

# Fear and Loathing in Post-Katrina Emergency Debris Management: According to Whom, Pursuant to What, and You Want To Dump That Where?

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## I. INTRODUCTION

It is late April 2006, and another storm is raging in New Orleans. This storm rivals Katrina in its ferocity, but there is no wind, no rain, and no storm surge. The elements of this storm include the U.S. Army Corps of Engineers, the Louisiana Department of Environmental Quality, the Mayor of New Orleans, the New Orleans City Council, Waste Management of Louisiana, and various environmental groups. Amidst the fury stands a battered but resilient Vietnamese community from a ravaged New Orleans East, and between 2.6 and 6.5 million tons of potentially toxic hurricane debris about to be dumped in their backyard, which also happens to be directly adjacent to the Bayou Sauvage National Wildlife Refuge.<sup>1</sup> Who has the authority to circumvent federal

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1. Leslie Eaton, *New Landfill in New Orleans Sets Off a Battle*, N.Y. TIMES, May 8, 2006, at A1. The proposed landfill, known as the Chef Menteur site because of the highway that borders it to the north, was situated “across [the Maxent] [C]anal from Bayou Sauvage, the largest urban wildlife refuge in the country; 23,000 acres . . . of marshland, canals and lagoons that are home to herons, egrets, alligators in the fall, and tens of thousands of migratory ducks.” *Id.* “[A]ny effluent [the landfill] produces would flow into the Maxent Canal and eventually into nearby wetlands.” Gordon Russell, *Second Firm Seeking Landfill Permit, Company Official*

and state environmental law and local zoning ordinances to lash millions of tons of hurricane debris to the backs of a previously-thriving minority community and already-ailing wetlands? Why did no one think to prepare for such a foregone conclusion as a major hurricane devastating an exceedingly vulnerable coastal region? What can be done to prevent such circumstances in the future?

Part II of this Comment will detail the sociological and legal melodrama that surrounded the opening and closing of the Chef Menteur landfill site near the New Orleans East neighborhood of Village de l'Est, and the long, hard fight in between.

Part III will address the problems caused by the interplay of federal, state, and local power and will argue that because disasters can cripple local governments, a little federal push should be permissible.

Part IV will address the issue of foresight (or lack thereof) in a severely hurricane-prone region and will argue that the sins of this generation must be avoided by the next generation through the avenue of prior planning.

## II. BACKGROUND

Hurricane Katrina left more than pain, suffering, and human tragedy in her wake after plowing through Southeast Louisiana and Southern Mississippi on August 29, 2005; she left

more than 22 million tons or 55 million cubic yards of debris, including thousands of orphan drums of unknown origin and content, [more than] 350,000 flooded and abandoned cars, [more than] 60,000 damaged vessels, [more than] 1.5 million units of white goods, [more than] 500,000 units of electronic goods, [and] 140,000 to 160,000 flooded homes. . . .<sup>2</sup>

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*Offers City Share of Revenue from Eastern N.O. Site*, *TIMES-PICAYUNE* (New Orleans), Apr. 12, 2006, at A1.

2. LA. DEP'T OF ENVTL. QUALITY, COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT 1 (2006), *available at* <http://www.deq.louisiana.gov/portal/portals/O/news/pdf/DEQDebrisPlan-8-25-FINAL.pdf> [hereinafter COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT]. These numbers, though staggering, do not do justice to the psychological connotations that the word "debris" now elicits in the minds of New Orleanians.

[E]very time the word "debris" was uttered, people thought of smashed glass or blasted furnaces, sopping wet clothes or splintered church collection boxes, fallen Our Lady of Lourdes statues or deflated soccer balls. When you saw somebody picking through debris, looking for a forlorn memento to snatch out of the wreckage, an awkwardness came over you. It was too humbling to watch; you had to turn away.

DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 386 (2006) (indicating that the massive amount of debris generated by Katrina is not entirely a practical problem to which a practicable solution may be applied; one must keep in mind that it is also the broken detritus of people's shattered lives).

This incomprehensible mass of debris—unprecedented in type and amount—had to be put somewhere. Complicating matters was the fact that the city-owned Old Gentilly landfill, which was the only operational construction and demolition (C&D) landfill in Orleans Parish, had been scaled down as to the type and amount of debris it could receive per a settlement between the City of New Orleans and the Louisiana Environmental Action Network (LEAN) in the months just after Katrina.<sup>3</sup>

In response to that settlement and the marked money-making possibilities it made available, Waste Management of Louisiana (WML) applied for, and was granted, an emergency, six-month conditional-use permit needed to operate the Chef Menteur landfill (Chef Menteur).<sup>4</sup> There was an immediate outcry from the Vietnamese community that resides less than two miles from the site—now organized as the Citizens for a Strong New Orleans East (CSNOE)—as well as from LEAN, other environmental advocacy groups, and the New Orleans City Council.<sup>5</sup> The problem with Chef Menteur, they said, was the same problem that necessitated the outcome of the Old Gentilly suit: the dump was situated in a flood-prone area, was unlined, and was wholly lacking in other abatement features that are otherwise required for receipt of the type of potentially toxic debris that would be deposited there.<sup>6</sup>

The overarching fear of opponents was that history was repeating itself; after Hurricane Betsy in 1965,<sup>7</sup> “local and federal officials . . . ignore[ed] or circumvent[ed] their own regulations, long after the immediate emergency [had] ended,” resulting in an environmentally hazardous dump on Agriculture Street in Eastern New Orleans that ended up being declared a Superfund site.<sup>8</sup>

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3. Gordon Russell, *Storm Debris Landfill Is OK'd, Eastern N.O. Residents Furious*, TIMES-PICAYUNE (New Orleans), Apr. 14, 2006, at A1.

4. *Id.* In February 2006, New Orleans Mayor C. Ray Nagin issued Executive Order CRN0603, thus invoking emergency powers in order to waive the requirements of New Orleans' comprehensive zoning ordinance. *Id.*

5. Eaton, *supra* note 1.

6. Russell, *supra* note 3.

[A]fter Hurricane Katrina, the state expanded the definition of construction and demolition debris to include most of a house's contents, down to the moldy mattresses and soggy sofas. “It's essentially the guts of your house, all your personal possessions,” said Joel Waltzer, a lawyer representing landfill opponents. “Electronics, personal-care products, cleaning solutions, pesticides, fertilizers, bleach.”

Eaton, *supra* note 1.

7. Until Katrina, Hurricane Betsy was the most devastating hurricane to hit the New Orleans metropolitan area.

8. Eaton, *supra* note 1; see also John P. Manard, Jr., Patrick O'Hara & Kelly R. Blackwood, *Katrina's Tort Litigation: An Imperfect Storm*, 20 NAT. RESOURCES & ENV'T 31, 37 (2006).

Opponents cried foul at alleged abuses of power inherent in the emergency suspension of regulations and processes done several months after Katrina had already dissipated as a thunderstorm over the Midwest. Beyond these allegations, the specter of impropriety and political patronism hovered over the Chef Menteur dealings between WML and the City of New Orleans. The same day that the Nagin Administration granted WML's request for the six-month conditional use permit for Chef Menteur, WML pledged a donation of twenty-two percent of all revenue gained from the new facility.<sup>9</sup> The total amount was about \$860,000, or \$1.10 of each \$5-per-cubic-yard fee WML charged the Federal Emergency Management Agency (FEMA), which was footing the bill.<sup>10</sup> The City's share of the Chef Menteur operation proceeds remain "in an escrow account while the various lawsuits are pending."<sup>11</sup>

In mid-April 2006, despite opposition from citizens, environmental groups, and the New Orleans City Council, the Louisiana Department of Environmental Quality (LDEQ) announced that it would authorize Chef Menteur to open. The court thus gave the United States Army Corps of Engineers (Corps) the state-mandated go-ahead to issue an emergency section 404 permit authorization under the Clean Water Act (CWA).<sup>12</sup>

Then ensued five months of legal wrangling in both state and federal court, during which the City of New Orleans changed postures several times, prompting LDEQ to follow suit.<sup>13</sup> LEAN and CSNOE filed suit against the Corps in federal court to enjoin the issuance of the emergency CWA section 404 permit, in which WML intervened on the side of the Corps.<sup>14</sup> LEAN and CSNOE filed suit against LDEQ in state court to enjoin issuance of the state authorization, in which WML

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9. Russell, *supra* note 3. A subsequent federal audit found that the City of New Orleans, as beneficiary of the voluntary twenty-two percent donation, required the donor to (1) sign a notarized agreement, (2) submit an approximate calculation of said donation for verification by the City, and (3) continue donations as long as WML operated under the City's conditional authorization. Gordon Russell, *Feds Frown on City's Landfill Deal, Company Agreed To Give N.O. a Cut*, TIMES-PICAYUNE (New Orleans), Jan. 23, 2007, at A1; *see also* Editorial, *Failing Federal Smell Test*, TIMES-PICAYUNE (New Orleans), Jan. 24, 2007, at B6.

10. Russell, *supra* note 9 (stating that because FEMA was paying 100% of all landfill operation costs, the City was "in essence helping itself to an unauthorized federal grant").

11. *Id.*

12. *Id.*; *see* Clean Water Act § 404, 33 U.S.C. § 1344 (2000) (requiring Corps-issued permits for the discharge of fill or dredge material in the navigable waters of the United States).

13. Stephanie Grace, Op-Ed., *Mayor Goes from Decision to Indecision*, TIMES-PICAYUNE (New Orleans), Aug. 15, 2006, at B7.

14. *La. Env'tl. Action Network v. U.S. Army Corps of Engineers*, No. 06-2020, 2006 U.S. Dist. LEXIS 24344 (E.D. La. Apr. 27, 2006).

intervened on the side of LDEQ.<sup>15</sup> WML filed suit against the City of New Orleans in federal court to enjoin the six-month revocation of its zoning waiver and conditional use permit, in which LEAN and CSNOE intervened on the side of the City.<sup>16</sup> WML filed suit against LDEQ in state court to enjoin the revocation of its own state permit in response to revocation of local authorization, in which LEAN and CSNOE intervened on the side of LDEQ.<sup>17</sup> The only parties who did not vacillate were LEAN and CSNOE, who wanted Chef Menteur to be closed, and WML, who wanted Chef Menteur to remain open.<sup>18</sup>

In mid-August, the state court proceedings in Baton Rouge were consolidated. Judge Janice Clark issued an order to maintain “the status quo,” thus effectively preventing LDEQ from revoking its authorization and allowing Chef Menteur to continue to operate past the six-month life of the original zoning waiver.<sup>19</sup> Meanwhile, the federal court proceedings in New Orleans were thrown into disarray by a letter to LDEQ from City Attorney Penny Moses-Fields, which stated, “Nagin’s refusal to renew the executive order that opened the landfill ‘is not intended and should not be construed as an expression of the administration’s opposition’ to [LDEQ] permitting the landfill, if the agency deems it ‘appropriate and necessary.’”<sup>20</sup> LDEQ officials took the Penny-Moses letter as an indication of further authorization for Chef Menteur, and the judge saw no need for action; that was, until Moses-Field clarified the clarification

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15. La. Env’tl. Action Network v. Dep’t of Env’tl. Quality, 543,232 (La. 19th Jud. Dist. Ct. May 16, 2006).

16. Waste Mgmt. of La. v. City of New Orleans, No. 06-4265 (E.D. La. filed Aug. 14, 2006).

17. Waste Mgmt. of La. v. Dep’t of Env’tl. Quality, 545,758 (La. 19th Jud. Dist. Ct. July 31, 2006).

18. Grace, *supra* note 13. Even the Louisiana Legislature chimed in with a concurrent resolution. The parties opposed to the landfill insisted they be allowed to have the contents of the landfill independently tested; WML refused those scientists access. The DEQ testing protocol provided for testing by its own scientists of material that was tentatively slated to be hauled to the Chef Menteur site. The Louisiana Legislature spoke: “[Be it resolved] that the Legislature of Louisiana does hereby strongly urge and request [DEQ] to immediately jointly test with scientists identified by the community the actual contents and leachate of the Chef Menteur landfill itself.” S. Con. Res. 138, Reg. Sess. (La. 2006).

19. Waste Mgmt. of La. v. Dep’t of Env’tl. Quality, 543,232 and 545,758 (La. 19th Jud. Dist. Ct. Aug. 14, 2006) (order to maintain status quo and stay further proceedings until identification of further issues). Issues regarding the definition of “status quo” are pertinent here; specifically, all parties were well aware of the impending expiration of its emergency permit. Arguably, maintenance of the status quo should have dictated timely expiration of the permit, and thus closure of the landfill.

20. Grace, *supra* note 13 (“The letter also declares [LDEQ] ‘justified’ in the findings, recommendations and conclusions’ on which it based its initial support. And it ended, with no apparent irony, by saying that ‘the above and foregoing is intended to clarify the administrations’ position regarding the utilization of the Chef Menteur Landfill as a C&D Landfill.’”).

as “not a letter of support.”<sup>21</sup> On August 14, Nagin then issued a cease and desist order, in response to which WML filed an application for a conditional use permit under normal zoning procedures.<sup>22</sup> WML then filed suit in New Orleans Civil District Court to enjoin the cease and desist order.<sup>23</sup> In mid-October, Judge Ethel Sims Julien declined WML’s request, finding that WML could not prove irreparable harm, that WML had notice of the six-month time restriction of Nagin’s original executive order, that WML had no valid expectancy of operating beyond that date, and that WML had ample time during that six-month period to apply for a normal conditional-use permit subject to public notice and comment, and voting by the City Council.<sup>24</sup>

As of this writing in March 2007, Chef Menteur remains closed.

### III. THE PROBLEM OF CONTROL

In the days after Hurricane Katrina mowed down much of Southeast Louisiana and Southern Mississippi, President George W. Bush was apt to comment that “[i]t’s a—very important for us to understand the relationship between the federal government, the state government, and the local government when it comes to major catastrophe.”<sup>25</sup> In order to understand this tripartite relationship in the disaster context, one must look at federal, state, and local disaster law and policy.

#### A. *Federal Disaster Relief*

Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act in 1988 to

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21. *Id.* (“The next day, the mayor took it up a notch and said, in his most fighting words, that [LDEQ’s] conclusion was very wrong, so wrong that he planned to issue a cease and desist order, which he did [three days later].”).

22. Bruce Egger, *Judge: N.O. Landfill To Stay Closed*, *TIMES-PICAYUNE* (New Orleans), Oct. 14, 2006, at A1 (“The understaffed City Planning Commission is not expected to hold a hearing on that application until sometime [in mid-2007].”).

23. *Waste Mgmt. of La. v. City of New Orleans*, 06-11056 (La. Orleans Parish Civ. Dist. Ct. Sept. 11, 2006) (order dismissing request for injunction).

24. Egger, *supra* note 22. A Florida case speaks to the issue of any claim WML might later raise against LDEQ for rescinding its permit. The operator of a waste management facility, PZ Construction Company, filed suit against the Florida Department of Environmental Protection, seeking injunction against an order requiring the operator to close the facility and move the waste. The District Court of Appeal of Florida held that the operator was precluded from bringing suit for failure to exhaust all administrative remedies. The operator did not allege any egregious agency action, which is required to bring suit having not exhausted all administrative remedies. *See Fla. Dep’t of Env’tl. Prot. v. PZ Constr. Co.*, 633 So. 2d 76 (Fla. Dist. Ct. App. 1994).

25. CNN REPORTS, *KATRINA: STATE OF EMERGENCY* 129 (Michael Reagan et al. eds., 2005).

provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by . . . encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments . . . .<sup>26</sup>

Thus, by mandating that state and local governments promulgate their own disaster plans, the Stafford Act also provides that in the vast majority of emergencies, state and local governments bear the primary responsibility of response.<sup>27</sup> Indeed, when the governor of a state requests that the President make an emergency declaration and provide federal assistance, that request hangs upon the prerequisites that “the Governor shall take appropriate action under State law and direct execution of the State’s emergency plan” and that state and local capabilities and resources be exhausted.<sup>28</sup> These provisions, along with the very structure of the Stafford Act, indicate a bottom-up hierarchy of responsibility—and thus one of power and control. The hierarchy runs first to local government, then to state government, and finally to the federal government, but only when “the situation is of such severity and magnitude that effective response is beyond the capabilities of the [s]tate and the affected local governments.”<sup>29</sup>

The National Response Plan (NRP) states that it is “not intended to compromise” state or local government response plans, and advises that integration of federal, state, and local resources is the ultimate goal.<sup>30</sup> Among the listed responsibilities of the local chief executive officer are the “coordinati[on] [of] local resources to address the full spectrum of actions to prevent, prepare for, respond to, and recover from . . . natural disasters” and the “[r]equest[] [of] State and, if necessary, Federal assistance through the Governor of the State when the jurisdiction’s capabilities have been exceeded or exhausted.”<sup>31</sup>

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26. Stafford Disaster Relief and Emergency Assistance Act § 101(b), 42 U.S.C. § 5121(b) (2000).

27. Stafford Act § 501(a), 42 U.S.C. § 5191.

28. *Id.*

29. *Id.* See generally 42 U.S.C. §§ 5121-5207 (exhibiting a structure that shows a hierarchy of responsibility and control that roots in the locality and proceeds upward through state and federal authorities).

30. U.S. DEP’T OF HOMELAND SEC., NAT’L RESPONSE PLAN, at x-xi (Dec. 2004), available at [http://www.dhs.gov/xlibrary/assets/NRP\\_FullText.pdf](http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf).

31. *Id.* at 8.

*B. State and Local Disaster Relief*

The Louisiana Homeland Security and Emergency Assistance and Disaster Act (Louisiana Emergency Act), together with the Louisiana Emergency Operations Plan (LEOP) and both the Katrina-specific and post-Katrina LDEQ disaster debris management plans tack closely to the federal Stafford Act in assigning primary responsibility and control of disaster response to localities.<sup>32</sup> The Louisiana Emergency Act provides that parish governments, through the parish president (or mayor in the case of New Orleans/Orleans Parish), have primary responsibility for declaring and responding to emergencies on the local level; only after local parish resources are exhausted and/or overwhelmed may the governor apply state emergency resources, and only at the request of the parish president.<sup>33</sup> The LEOP provides that “[t]he initial actions of prevention, mitigation, preparedness, and response and recovery operations are conducted by local government. Local authorities will exhaust their resources, and then use mutual aid agreements with volunteer groups, the private sector, and/or neighboring parishes.”<sup>34</sup> Further, “[t]he Parish and Municipal governments’ Chief Executive has overall responsibility by law for the direction and control of emergency/disaster operations.”<sup>35</sup> The state Katrina Debris Management Plan charges local governments with determining “appropriate sites for . . . staging and transfer of . . . [C & D] debris “and considering the “[u]se of a site as a permanent disposal site.”<sup>36</sup> Finally, the LDEQ Comprehensive Plan for Disaster Clean-up and Debris Management

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32. See Louisiana Homeland Security and Emergency Assistance and Disaster Act, LA. REV. STAT. ANN. §§ 29:721-:737 (2006); GOVERNOR’S OFFICE OF HOMELAND SEC. & EMERGENCY PREPAREDNESS, STATE OF LA., EMERGENCY OPERATIONS PLAN (June 15, 2006), *available at* [http://www.ohsep.louisiana.gov/plans/EOP\\_GOHSP.doc](http://www.ohsep.louisiana.gov/plans/EOP_GOHSP.doc); see also LA. DEP’T OF ENVTL. QUALITY, STATE OF LA., HURRICANE KATRINA DEBRIS MANAGEMENT PLAN (2005), *available at* <http://www.deq.louisiana.gov/portal/portals/O/news/pdf/finaldebrisplanrevisedOct14.doc>; COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 2.

33. LA. REV. STAT. ANN. §§ 29:727(D), (F).

34. GOVERNOR’S OFFICE OF HOMELAND SEC. & EMERGENCY PREPAREDNESS, *supra* note 32, at Basic 2. “State assistance will supplement local efforts and federal assistance will supplement State and local efforts when it is clearly demonstrated that it is beyond local and State capability[ies] to cope with the emergency/disaster.” *Id.* at Basic 3.

35. *Id.* at Basic 6.

36. HURRICANE KATRINA DEBRIS MANAGEMENT PLAN, *supra* note 32, at 1. Among a list of factors that local governments are directed to take into account when selecting debris management sites are what the proposed site will be used for, if the site is a wetland area, and if there are nearby residences that will be adversely affected or inconvenienced by use of that particular site. *Id.*



(Comprehensive Debris Plan) specifically avoids superseding local ordinances.<sup>37</sup>

The New Orleans Emergency Operations Plan parallels in all aspects both the state and federal emergency plans.<sup>38</sup>

*C. Analysis: State and Local Disaster Relief Efforts Sometimes Need a Federal Push*

Taken together, all of the above disaster response policy points to the local governmental entity as the wellspring of all responsibility and control in an emergency situation; the state may step in to assist only when local resources are overwhelmed, and the governor may request assistance from the federal government only after state resources are overwhelmed.<sup>39</sup> This indicates that when the support of the local government for a particular emergency response action dissipates, the authority to either commence or continue that action disappears as well. In the Chef Menteur situation, WML was and should have been wholly dependant on the directive of Mayor Nagin and his administration. Once Nagin rescinded his requisite authorization, LDEQ legally could not continue to extend its own; by the time Nagin's original executive order granting himself the authority to waive zoning requirements ran its six-month course, the emergency that necessitated the whole scenario had long since dissipated, and WML was perfectly capable of following the normal channel for a conditional-use application. WML's absence in the fray was no impediment to the recovery of New Orleans and the metropolitan region.<sup>40</sup>

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37. COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 2, at 1. The Comprehensive Debris Plan also adopts the same factors of concern used in the Katrina Debris Management Plan: whether the site is appropriate for the material, whether the site is in a wetland area, whether there are nearby residents, among other factors. *Id.* at 4. See *generally* CONG. RESEARCH SERV., ROBERT T. STAFFORD DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT: LEGAL REQUIREMENTS FOR FEDERAL AND STATE ROLES IN DECLARATIONS OF AN EMERGENCY OR A MAJOR DISASTER, NO. RL3390 (2005) (summarizing national emergency management authorities); CONG. RESEARCH SERV., LOUISIANA EMERGENCY MANAGEMENT AND HOMELAND SECURITY AUTHORITIES SUMMARIZED, NO. RL32678 (2004) (summarizing national and Louisiana emergency management authorities).

38. See CITY OF NEW ORLEANS, OFFICE OF EMERGENCY PREPAREDNESS, COMPREHENSIVE EMERGENCY MANAGEMENT PLAN, ANNEX I: HURRICANES 1-14 (2005), *available at* <http://www.cityofno.com/portals/portal46/portal.aspx?portal=46&tabid=38> (providing that primary responsibility and control of emergency response is in the hands of the City, with assistance from the state and the federal government at request).

39. "[T]he Federal response is predicated on an incident being handled at the lowest jurisdictional level possible." THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 42 (2006) [hereinafter LESSONS LEARNED].

40. Egger, *supra* note 22. Ample use was made of a private C&D-rated landfill on Highway 90 near Waggaman, Louisiana, in Jefferson Parish. Russell, *supra* note 9.

Despite its clarity, there is a major difficulty inherent in this bottom-up structure promulgated by federal and state policy in the hurricane context. As shown above, the local, state, and federal plans all emphasize the control and responsibility of the “lowest level of government possible.”<sup>41</sup> Katrina effectively “blasted away nearly all of the local government infrastructure in New Orleans and on the Mississippi Gulf Coast . . . [and] therefore removed the basis on which the [NRP and state plan] was built.”<sup>42</sup> This fracture resulted in all responsible officers bickering about who was in charge instead of immediately taking desperately needed action; Professor Stephen Griffin asserts that this is the direct result of “remaining faithful to the values of eighteenth century federalism[,] [causing us to] become unthinking believers in an ideology that does not relate to contemporary reality.”<sup>43</sup>

One way to avoid a similar result following future storms is to revise state and federal emergency response plans to allow for more federal “push.” This would allow federal authorities to send obviously needed aid when state and local authorities have reached some threshold level of incapacity, rendering them unable to “pull” the federal assistance to them as the disaster policy currently dictates. Although the Stafford Act allows this in certain circumstances,<sup>44</sup> the President failed to exercise this power in the hours and days after Katrina.

Such a change in policy would involve a minor reexamination of what a traditionally federalist system means to modern American society, but the better part of any resultant growing pains has already been felt with little fanfare.<sup>45</sup>

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41. Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN'S J. LEGAL COMMENT. 527 (forthcoming 2007).

42. *Id.* (“Katrina challenged assumptions going back many decades as to how the federal structure should operate, not just during a crisis, but also in preparing for crisis situations.”); see also LESSONS LEARNED, *supra* note 39, at 42 (“In the case of Katrina, the local government had been destroyed and the State government was incapacitated, and thus the Federal government had to take on . . . additional roles . . . it would normally rely upon the State and local governments to provide.”).

43. Griffin, *supra* note 41, at 14.

44. “Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster. . . .” Stafford Act § 403(a), 42 U.S.C. § 5170b(a) (2000) (omitting language present elsewhere in the Act that provides for general federal assistance in support of State and local efforts); see also Stafford Act § 402(1), 42 U.S.C. § 5170a(1) (including the differentiated support language).

45. Minor because, as Professor Griffin relates, such a reexamination has already been made successfully with the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified throughout 20 U.S.C.), which “involved an unprecedented intrusion into a subject, education, that everyone used to agree should be left to the states.” Griffin, *supra* note 41, at 14.

Another way to avoid a similar result, particularly in the debris management context, is to promulgate a detailed disposal plan that reads like a script from pick-up through to final disposal in a properly prepared and properly permitted landfill. The Comprehensive Debris Plan, prepared by LDEQ almost a year after Katrina barreled ashore, does not address final disposal directly.<sup>46</sup> New Orleans—as well as other coastal communities vulnerable to hurricanes or other forces capable of similar devastation—should take the initiative<sup>47</sup> and, pursuant to local responsibility and control, tackle the issue of final disposal themselves.

#### IV. THE PROBLEM OF FORESIGHT

In the wake of Katrina, the primary question on the minds of many—and an apt question it is—is how could the government officials and residents of a region such as Southeast Louisiana, prone to such devastation because of its location, geography, and history, not anticipate and adequately prepare for such a contingency?<sup>48</sup> The damage that Katrina wrought was not unprecedented; Hurricane Betsy in 1965 and the Great Mississippi Flood of 1927 were each, in their own time, considered the greatest natural disaster the country had ever known.<sup>49</sup> Many of the foreseeable causes and consequences of Katrina's rampage through Louisiana and the Mississippi Gulf Coast—levee failure and storm surge abatement through wetland conservation and restoration to name but two—are beyond the scope of this Comment. That said, it should not have taken a prohibitively large jump in logic to recognize that prior planning in the debris management and disposal context would be a justifiable and beneficial expenditure of time and resources on the part of those whose responsibility it is to provide for such eventualities.

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46. See COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 2, at 4 (stating that the closest the Comprehensive Debris Plan comes to addressing final disposal is “[u]se of a site as a permanent disposal site may also be considered”).

47. Another reason localities should take the initiative upon themselves: the final report prepared by the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina was itself entitled “A Failure of Initiative.” See SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., FINAL REPORT: A FAILURE OF INITIATIVE (2006).

48. For a pointed indictment of the bureaucratic negligence that caused the levee failure that drowned New Orleans and a study using best available science of just how foreseeable it was, see IVOR VAN HEERDEN & MIKE BROWN, *THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST* (2006). For a more historical and sociological treatment of the foreseeability and consequences of Katrina, see BRINKLEY, *supra* note 2.

49. For an eloquent and apropos retelling of the Great Mississippi Flood of 1927 and its far-reaching implications and consequences, see JOHN M. BARRY, *RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (1997).

A slight allusion to state agency recognition of the problem of preparation and foreseeability peeks from behind exceedingly bureaucratic language in LDEQ's Comprehensive Debris Plan, albeit in another context. In enunciating its laudable goal to "reduce debris 50% by volume prior to disposal in a landfill," LDEQ recommends that "[l]ocal Governments should have standby contracts to provide for the oversight, implementation, and operation of recycling and beneficial use projects associated with disaster-generated debris activities."<sup>50</sup> Although this statement explicitly refers to debris staging areas and recycling facilities only, the same could easily be said for adequately prepared landfills reserved for the voluminous debris bound to be produced by the occasional and inevitable hurricane.

A possible answer to the question of foreseeability and preparation lies in a new C&D landfill proposal that was all but lost in the flurry of Chef Menteur litigation. In mid-April 2006, Newport Environmental Services LLC (Newport) announced in a newspaper advertisement its intention to begin the arduous process of opening a C&D landfill in a coastal zone by applying for a conditional use permit with the New Orleans City Planning Commission.<sup>51</sup> Newport owns a 700-acre tract of land in Eastern New Orleans that abuts the much-maligned Mississippi River-Gulf Outlet.<sup>52</sup> The Tulane Environmental Law Clinic (TELC)—on behalf of LEAN and Sierra Club-Delta Chapter—sent a letter to Newport on August 10, 2006, detailing the groups' comments and concerns regarding the proposed wetland area C&D landfill; Donald W. Doyle, Newport's principal investor, responded at length in a letter of February 5, 2007.<sup>53</sup> Newport's Clean Water application and the concerns iterated by TELC raise numerous issues of environmental regulation.<sup>54</sup>

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50. COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 46, at 4. Appropriate to the issue of awarding hurricane debris contracts is a case from the Louisiana Third Circuit Court of Appeal regarding debris left by Hurricane Lili in October 2002. Judge Ezell there held that hurricane removal projects do not qualify as public works contracts subject to Public Bid Law. *See* Regency Constr. Co. v. Lafayette City-Parish Consol. Gov't, 03-313 (La. App. 3 Cir. 6/4/03); 847 So. 2d 796.

51. Russell, *supra* note 1. Donald Doyle, one of the principal investors in the Newport group, "said that he will 'meet or beat' the deal [WML] . . . granted the city: a 22% share of the landfill's gross revenue that the company signed over on the same day Nagin granted the [Chef Menteur] zoning waiver." *Id.* This raises fresh concerns of impropriety and political patronism.

52. *Id.*

53. Letter from Donald W. Doyle, Jr., Principal Investor, Newport Env'tl. Servs., to Jill Witkowski, Clinical Instructor, Tulane Environmental Law Clinic (Feb. 5, 2007) (on file with author). For Newport's section 404 Clean Water Permit Application, see Clean Water Permit No. MVN-2006-03334 EFF.

54. Though beyond the scope of this Comment, the issues raised include section 404 Clean Water Act permitting factors such as demonstrated water dependency, lack of practicable

In his letter, Doyle detailed numerous design enhancement actions that Newport intends to take in the construction of its proposed landfill that pursue commendable aims of environmental protection and wetland loss mitigation while still seeking to provide the much-needed service of accepting hurricane-generated C&D debris.<sup>55</sup> Newport's proposed design enhancements include a twenty-four-inch thick recompacted clay liner in each waste cell within the landfill; twelve inches of interim cover spread over exposed waste at least every fourteen days; drainage ditches that would divert runoff from active landfill areas to a "Storm Water Retention Basin, which will also handle all flow from other developed areas such as parking lots, roads, completed waste cells, excavations, and buildings"; a visual and nonpoint source water pollution buffer surrounding the site formed by 400 acres of unused land owned by Newport, including 100-foot buffers along Bayou Bienvenue and the adjacent hurricane protection levee; and a beefed-up double screening process preceding acceptance that will document by video and hand-examine all incoming waste streams to protect against inclusion of hazardous waste.<sup>56</sup> In addition, supplemental hurricane protection measures aimed at preventing redistribution of debris by wind or flood water will be implemented when a storm with sustained winds of forty miles per hour or more is projected to make landfall near the Louisiana and Mississippi Gulf coasts.<sup>57</sup>

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alternatives, temporary reduction of water storage capacity of a floodplain, general public interest, etc. See Letter from Donald W. Doyle, Jr., to Jill Witkowski, *supra* note 53.

55. See *id.* Doyle writes:

While the poor management practices of other area landfills have resulted in [environmental] concerns being raised . . . , to mitigate adverse environmental effects to the maximum extent possible, . . . [Newport's engineering design] has incorporated numerous engineered and operational enhancements to address these concerns at the landfill. . . . The additional capital costs of the enhancements will be approximately \$4 million.

*Id.* at 6.

56. *Id.* at 6-7.

57. *Id.* at 5.

[U]nder Newport's Hurricane Protection Contingency Plan, during the hurricane season, Newport will maintain and/or have access to sufficient material to cover the active disposal cell with twelve inches of interim cover in case of hurricane. Newport will also maintain sufficient earth moving equipment to perform hurricane-action level activities. Approximately seventy-two hours before the anticipated arrival of sustained forty [mile per hour] winds, the site manager will place all plant personnel on hurricane standby, and active areas containing debris will be covered with twelve inches of interim cover.

*Id.*

Newport also reiterated its commitment to accepting only nonhazardous debris from which the majority of potentially dangerous substances has been culled.<sup>58</sup> Although LDEQ's new definition of C&D material excludes many substances of concern such as cleaning agents, pesticides, oil, housing insulation, propane tanks, white goods, and mercury-laden electronic waste, the definition retains material that has the potential to become toxic, either of its own accord or in combination with other substances.<sup>59</sup> Arsenic-treated lumber, lumber covered by lead-based paint as well as varnishes and stains, gypsum sheetrock covered by black mold, and "incidental" material contaminated by asbestos are not excluded.<sup>60</sup>

Although it is irrefutable that defining what can and cannot be placed in C&D landfills is a step in the right direction, this working definition of C&D material must be narrowed further to curtail wetland contamination and risk to public health. The potential cumulative effect of these allowed items and substances could be devastating to water quality and public health were Newport's mitigation efforts to fail.

Newport insists further that their proposed site is the only viable option when evaluated against other potential sites "in terms of social and economic impacts on the population in the New Orleans East area."<sup>61</sup> Other sites were deemed unacceptable "due to the proximity of the alternative landfill sites to large 'at-risk' populations. These populations were deemed at-risk due to economic, social, and cultural status."<sup>62</sup> This statement no doubt was made partly in reference to the Vietnamese community in Village de l'Est and their incredibly successful grassroots

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58. *Id.*

In August 2006 LDEQ listed material to be considered as C&D debris as: Non-hazardous waste generally considered not water-soluble, including but not limited to[] [m]etal, concrete, brick, asphalt, roofing materials (shingles, sheet rock, plaster), or lumber from a construction or demolition project[;] [f]urniture, carpet, painted or stained lumber contained in the demolished buildings[;] [t]he incidental mixture of [C&D] debris with asbestos-contaminated waste, (i.e., incidental asbestos-contaminated debris that cannot be extracted from the demolition debris)[;] [and] [y]ard [t]rash (vegetative matter resulting from landscaping and yard maintenance, including tree and shrubbery leaves and limbs, grass clippings, and flowers).

*Id.* at 5-6; *see also* COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 2, at 3.

59. *See* COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT, *supra* note 2, at 3.

60. *See id.*

61. Letter from Donald W. Doyle, Jr., to Jill Witkowski, *supra* note 53, at 12.

62. *Id.*

campaign to shut down the Chef Menteur landfill,<sup>63</sup> but it is more than mere recognition of a legal and political reality. Provided the statement is not simple lip service, it is an indication that the waste management industry is beginning to take notice of the larger social consequences of its business actions, which is a refreshing sight after the entirely bottom-line, blind-capitalist mentality exhibited by WML in its handling of the Chef Menteur situation. All private enterprises and governmental entities involved in the Katrina recovery effort must take heed of these larger social consequences when conducting their affairs and moving forward into subsequent hurricane seasons. It was business-as-usual that destroyed the wetlands, breached the levees, and delayed aid and response; that attitude will continue to do the same in the future if it is allowed to persist.

Southeast Louisiana and the Mississippi Gulf Coast need devoted landfills reserved for potential hurricane debris. The Newport proposal, or rather the model it suggests, is an adequate starting-point for how such a landfill might look, but we must go further. Due allowance for wetland conservation and the public interest must be observed in the process of determining site and composition. Further, waste management entities seeking to open a devoted hurricane landfill must embrace at minimum a zero-net-loss policy by implementing compensatory mitigation measures—acre-for-acre wetland substitution of one restored for every one impacted—where impact avoidance and alternatives are not available. These compensatory mitigation measures must also account for the respective functional values of the impacted areas versus the compensated areas.<sup>64</sup> An acre created or restored is a sufficient offset to

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63. See generally Eric Tang, *Rebel Survivors: The Vietnamese of New Orleans East Won a Grassroots Victory Nobody Expected*, COLORLINES, Jan.-Feb. 2007, at 35. The article puts a very personal face on the legal battle described above in Part II.

As an Asian American community subsisting in a New Orleans long divided by the black-and-white fault line—the depth of which was fully exposed by Katrina—the residents of Village de l’Est are especially susceptible to enlistment as a model minority wedge. Yet a deeper and more clear-eyed examination of the conditions that led to the community’s impressive organizing efforts reveals that the landfill struggle is not so much an example of model minority-ism as it is a model example of what it takes for the grassroots to win in post-Katrina New Orleans.

*Id.*

64. Newport plans to implement such a policy; their plan calls for two acres conserved for every one impacted. Letter from Donald W. Doyle, Jr., to Jill Witkowski, *supra* note 53, at 9 (“[T]he proposed landfill project will impact approximately 200 acres of jurisdictional wetlands. In order to compensate for losses of wetlands associated with the proposed development of the Newport C&D landfill, Newport will establish and maintain a productive wetland ecosystem [including marsh and bottomland hardwood forest] on 400 acres in St. Bernard Parish.”).

an acre lost—provided it is a like-kind exchange regarding the type and functionality of the particular parcel—whereas an acre conserved or protected is not satisfactory.<sup>65</sup> Addition should be the ultimate goal.

Also, any cost-benefit analysis conducted in determining a landfill site must include factors beyond feasibility of geography and environment; reasonably foreseeable impacts on the wants and needs of nearby communities must be considered, with special deference given to minority populations and potential impacts on the businesses and livelihood of constituent members.

Finally, recyclable and reclaimable material must be segregated from solid and C&D waste streams prior to dumping in order to reduce net landfill mass and make room for wholly unusable material. Potential qualifying material could include, but should not be limited to, recyclables such as household glass and plastics; paper products; properly treated lumber and brick; and steel, iron, or aluminum construction hardware such as screws, nails, and bolts. Unfortunately, there has been no public recycling of Katrina debris.

One lasting lesson taught to me by my father was that “prior planning prevents poor performance.” An ounce of such planning either in the form of devoted landfills reserved for hurricane debris in conformity with the suggestions above or more comprehensive recycling programs would prevent millions of tons of litigation, environmental degradation, and unneeded—nay, unacceptable—delay in getting people back into their homes.

## V. CONCLUSION

Katrina is not over; her floodwaters receded nearly two years ago, but the frightening mirror she held up to the region and the nation is still there, and her many questions are still with us. The ultimate answer to those questions lies in better preparation. This is easy to say, but not so easy to do.<sup>66</sup> One way to accomplish this is to preserve primary responsibility and control of responsorial decisions in the hands of local

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65. Zero-net-loss has been the observed policy since 1989. See Deborah Schoch, *New Policies Threaten To Dry Up Wetland Protection*, L.A. TIMES, Nov. 12, 2001, at A14. Despite this, an official Regulatory Guidance Letter circulated to the Corps regulators suggests that “[p]rotection/[m]aintenance” is sufficient to mitigate wetland loss. U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER (No. 01-1(2)(g)(4)), at 3-4 (2001).

66. Complete preparation for such a massive disaster is unlikely, if not impossible. “The declared disaster area for Hurricane Katrina covered 90,000 square miles and included a major metropolitan area . . . and the entire coast of Mississippi.” Robert Esworthy et al., *Cleanup After Hurricane Katrina: Environmental Considerations*, at 8 (Cong. Res. Serv. RL33115, May 3, 2006). But any preparation is better than none at all.



governments, with due allowance for federal push of assistance in the case of essential matters or where the local government is impacted so drastically that it cannot respond. Despite the occasional waft of corruption in the local permitting procedure, the state and federal governments should maintain support functions, with the above exceptions only. Localities know best how to help themselves because they know what works and what does not in their own unique systems. A state legislator from Shreveport or a federal bureaucrat from Washington, D.C., knows little to nothing about the needs and concerns of the people of Southeast Louisiana.<sup>67</sup>

Another way to accomplish better preparation is to provide for, and maintain, devoted facilities reserved for hurricane debris disposal before the next storm curls off the Horn of Africa as a tropical depression. Making do on a temporary and emergency basis with improperly built or maintained landfills is not acceptable, and eliminating this particular realm of uncertainty would do much to alleviate the resulting heavy burden on the dockets of the civil justice system, the agenda of environmentalists, the pockets of the local economy, and the minds of the people in nearby communities.<sup>68</sup>

Finally, more attention must be paid to the potential recycling or reclamation of qualifying debris, such as household glass and plastics, paper products, and properly treated construction material. As with all resources on this planet, waste disposal opportunities are finite; taking objects that still have viable uses above ground and burying them in endangered wetlands is simply foolish.

Statistically speaking, a storm of Katrina's magnitude or greater will come knocking again, sooner rather than later. Such is not within the control of man. The true test will be to apply the lessons learned from Katrina and to see that the lamentable man-made portions of history do not repeat themselves. Responsibility and preparation are two vital factors in the equation that officials and residents of New Orleans and

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67. For an extensive presentation of the stuttering federal response in general and the ineptitude of former Federal Emergency Management Agency director Michael Brown in particular, see generally BRINKLEY, *supra* note 2. See also SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, *supra* note 47.

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Disaster debris is a highly visible reminder of the scope of a disaster, and debris management accounts for as much as 40% of all disaster-related costs. . . . Proper management of this disaster debris continues to be an important step in protecting public health and safety and the environment, and in recovery and rebuilding efforts in affected areas.

Esworthy et al., *supra* note 66, at 7.

the Mississippi Gulf Coast will be required to solve the next time a storm comes barreling into the Gulf.