fund the OSLTF, the oil spill liability tax expired at the end of 2018 and was not reinstated until 2020, suggesting the fund has the potential to fluctuate.¹⁶⁶ Congress has expressed its concerns about the financial burden on the OSLTF, and conducting a lengthy oil spill damage assessment process only enhances that burden as more trustees and states will have to rely on the fund for natural resources damage recovery.¹⁶⁷ Consequently, the OSLTF will be heavily relied upon to fund damage claims while oil companies are able to avoid financial responsibility for the oil discharged from their facility. If the slow-moving damage claims process continues to prompt parties injured by oil spills’ reliance upon the OSLTF, funds will continue to be removed from the OSLTF when future funding mechanisms are not guaranteed. After the 2010 BP oil spill, BP paid billions to help restore the environment, and “[i]f the companies responsible for the Katrina and Rita

160. *Id.* § 2717(f)(A)–(B); *see also id.* § 2706.

161. *See* Kiern, *supra* note 70, at 551.

162. *See* 33 U.S.C. § 2713(c).

163. ALEXANDER, *supra* note 77.

164. Kiern, *supra* note 149, at 24.

165. *Id.* at 25.

166. *Id.*; *Oil Spill Liability Tax*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/oil-spill-tax#:~:text=The%20oil%20spill%20liability%20tax%20imposes%20a%20tax,reminded%20to%20resume%20making%20semimonthly%20deposits%20of%20tax> [<https://perma.cc/B5V9-5JQE>] (last visited Oct. 6, 2021).

167. Kiern, *supra* note 149, at 24.

spills paid up at the same rate, Louisiana would add more than \$700 million to its restoration budget.”¹⁶⁸

C. Climate Change, Loss of Coastal Wetlands, and the Increase in Oil and Gas Activity

With the rise in global temperatures, the loss of coastal wetlands, and the increase in oil and gas activity in the Gulf of Mexico, the looming threat of post-hurricane oil spills is increasing. Accompanying such a threat is the potential for future oil spill damage claims to lay idly by for decades as illustrated by the aftermath of Hurricanes Katrina and Rita. However, this potential future harm could be mitigated.

The Intergovernmental Panel on Climate Change has noted that climate change is likely to cause an increase in “intense tropical cyclone activity” and predicts that “storm impacts are likely to be more severe, especially along the Gulf and Atlantic coasts.”¹⁶⁹ The Gulf Coast region felt this prediction in August 2021 when Louisiana experienced Hurricane Ida, “one of the strongest and most rapidly intensifying hurricanes ever to make landfall.”¹⁷⁰ In turn, the rising occurrence and severity of hurricanes enhances the risk posed of oil pipelines, refineries, and platforms potentially succumbing to such hurricanes, releasing oil as a result. Despite the rising global temperature’s impact on the frequency and severity of hurricanes and the threat of oil spills that accompanies such hurricanes, the push for oil leasing in the Gulf of Mexico shows no sign of slowing down.¹⁷¹ The Obama and Trump administrations opened up millions of acres in the Gulf of Mexico for oil and gas development.¹⁷² Many of the acres were “offered at reduced royalty rates to encourage additional near-shore drilling in Louisiana waters.”¹⁷³ Recently, the Biden administration offered more than 80 million acres of the Gulf of Mexico

168. *Id.*

169. CONTRIBUTIONS OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY 18, 55 (Martin Parry et al. eds., Cambridge Univ. Press 2007).

170. *Lawsuit Filed After Biden Opens 80 Million Acres of Gulf of Mexico for Oil*, CTR. FOR BIOLOGICAL DIVERSITY (Aug. 31, 2021), <https://biologicaldiversity.org/w/news/press-releases/lawsuit-filed-after-biden-opens-79-million-acres-of-gulf-of-mexico-for-oil-2021-08-31/> [<https://perma.cc/HR3R-9SMC>].

171. Meiners, *supra* note 8.

172. *Id.*

173. *Id.*

for oil and gas leasing.¹⁷⁴ These oil and gas operations are encroaching on the coastal wetlands, allowing the Gulf of Mexico's saltwater to intrude into the wetlands, killing the soil-anchoring plants and trees.¹⁷⁵ Consequently, this encroachment depletes the buffer zone that typically absorbs a hurricane's initial storm surge. The loss of this buffer zone renders cities further inland at greater risk of succumbing to substantial damage from hurricanes.

Even if we are to never experience another oil spill of the same magnitude as the BP, Exxon Valdez, or Hurricanes Katrina and Rita oil spills, minor oil spills similarly lead to significant pollution.¹⁷⁶ For example, although the 2012 Hurricane Isaac was merely a Category 1 hurricane, the Gulf Monitoring Consortium reported that (1) the Marathon refinery in Garyville dumped 12.6 million gallons of untreated stormwater runoff; (2) oil wastewater overflowed the collection system at the Phillips 66 refinery in Belle Chasse; (3) 47 gallons of slop oil spilled from the Valero refinery in St. Charles Parish; and (4) an oil slick formed around a closed Chevron offshore well.¹⁷⁷ Given the foregoing considerations and concerns, the looming threat of future post-hurricane oil spills provides an incentive to expedite the oil spill damage assessment process so as to ensure that (1) the heavy financial burden on the OSLTF is relieved; (2) the OPA's intended goal of expanding liability can be met; (3) the harmful ecological effects from oil spills can be successfully rectified; and (4) responsible parties can no longer evade financial accountability.

III. SOLUTION

A. A Revision to the OPA's "Period of Limitations" Provision

The current language in the OPA's "Period of limitations" provision is far too open-ended, creating room for uncertainty regarding when OPA damage claims can be remedied. A party's ability to institute a damage claim is purely contingent upon circumstances generally not within that party's control.¹⁷⁸ The same cannot be said for removal cost claims as the time period for judicial action to be commenced begins immediately after the removal costs have been incurred.¹⁷⁹ As for damage claims, the current

174. See *Lawsuit Filed After Biden Opens 80 Million Acres of Gulf of Mexico for Oil*, *supra* note 170.

175. Meiners, *supra* note 8.

176. *Id.*

177. *Id.*

178. See 33 U.S.C. § 2717(f).

179. *Id.*

“Period of limitations” provision’s language leaves open the possibility for decades to pass before judicial action for damages can ever be commenced.¹⁸⁰ Given the lingering threat of future hurricanes, the difficulty in successfully completing a damage assessment as time progresses, and the intensified burden on the OSLTF, the damage claims assessment process needs to be expedited. To remedy the foregoing consequences, the OPA’s “Period of limitations” provision should be revised to include a time period by which the NRDA and discovery of the connection between the damage and its source must be completed. Specifically, the OPA’s “Period of limitations” provision should be revised to provide that the natural resource and other damage assessments must be conducted within five years of the oil spill.

While a hardline time period may be difficult to achieve, the benefits of expediting the damage claims assessment process significantly overshadow such difficulties. First, a five-year requirement substantially increases a designated party’s ability to recover from the responsible party for the damages incurred. Too long of a delay between the oil spill and the damage assessment “causes significant problems in investigating, documenting, and otherwise substantiating claims.”¹⁸¹ An increase in a party’s ability to recover from the responsible party in turn decreases a responsible party’s ability to evade financial accountability entirely.¹⁸²

Second, a five-year rule would help to relieve the financial burden on the OSLTF as harmed parties would be able to actually recover from the responsible party instead of relying on the OSLTF.¹⁸³ Lastly, as global temperatures continue to rise, wetlands erode, and oil and gas activity in the Gulf of Mexico increases, oil infrastructure will inevitably succumb to the impact of future hurricanes, thereby potentially resulting in the release of oil. A five-year rule would increase the likelihood of an existing oil spill damage claim being remedied before it becomes overshadowed by a subsequent, larger hurricane.

As a matter of public policy, the primary concerns following a hurricane are ensuring the safety of citizens, obtaining shelter, restoring power, and ensuring access to food and water sources. Rightfully so, the state, local, and federal governments’ efforts should be focused on what can be done for the livelihoods of those citizens in the areas most heavily impacted by the hurricane. Bearing in mind this policy, too stringent of a time requirement could divert attention away from more demanding

180. *Id.*

181. *See* Kiern, *supra* note 70, at 551.

182. *Id.*

183. *See* 26 U.S.C § 9509.

concerns. However, after all the primary concerns are mitigated, the oil response teams, like LOSCO, have the perfect opportunity to assess the extent of the oil spill's damages. For example, one year after Hurricane Katrina, post-hurricane response and restoration efforts had settled to the point where "oil response teams should have been moving forward with environmental damage claims."¹⁸⁴ A five-year period provides the state, local, and federal governments ample time to handle the primary concerns following a hurricane and then shift gears into oil spill damage assessments. In fact according to Charlie Henry, a member of the NOAA response team, "it's common for five years to pass before a spill assessment and remediation plan is complete."¹⁸⁵ Therefore, a five-year rule would allow a party a maximum of eight years to bring their claim, assuming the assessment takes the full five years and the party takes the full three years allotted under the OPA to commence their lawsuit.¹⁸⁶ Thus, providing LOSCO and NOAA five years to conduct their damage assessments would rectify the problems highlighted by the aftermath of the Hurricanes Katrina and Rita spills.

On the other hand, while a streamlined time period provision in the OPA would be beneficial, "[n]o two NRDA cases are alike, and the process may take years to complete."¹⁸⁷ Despite this fact, "successfully completed NRDA cases deliver real benefits to the citizens of Louisiana," and expediting the damage claims assessment process would only increase that success rate.¹⁸⁸ According to LOSCO's website, since 1992 only 24 successful NRDA's have been conducted in Louisiana, and that number could exponentially increase if a mandatory five-year rule were imposed on the damage assessment teams.¹⁸⁹

CONCLUSION

Louisiana and its Gulf Coast neighbors are no strangers to a hurricane's devastating effects. For those communities heavily impacted, a hurricane affects every aspect of one's life. Similarly, oil and gas

184. Meiners, *supra* note 8.

185. *Id.*

186. *See* 33 U.S.C. § 2717(f).

187. *Natural Resource Damage Assessment (NRDA)*, LA. OIL SPILL COORDINATOR'S OFF., <http://www.losco.state.la.us/nrda.html> [<https://perma.cc/H8FP-ZAWR>] (last visited Nov. 8, 2021).

188. *Id.*

189. *See Louisiana Oil Spill Management System: NRDA Search*, LA. OIL SPILL COORDINATOR'S OFF., <https://data.losco.org/PublicNRDASearch/PublicNRDASearch> [<https://perma.cc/JA7Z-B5WC>] (last visited Oct. 5, 2021).

infrastructure located in and around the Gulf of Mexico is no stranger to a hurricane's damaging effects; in fact, such infrastructure is designed to withstand a hurricane's gale force winds.¹⁹⁰ However, as seen during several Gulf Coast hurricanes, no measure is foolproof, and oil spills will inevitably follow intense hurricanes.

To recover from an oil spill's damaging effects, the OPA provides a means for those affected and specific trustees to recover for the clean-up costs, natural resource damages, and other damages associated with oil spills. To potentially evade such liability, a PRP can attempt to establish that an act of God prompted the discharge of the oil. However, as seen in the defense's statutory language and the jurisprudence, a hurricane does not meet the statutory definition of act of God. Thus, in theory, liability should be imposed on PRPs pursuant to the OPA's strict liability regime. Realistically, however, due to the OPA's expansive "Period of limitations" provision, it is possible for PRPs to escape OPA liability entirely. As evidenced by the aftermath of the Hurricanes Katrina and Rita oil spills, over 16 years have passed since such storms, and to this day an NRDA has yet to be completed. Such an extensive time delay complicates the NRDA process and creates the opportunity for a PRP to escape financial responsibility entirely. Although the OPA was enacted to expand liability on PRPs, the OPA's lack of a specific time limitation outlining when an NRDA must be completed fosters an entity's ability to escape liability entirely, thereby contradicting the OPA's intended goals.

In addition to the issues fostered by the OPA's current "Period of limitations" provision, various other considerations highlight the need to revise the provision. Louisiana oil refineries, platforms, rigs, and pipelines are consistently at risk of oil spills considering the prominence of the oil and gas industry in Louisiana and global warming's direct impact on the frequency of hurricanes. Bearing in mind such a risk and the push for further oil and gas leasing in the Gulf of Mexico, the looming threat of future post-hurricane oil spills provides an incentive to expedite the oil spill damage assessment process. The Hurricane Katrina-era oil spills have highlighted the dangers of allowing oil spill damage claims to sit idle for decades. As time progresses, successfully completing an oil spill damage assessment becomes increasingly more difficult, and consequently oil companies increase their chances of escaping liability with the progression of time.

For these reasons, a requirement that the oil spill damage response teams conduct their assessments within five years of the oil spill would help to alleviate the heavy financial burden on the OSLTF, render the

190. See NAT'L OCEAN INDUS. ASS'N, *supra* note 5, at 2.

OPA's language consistent with its intended goals, rectify the harmful ecological effects from oil spills, and ensure responsible parties can no longer evade financial accountability. In turn, permitting a maximum of eight years to pass from the date of the oil spill to the commencement of a judicial action increases judicial efficiency in addressing post-hurricane oil spills.¹⁹¹

191. See 33 U.S.C. § 2717(f) (stating that the "Period of limitations" provision provides for three years in which the damage claim can be brought after the damage assessment is complete).