

# ARTICLE

## INVOKING THE ACT OF GOD DEFENSE

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### I. INTRODUCTION

The term force majeure has existed for many years.<sup>1</sup> Often likened to impossibility, it historically embodied the notion that parties could be relieved of performing their contractual duties when performance was prevented by causes beyond their control, such as an act of God.<sup>2</sup> The term “act of God” has been defined by Congress as an act occasioned by an unanticipated grave natural disaster.<sup>3</sup> The use of the term “grave” to qualify a natural disaster suggests that not all natural disasters are an act of God, contrary to common belief. The disaster has to be an unusual and extraordinary manifestation of the forces of nature that could not have been anticipated or expected under normal conditions.<sup>4</sup> If the natural disaster is a normal occurrence in the geographical area, then it could not be characterized as a grave natural disaster, thus any resulting effect is not an act of God.

Typically, hurricanes are considered in law to be an act of God.<sup>5</sup> Nevertheless, they have to be of a grave nature to be

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1. ARTHUR A. CORBIN, CORBIN ON CONTRACTS § 1324 (1962).
2. *Id.*
3. Oil and Hazardous Substances Liability Act, 33 U.S.C.S. § 1321(a)(12) (LexisNexis 1990).
4. *Jacoby v. Town of Gillette*, 174 P.2d 505, 509 (Wyo. 1946).
5. *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1239-40 (D. Ala. 2001)

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characterized as an act of God.<sup>6</sup> The reason hurricanes are typically considered an act of God is because forecasting the track, speed and tidal surge of a hurricane is one of the most challenging and difficult tasks encountered by meteorologists and rarely predicted with precision.<sup>7</sup> Instead, hurricane tracks exhibit “humps, loops, staggering motions, abrupt course and/or speed changes, and so forth,” which alter flood predictions.<sup>8</sup> One could conclude that this unanticipated and unpredictable nature of a hurricane earns it the classification of an act of God. Yet, despite the typically challenging and difficult task of forecasting hurricanes, some courts, as will be shown later in this article, have rejected classification of hurricanes as an act of God.

An act of God is also defined as an act occasioned exclusively by forces of nature without the interference of any human agency.<sup>9</sup> This suggests that any human interference that contributes to the incident is likely to result in a court’s rejection of an act of God defense. This prohibition of any human interference with the act of God makes it a very difficult, if not impossible, hurdle to overcome, particularly when human interference may be necessary to minimize the effect or impact of the act of God. This raises the question of whether one, who in good faith interferes with the act of God, would be precluded from claiming the act of God defense.

To be an act of God, the misadventure or casualty has to be a direct, immediate, and exclusive operation of the forces of nature, uncontrolled and uninfluenced by the power of man, and without human intervention.<sup>10</sup> It has to be of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence.<sup>11</sup>

Several major environmental statutes strictly define the act of God defense, making it almost impossible to meet. Despite the strict and narrow construction of the act of God defense, Potentially Responsible Parties (“PRPs”) under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) continue to invoke it as a defense in an

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6. *See id.* at 1240 (“A hurricane that causes unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge, is a classic case of an “Act of God.””)

7. *See* WILLIAM J. KOTSCH, *WEATHER FOR THE MARINER* 150 (2d ed. 1977).

8. *Id.* at 151.

9. BLACK’S LAW DICTIONARY 33 (6th ed. 1990).

10. *Id.*

11. *Id.*

effort to limit their liability.<sup>12</sup> In many instances, PRPs believe the alleged incident would not have occurred but for the act of God. As this article will show, this belief is highly distorted because anyone invoking the act of God defense has a heavy burden to overcome. It is not sufficient to simply attribute an incident such as a hurricane or a heavy storm to an act of God. Rather, one has to show that it was not humanly possible to either foresee or prevent the alleged violation from occurring and that the act of God was the sole cause of the incident.

This article analyzes the act of God defense in three major federal environmental statutes and gives an overview of several Texas environmental statutes dealing with the act of God defense and the elements required to successfully proffer the defense. The federal statutes: The Federal Water Pollution Control Act,<sup>13</sup> (“FWPCA” or commonly known as the Clean Water Act “CWA”), The Comprehensive Environmental Response, Compensation, and Liability Act<sup>14</sup> (“CERCLA”), and Oil Pollution Act<sup>15</sup> (“OPA”) (collectively referred to as “Federal Environmental Statutes”) are all similar in their approach to the act of God defense. The party asserting an act of God defense must prove, by a preponderance of the evidence, not only the occurrence of the act of God but that the act of God was the sole cause of the violation.<sup>16</sup> Indeed, they must not only assert an act of God, they must also establish lack of fault in order to be exonerated from liability.<sup>17</sup>

As will be analyzed in this article, to successfully invoke the act of God defense one must show that: the act of God was unanticipated; the act of God was a grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character; the act of God was the sole cause of the disaster; and the violation resulting from the act of God could not have been prevented by exercise of due care or foresight.

## II. OVERVIEW OF MAJOR FEDERAL ENVIRONMENTAL STATUTES

### A. *The Federal Water Pollution Control Act known as the Clean*

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12. Potentially responsible parties in this context refer to anyone who may be facing liability in an act of God related case.

13. *See generally* Clean Water Act, 33 U.S.C. §§ 1251-1387 (1977).

14. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1980).

15. *See generally* Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1990).

16. *Skandia Ins. Co.*, 173 F. Supp. 2d at 1241-42

17. *Id.*

*Water Act*

The Clean Water Act defines an act of God as an act occasioned by an unanticipated grave natural disaster.<sup>18</sup> Under this definition, only those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict, would be included as an act of God.<sup>19</sup>

The CWA was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>20</sup> Basically, the CWA holds owners or operators of the applicable vessel or onshore/offshore facilities that cause damage to water liable to the United States for cleanup costs, except if the owner or operator proves that the discharge was caused by one of the liability exceptions which include an act of God.<sup>21</sup>

Under the CWA, the basic responsibility for oil spill cleanup is on the President of the United States, although spillers may undertake the cleanup themselves.<sup>22</sup> In either case, strict liability is applied.<sup>23</sup> If the United States incurs cleanup costs, it may recover against the vessel or against the owner or operator, in any court of competent jurisdiction, unless the spill was caused solely by one of the liability exceptions, including an act of God.<sup>24</sup> If the spiller has incurred cleanup costs, it may recover against the United States if it can prove that the spill was caused solely by an act of God.<sup>25</sup>

*B. Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”)*

CERCLA is a broad remedial statute that Congress enacted to enhance the authority of the Environmental Protection Agency (“EPA”) to respond effectively and promptly to toxic pollutant spills that threaten the environment and human health.<sup>26</sup> CERCLA relieves a PRP from liability in the release of hazardous material if the release or threatened release of hazardous

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18. *Id.*; 33 U.S.C. § 1321(a)(12).

19. *Sabine Towing & Transp. Co. v. U.S.*, 229 Ct. Cl. 265, 269-70 (Ct. Cl. 1981).

20. 33 U.S.C. § 1251(a).

21. 33 U.S.C. § 1321(f)(1).

22. *See id.* *See also* CONF. REP. NO. 940 (for the Water Quality Improvement Act of 1970), 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 2712, 2723.

23. *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979).

24. 33 U.S.C. § 1321.

25. *Id.*

26. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992).

substances was caused solely by an act of God.<sup>27</sup> In order to prevail, a defendant must establish by a preponderance of the evidence that he exercised due care and took precautions.<sup>28</sup> As in the CWA, CERCLA imposes strict liability on responsible parties notwithstanding any other provision or rule of law, and subject only to the defenses set forth in section 107(b).<sup>29</sup> CERCLA defines an act of God a bit differently from the definition in the CWA. In CERCLA, an act of God is defined as “an unanticipated 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.”<sup>30</sup>

### C. *The Oil Pollution Act (“OPA”)*

The OPA was signed into law by President Bush on August 18, 1990.<sup>31</sup> In the wake of the eleven-million gallon spill from Exxon Valdez in Alaska’s Prince William Sound, the OPA amended the CWA to require federal removal of oil spills and federal approval of oil spill response plans, provided expanded cleanup and oversight responsibilities of the federal government, and increased the potential liabilities of responsible parties, significantly broadening their financial responsibility requirements.<sup>32</sup> The OPA relieves a responsible party of liability for removal costs or damages if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by an act of God.<sup>33</sup> Similar to the CWA and CERCLA, liability under the OPA is strict, and the absence of fault, or the exercise of due care is not a defense.<sup>34</sup> The OPA established a comprehensive Federal oil spill response and liability framework, and ushered in several landmark reforms.<sup>35</sup> Prior to the OPA, the CWA provided liability limitations for federal pollution removal costs associated with oil

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27. 42 U.S.C. § 9607(b)(1).

28. *U.S. v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (quoting 42 U.S.C. § 9607(b)(3)).

29. 42 U.S.C. § 9607(a)(1).

30. 42 U.S.C. § 9601(1).

31. *Apex Oil Co. v. U.S.*, 208 F. Supp. 2d 642, 651 (E.D. La. 2002).

32. S. REP. NO. 101-94, 101st Cong., reprinted in 1990 U.S.C.C.A.N. 723-24, 729.

33. 33 U.S.C. § 2703(a)(1) (1990).

34. *In re Metlife Capital Corp.*, 132 F.3d 818, 820-21 (1st Cir. 1997).

35. See *Apex Oil Co.*, 208 F. Supp. 2d at 651.

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spills.<sup>36</sup>

The definition of an act of God in the OPA is identical to that provided by CERCLA. Similar to CERCLA, the OPA defines the term 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.”<sup>37</sup> The OPA’s definition of act of God may be interpreted through its relationship with the CWA and CERCLA.<sup>38</sup>

The legislative history of OPA shows that it “amended, expanded, and strengthened pre-existing statutes that addressed oil spill cleanup, liability and compensation.”<sup>39</sup> Further, “the body of law already established under section 311 of the CWA is the foundation of the OPA.”<sup>40</sup> Therefore, “many of that section’s concepts and provisions are adopted directly or by reference.”<sup>41</sup> In light of the legislative history and congressional intent, the OPA’s act of God defense should be read to be at least as restrictive in its scope as it is under both the CWA and CERCLA cases.<sup>42</sup> The Senate Report specifically provides that the OPA continues to rely on the CWA as the basic law providing for cleanup authority, penalties for spills and failure to notify of spills, and, by adopting the standard of liability under CWA’s section 311, the standard of liability under the OPA.<sup>43</sup> That standard of liability has been determined repeatedly to be strict, joint, and several liability.<sup>44</sup> The only defenses to strict liability are that removal costs were caused solely by one of the liability exceptions, which includes an act of God.<sup>45</sup>

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36. 33 U.S.C. §§ 1251-1387.

37. 33 U.S.C. § 2701(1).

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

39. *Id.* (citing S. REP. NO. 101-94, 101st Cong., reprinted in 1990 U.S.C.C.A.N. 723-24, 726).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See Apex Oil Co.*, 208 F. Supp. 2d at 652.

44. *Id.*

45. 33 U.S.C. § 2703(a)(1).

### III. ELEMENTS OF THE FEDERAL ENVIRONMENTAL ACT OF GOD DEFENSE

#### A. *The act of God must be unanticipated*

In reviewing an act of God case using the Federal Environmental Statutes the court must first determine whether the act of God in issue was unanticipated. If there is any indication that the act of God could have been anticipated or predicted, perhaps due to past events, the court will not accept such a defense. Several cases have illustrated the courts' holding that an act of God must be unanticipated.

In *Sabine Towing and Transportation Company v. United States*, the plaintiff sought recovery from the Government of plaintiff's costs in cleaning up an oil spill from a damaged ship on the Hudson River.<sup>46</sup> The ship had suffered a ruptured hull when it struck an unknown underwater object in the Hudson River channel.<sup>47</sup> The unknown object was likely deposited in the riverbed during an increased rate of flow in the river, known as a "freshet," due in this instance to rain and the spring runoff of melted snow.<sup>48</sup> Although there was no way to determine what may have rolled down the river and embedded in the riverbed during a freshet, it was normal practice not to interrupt regular navigation on this account.<sup>49</sup> There was no significant oil spillage from the ship until the ruptured tank was opened for discharging.<sup>50</sup> The opening released a partial vacuum in the tank that had been created as the oil inside had cooled from its high loading temperature and allowed 30,000 to 50,000 gallons to escape out of the tear and into the Hudson.<sup>51</sup> The plaintiff argued that the freshet condition on the river which led to the spill was unanticipated and that the resulting spill was an act of God.

The court, applying the act of God definition in CWA, considered whether the unknown debris that the ship struck, or the freshet condition that deposited it, was unanticipated.<sup>52</sup> The court relied on the definition of act of God as it appears in section 1321(a)(12) from the conference committee for the final version of

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46. See *Sabine Towing & Transp. Co.*, 229 Ct. Cl. at 266.

47. *Id.*

48. *Id.* at 267.

49. *Id.*

50. *Id.*

51. See *Sabine Towing & Transp. Co.*, 229 Ct. Cl. at 267.

52. *Id.* at 269.

the Water Quality Improvement Act of 1970.<sup>53</sup> There, the committee defined the term act of God as an act occasioned by an unanticipated grave natural disaster.<sup>54</sup> Under this definition, only those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict would be included.<sup>55</sup>

The court held that the hull rupture was not unanticipated.<sup>56</sup> The decision was based on the reasoning that the frequency of freshet conditions on the Hudson and the danger that they caused were well known to those who navigate the river and could have, therefore, been anticipated.<sup>57</sup> The court explained that Congress did not mean to allow recovery for spills resulting from events as regular and predictable as freshets.<sup>58</sup> The court rejected plaintiff's argument that it could not have avoided the accident without suspending its operations, and that Congress could not have intended that shippers stop using the Hudson whenever there is danger from freshets.<sup>59</sup>

Instead, the court countered that it would be inconsistent with the strictness with which the conference committee recommended that "unanticipated," for the purposes of section 1321, be read to allow the section to cover regular and frequent conditions, like freshets, where the dangers are expected and where the losses are normally worked into the cost of doing business.<sup>60</sup> Therefore, the court concluded that the freshet condition should have been anticipated. The court's holding in *Sabine* thus shows that a bad weather condition in a geographical area, which is not unusual for that area, will not be characterized as unanticipated and, as such, any resulting incident will not be considered an act of God.

In *Liberian Poplar Transports, Inc. v. United States*, the court applied the same reasoning from *Sabine Towing*.<sup>61</sup> Plaintiff, Liberian Poplar Transports, Inc., was the owner of the M/V World Radiance (World Radiance), a vessel operated by

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53. *Id.*

54. *Id.* at 268 (citing Conf. Rep. No. 940, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 2712, 2722).

55. *Id.*

56. See *Sabine Towing & Transp. Co.*, 229 Ct. Cl. at 270.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Liberian Poplar Transp., Inc. v. U.S.*, 26 Cl. Ct. 223 (1992).

Worldwide Shipping Agency, Inc.<sup>62</sup> The World Radiance was transferring oil at the Chevron Hog Island facility in Philadelphia, Pennsylvania at approximately 1:00 p.m.<sup>63</sup> Plaintiff claimed that the captain of the World Radiance had checked the weather conditions on the radio prior to commencing transfer operations and had found no reports of severe weather.<sup>64</sup> Later that night, the National Weather service issued a Severe Thunderstorm Watch for the Philadelphia Metropolitan Area, but the crew of the World Radiance had not monitored the radio for weather conditions since the transfer began.<sup>65</sup> Nonetheless, plaintiff contended that the third mate on watch observed no signs of the impending storm as late as 9:15 p.m. that night.<sup>66</sup> Because of the storm's sudden onset, plaintiff maintained that the crew was unaware of the storm until it virtually was upon them.<sup>67</sup> Although plaintiff cleaned up the oil leak, plaintiff sought reimbursement under the CWA for amounts spent on the cleanup arguing, in part, that the storm was unanticipated.<sup>68</sup>

The court disagreed with the plaintiff's contention that the storm was not anticipated because the storm was not *well* forecasted, and was not *visually* foreseeable by the ship's watch.<sup>69</sup> The court reasoned that the plaintiff's argument was subjective rather than objective based on a reasonable person standard, particularly when the statute and the legislative history do not subscribe to a subjective test.<sup>70</sup> Whether the crew did or did not actually anticipate the storm is beside the point, said the court.<sup>71</sup> If the crew had monitored the radio for weather conditions, they clearly *could* have anticipated and taken precautions against the storm.<sup>72</sup> Furthermore, the court reasoned that although the storm was not *well* forecasted, it was in fact forecasted at least an half-hour before it hit, and there was an indication of bad weather in a storm watch issued approximately an hour before the storm struck.<sup>73</sup> Based on all the facts, the court concluded

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62. *Id.* at 224

63. *Id.*

64. *Id.*

65. *Id.*

66. *See Liberian Poplar Transp., Inc.*, 26 Cl. Ct. at 224.

67. *Id.*

68. *Id.*

69. *Id.* at 226.

70. *Id.*

71. *Liberian Poplar Transp., Inc.*, 26 Cl. Ct. at 226.

72. *Id.*

73. *Id.*

that the storm could have been anticipated and therefore could not be considered an act of God.<sup>74</sup>

Clearly, the court places a high burden on anticipation. One cannot simply argue that they did not anticipate the act of God due to insufficient notice or warning. Judging from the court's decision, it is clear that the anticipation element is not subjective. Rather, the test is whether a reasonable person could have or should have anticipated the occurrence of the act of God and consequently avoided the impact. The length of time or the argument that one did not have sufficient warning does not seem to relieve a party of responsibility. It appears that so long as a party had some warning prior to the occurrence of the violation, the court will find that the event was anticipated, thereby barring an act of God as a defense. This strict and narrow standard applied by the courts make it very difficult for one to successfully argue an act of God as a defense, particularly when the act of God is an adverse weather condition such as a hurricane because these conditions are often forecasted. As a result, more often than not, a party will probably be unsuccessful in showing that the act of God was unanticipated.

*B. The act of God must be a grave natural disaster*

The defense for the exceptional natural phenomenon is similar to, but more limited in scope than, the traditional common law act of God defense.<sup>75</sup> It has three elements: the natural phenomenon must be exceptional, inevitable, and irresistible.<sup>76</sup> Proof of all three elements is required for successful assertion of the defense.<sup>77</sup> Many occurrences asserted as acts of God would not qualify as an exceptional natural phenomenon.<sup>78</sup> For example, a major hurricane might otherwise be an act of God, but in an area (and at a time) where a hurricane should be expected, it would not qualify as a phenomenon of exceptional character.<sup>79</sup> Courts addressing the act of God defense in CERCLA have found that flood and periodic storm events do not constitute the type of happening to which the CERCLA act of

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74. *Id.*

75. *See Apex Oil Co.*, 208 F. Supp. 2d at 653 (citing H.R. REP. NO. 99-253(IV), 1986 U.S.C.C.A.N. (99 Stat.) 3068, 3100).

76. H.R. REP. NO. 99-253(IV), at 71 (1986), *reprinted in* 1986 U.S.C.C.A.N. (99 Stat.) 3068, 3101.

77. *Id.*

78. *See Apex Oil Co.*, 208 F. Supp. 2d at 653.

79. *Id.*

God exception applies.<sup>80</sup>

For one to successfully plead an act of God as an affirmative defense, one has to show that the act of God was not just a natural disaster or other phenomenon of an exceptional, inevitable, and irresistible nature, but that the natural disaster was “grave” in nature, meaning that the natural disaster has to be extremely serious.<sup>81</sup> In *Sabine Towing*, on the issue of whether the spring runoff of the melted snow or the underwater object in the Hudson amounted to a grave or exceptional natural disaster, the court rejected the plaintiff’s act of God defense, noting that “neither the spring runoff of the melted snow nor the object struck by the ship was a disaster as the word is commonly used.”<sup>82</sup> The court defined disaster as “a sudden calamitous event bringing great damage, loss, or destruction; broadly: a sudden or great misfortune.”<sup>83</sup> The court was not persuaded by the plaintiff’s claim that the tearing of the ship was a disaster, because the CWA was not written so subjectively.<sup>84</sup> The court reasoned that the definition of act of God requires that the disaster be the cause and not the effect.<sup>85</sup> Therefore, under this construction, a weather condition such as melted snow runoff does not amount to a grave natural disaster or exceptional natural phenomenon.<sup>86</sup> The court explained that “grave natural disasters which could not be anticipated in the design, location, or operation of the facility or vessel by reason of historic, geographic, or climatic circumstances or phenomena would be outside the scope of the owner’s or operator’s responsibility.”<sup>87</sup> Because the spring runoff could be anticipated in that geographical vicinity, it could not possibly be a grave disaster within the meaning of the CWA.

In another case, plaintiffs sought to recover the cost of remediation from the owners and operators of a toxic waste disposal site (“the Stringfellow site”) pursuant to CERCLA and CWA.<sup>88</sup> The defendants contended that the heavy rainfall that

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80. U.S. v. Atl. Richfield Co., 1996 U.S. Dist. LEXIS 22885, at \*1, \*1212 (D. Mont. July 1, 1996).

81. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1976) (defining “grave” as “extremely serious, fraught with danger or harm”).

82. See *Sabine Towing & Transp Co.*, 229 Ct. Cl. at 270.

83. *Id.* at n.5

84. *Id.*

85. *Id.*

86. See *id.* at 270.

87. See *Sabine Towing & Transp Co.*, 229 Ct. Cl. at 269 (citing CONF. REP. NO. 91-940, reprinted in 1970 U.S.C.C.A.N. 2712, 2722).

88. See *Stringfellow*, 661 F. Supp. at 1059.

led to the release of hazardous substances was a natural disaster, which constituted an act of God.<sup>89</sup> However, the Court disagreed, holding that “the rains were not the kind of exceptional natural phenomena to which the narrow act of God defense of section 107(b)(1) applies.”<sup>90</sup> “Therefore, the court conclude[d] that the rains were not sufficient to establish an act of God defense.”<sup>91</sup>

In a similar case, the United States brought an action under section 107 of CERCLA against the Atlantic Richfield Company (“ARCO”) “for reimbursement of costs incurred and to be incurred by the United States in responding to releases and the threat of releases of hazardous substances at certain areas of Superfund sites.”<sup>92</sup> The United States moved for summary judgment as to ARCO’s act of God defense.<sup>93</sup> Specifically, the United States argued, in part, that ARCO could not establish that the flood and storm events it had identified in support of its act of God defense were grave natural disasters.<sup>94</sup> ARCO attributed the release of hazardous substances to the severity of an exceptional rain storm and a snowmelt, which it characterized as an act of God.<sup>95</sup> The court considered whether the flood was a grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character.<sup>96</sup> Citing the *Stringfellow* case, the court reiterated the reasoning that in the CERCLA context, flood and periodic storm events do not constitute the type of happening to which the act of God defense applies.<sup>97</sup> The court concluded that there was nothing grave, exceptional, inevitable, or irresistible about the event.<sup>98</sup>

The various court decisions regarding the issue of what constitutes “grave” natural disaster have made it clear that excessive rainfall and melted snow runoff are not grave natural disasters or other natural phenomenon of an exceptional, inevitable, and irresistible character contemplated by CERCLA. This heightens the burden on a respondent or a PRP who claims the violation occurred due to a heavy rainfall or snow, and makes

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89. *Id.* at 1061.

90. *Id.*

91. *Id.*

92. *Atl. Richfield Co.*, 1996 U.S. Dist. LEXIS 22885, at \*5-6.

93. *Id.* at \*6.

94. *Id.* at \*9-10.

95. *Id.* at \*15.

96. *Id.* at \*12.

97. *Atl. Richfield Co.*, 1996 U.S. Dist. LEXIS 22885, at \*12 (citing *Stringfellow*, 661 F. Supp. at 1061).

98. *Id.* at \*18.

it almost impossible to show that the nature of the natural disaster was “grave.”

*C. The act of God must be the sole cause of the disaster*

Generally, “an act of God must be caused exclusively and directly by natural causes because when the cause is found to be in part the result of the participation of man, whether it is from active intervention or neglect, the whole occurrence is thereby humanized and removed . . . from acts of God.”<sup>99</sup> In *Stringfellow*, referring to CERCLA’s section 107(b) act of God defense, the court held that the polluters must show that the release of hazardous substances was caused solely by an act of God.<sup>100</sup> In essence, there can be no combination of an act of God and fault of man; the act of God must be the sole cause.<sup>101</sup> An occurrence is an act of God if it results solely from a grave natural disaster.<sup>102</sup> The terms “solely” and “caused” are not defined.<sup>103</sup> However, in determining the meaning of the term “solely”, the court assumed its common definition: “without an associate: singly, alone.”<sup>104</sup> This suggests that there can be no contributing factor to the cause of the natural disaster. Simply put, for one to successfully invoke an act of God as a defense, the act in question must be “occasioned exclusively by violence of nature without the interference of any human action.”<sup>105</sup>

In *Apex*, plaintiff filed suit appealing the denial of its claim for reimbursement of oil spill clean up costs under the OPA.<sup>106</sup> The oil company was towing barges, some of which were laden with slurry oil, up the Mississippi River toward their final destination in Chicago, knowing (1) the flood stage condition of the river, (2) that strong fast currents were precipitating damage to navigational aids, (3) that effects were migrating down river, and (4) after being duly advised that caution should be exercised in light of the considerably perilous conditions.<sup>107</sup> The tug and barge collided with a bridge abutment, which resulted in an oil

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99. *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1249 n.6 (D.C. Cir. 1979).

100. *See Stringfellow*, 661 F. Supp. at 1061.

101. *Sky Aviation Corp. v. Colt*, 475 P.2d 301, 304 (Wyo. 1970).

102. CONF. REP. NO. 91-940, *reprinted in* 1970 U.S.C.C.A.N. 2712, 2719.

103. *U.S. v. W. of Eng. Ship Owner’s Mut. Prot. & Indem. Ass’n*, 872 F.2d 1192, 1196, 1198 (5th Cir. 1989).

104. *Id.* at 1198; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1976).

105. CONF. REP. NO. 91-940, *reprinted in* 1970 U.S.C.C.A.N. 2712, 2719.

106. *See Apex Oil Co.*, 208 F. Supp. 2d at 644.

107. *Id.* at 656-57.

spill.<sup>108</sup> Apex argued that the flood and exceptionally strong and unpredictable currents solely caused the oil spill and was an act of God.<sup>109</sup>

“Apex accepted responsibility for the discharge, [and] funded removal activities.”<sup>110</sup> Subsequently, Apex submitted a claim to the National Pollution Fund Center (“NPFC”) for reimbursement of its removal costs and salvage activities claiming entitlement to the act of God defense.<sup>111</sup> Apex’s claim was supported by “the Coast Guard’s Marine Casualty Investigation Report (“MCIR”), which reached a conclusion that there was no negligence on the part of Apex’s pushboat captain and that a prudent mariner could not have foreseen the situation.”<sup>112</sup>

Despite MCIR’s findings, “NPFC. . . rejected Apex’s claim that an act of God was solely responsible for the release of [the] slurry oil.”<sup>113</sup> Instead, NPFC concluded that human influence (i.e. Apex’s decision to continue to navigate despite knowing the flood stage condition of the river) partly caused the incident and that the flood was not the sole cause.<sup>114</sup> The reasoning for NPFC’s decision was that because the Captain “was aware that the current on the river was strong and that the water was high, it appeared he took a knowledgeable risk in proceeding, which led to the unfortunate event.”<sup>115</sup>

Subsequently, Apex brought suit “against the United States seeking review of NPFC’s decision denying its claim for reimbursement of recovery costs and cleanup expenses.”<sup>116</sup> The court, in determining whether the act of God was the sole cause of the collision and resulting spill, compared the facts of this case to the *Sabine* case.<sup>117</sup> There, the court rejected the plaintiff’s characterization of a freshet condition as an act of God, reiterating that an act of God must result solely from a grave natural disaster, and must be unanticipated.<sup>118</sup> The *Apex* court explained that if freshet conditions in *Sabine* did not constitute an act of God within the meaning of CWA, then surely “a swift

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108. *Id.* at 645.

109. *Id.*

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

111. *Id.*

112. *Id.*

113. *Id.* at 646.

114. *Id.*

115. *See Apex Oil Co.*, 208 F. Supp. 2d at 646.

116. *Id.* at 648.

117. *Id.* at 657.

118. *Id.* (citing *Sabine Towing*, 666 F. 2d at 564).

unpredictable current on the Mississippi River at or about the time of heavy rains which caused the Mississippi River to rise to flood stage can not constitute an act of God within the meaning of the OPA.<sup>119</sup> The court attributed the most apparent cause of the release to the “underpowered Apex tug,” and the tug captain’s choice to negotiate the bridge with his tug in spite of the intensifying current.<sup>120</sup> Therefore, the court concluded that the act of God was not the sole cause of the oil spill.<sup>121</sup>

In another case, the court held that a cold spell was not the sole cause of an incident and did not constitute an act of God.<sup>122</sup> The case involved a suit by the United States under CERCLA seeking recovery of response costs expended by the EPA in cleaning up a former site of defendant Barrier Industries, Inc. (“Barrier”) operated by Barrier’s principal, defendant Kurt Wasserman (“Wasserman”).<sup>123</sup> “Wasserman, who operated the Barrier site, [did] not contest that the Government established a prima facie case of his liability under CERCLA, but contend[ed] that a genuine issue exist[ed] as to whether he was entitled to the act of God defense.”<sup>124</sup> Specifically, Wasserman argued that the spills were caused solely by the bursting of pipes occasioned by an unprecedented cold spell which constituted an act of God.<sup>125</sup>

In rejecting Wasserman’s act of God defense, the court focused on the phrase “caused solely by” and held that the cold spell did not fall within the CERCLA definition of an act of God because it was not the sole cause of the release of hazardous waste.<sup>126</sup> The court agreed with the Government that there was substantial undisputed evidence that numerous other factors antedating the cold weather causally contributed to the problems at the Barrier site, and that the cold spell was not the sole cause.<sup>127</sup> The court’s reasoning reiterates the theory that any human intervention at any point in the chain of events leading to an incident may render the act of God defense useless by making it impossible to meet the burden of proof.

In another case, the government brought an action under CERCLA against an aluminum manufacturer, Alcan Aluminum

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119. *Id.*

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

121. *Id.* at 658.

122. *U.S. v. Barrier Indus. Inc.*, 991 F. Supp. 678, 679 (S.D.N.Y. 1998).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Barrier Indus. Inc.*, 991 F. Supp. at 679-80.

(“Alcan”) to recover response costs.<sup>128</sup> Addressing the act of God defense relating to a hurricane, the court dismissed Alcan’s argument that the release of toxic substances occurred in connection with the torrential downpour of rain associated with a hurricane and constituted an act of God.<sup>129</sup> In rejecting Alcan’s act of God defense, the Court found that the hurricane was not the sole cause of the release because Alcan’s earlier conduct (unlawful disposal) played a part in flushing the chemicals into the river.<sup>130</sup> The court reasoned that “two million gallons of hazardous wastes were not dumped into the borehole by an act of God, and were it not for the unlawful disposal of this hazardous waste [the] hurricane would not have flushed the [toxic substance] into the river.”<sup>131</sup> The court agreed that while the storm was part of the chain of events that led to the harm, it was not the sole cause.<sup>132</sup>

The legislative history of the CWA indicates that an owner or operator will be exempt from liability when the discharge is beyond his control.<sup>133</sup> The Senate CWA Report used the phrases “no control” and “beyond the control of” to refer specifically to an act of God.<sup>134</sup> The discharge had to have been caused solely by an act of God and the owner or operator could have had no foreknowledge, could have made no plans to avoid, or could not have predicted in order to be beyond the control of an owner or operator.<sup>135</sup> “[The] language ‘no foreknowledge,’ ‘make no plans to avoid,’ and ‘could not predict’ supports the use of foreseeability as a means of setting the parameters of the term ‘caused’ as used in section 1321(f)(1).”<sup>136</sup> Therefore, if the discharge was foreseeable, one could not claim an act of God as the sole cause.

*D. Lack of negligence is insufficient to prove up an act of God defense*

Although the language of the CWA is couched in causation terms requiring an owner or operator to prove that the discharge was the sole cause of the incident in order to escape liability, it

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128. U.S. v. Alcan Aluminum Corp., 892 F. Supp. 648, 650 (M.D. Pa. 1995).

129. *Id.* at 658.

130. *Id.*

131. *Id.*

132. *Id.*

133. S. REP. No. 91-351, reprinted in 3 U.S. E.P.A, LEGAL COMPILATION 1328-29 (III vol. 1973).

134. *Id.* at 1329.

135. *Id.*

136. *W. of Eng. Ship Owner’s*, 872 F.2d at 1199 n.13.

does not state that a showing of non-negligence on the part of the discharger will suffice to invoke the act of God defense and absolve the owner and operator from liability.<sup>137</sup> In enacting the statute, Congress expressly used the term “negligent” in some parts of the CWA but did not use such a term in articulating the burden that an owner or operator must carry in order to satisfy the liability exceptions, which includes the act of God defense.<sup>138</sup> Instead, Congress used the phrase “caused solely by” with no indication that fault, or the lack thereof, plays a role in proving the act of God defense.<sup>139</sup>

In *West of England Ship Owner's*, the defendant's barge struck an unmarked wreck and discharged oil.<sup>140</sup> After the owner of the barge refused responsibility for the discharge, the United States removed the oil and sued the owner under the CWA for the cost of cleanup.<sup>141</sup> The defendants argued that they were entitled to judgment, in part, because the discharge did not occur as a result of their negligence.<sup>142</sup> The defendants argued that merely proving lack of fault satisfied an act of God defense.<sup>143</sup> The defendants explained that Congress expressed a clear intent in the Senate Committee Report of the CWA that any culpability on the part of the owner or operator would vitiate the act of God exception.<sup>144</sup>

The court disagreed with the defendants' argument that lack of fault satisfied an act of God defense.<sup>145</sup> Instead, the court held that the barge owner's decision to travel outside the maintained channel, while not negligent, was a proximate cause of the discharge, because the water was shallower and obstructions were more common in that area of the river.<sup>146</sup> The court cautioned that the language of the statute does *not* state, or even imply, a lack of negligence automatically proves an act of God defense: an owner or operator establishes the existence of a section 1321 exception, absolving itself from liability, once it

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137. *Id.*

138. *Id.*

139. *Reliance Ins. Co. v. U.S.*, 677 F.2d 844, 844 (Ct. Cl. 1982).

140. *See W. of Eng. Ship Owner's*, 872 F. 2d at 1193.

141. *Id.*

142. *Id.* at 1195.

143. *Id.*

144. *See W. of England Ship Owner's*, 872 F. 2d at 1196 (citing SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT, S. REP. NO. 351, at 6 (1969) (emphasis added), as reprinted in III EPA COMPILATION OF LEGAL AUTHORITY, LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, at 1329 (1973)).

145. *Id.*

146. *Id.* at 1199.

proves that it was non-negligent.<sup>147</sup> The court reasoned that the act of God defense in the CWA was causation-based and not fault-based.<sup>148</sup> Therefore, the court rejected the defendants' argument that proof of non-negligence alone was sufficient to exonerate them from liability.<sup>149</sup>

In *U.S. v. Tex-Tow, Inc.* the appellant appealed from the district court's enforcement for a discharge of oil into navigable waters.<sup>150</sup> Tex-Tow operated a tank barge that was being loaded with a cargo of gasoline at a dock on the Mississippi River owned and operated by Mobil Oil Company.<sup>151</sup> As the barge was filled with gasoline, it sank deeper into the water, settling on an underwater steel piling that was part of the dock structure.<sup>152</sup> The piling punctured the hull of the barge, resulting in a discharge of 1600 gallons of gasoline into the river.<sup>153</sup> Although the court agreed that Tex-Tow was not at fault because it had no knowledge of the piling, it concluded that the cause of a spill is the polluting enterprise rather than the conduct of the charged party or a third party.<sup>154</sup> Accordingly, the court held that Tex-Tow as an owner or operator of a discharging facility was liable even where it exercised all due care and a third party's act or omission was the immediate cause of the spill.<sup>155</sup> In essence, the court affixed legal responsibility on Tex-Tow despite an absence of fault or negligence.<sup>156</sup>

*E. The disaster could not have been prevented by exercise of due care or foresight*

An essential element of the act of God defense is that the damage from the natural event could not have been prevented by the exercise of reasonable care.<sup>157</sup> The defendants are not relieved from their liability by the damage or loss through an act of God until it is determined whether the damage arose through want of proper foresight and prudence.<sup>158</sup> To relieve a defendant

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147. *Id.* at 1196.

148. *Id.*

149. *W. of England Ship Owners*, 677 F.2d at 1196.

150. *U.S. v. Tex-Tow, Inc.*, 589 F.2d 1310, 1310 (7th Cir. 1978).

151. *Id.* at 1312.

152. *Id.*

153. *Id.*

154. *Id.* at 1316.

155. *Tex-Tow*, 589 F.2d at 1316.

156. *Id.* at 1314.

157. *Skandia Ins. Co.*, 173 F. Supp. 2d at 1242.

158. *Id.*

from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the damage and that it was unavoidable.<sup>159</sup>

The federal courts' "weathered" experience with the act of God defense has produced one crucial principle: if a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the act of God but fails to do so, then the defendant is responsible for the loss. However, "if there were insufficient warnings or insufficient means available to the defendant to protect . . . from the "act of God," then they are not responsible for the loss."<sup>160</sup> With this explanation, one has to wonder what the court considers as "insufficient warning," considering the act of God defense has been rejected in cases where the proponent of the defense argued that it did not have sufficient warning to guard against the storm.<sup>161</sup> In *Liberian Poplar Transp., Inc. v. U.S.* the Court disagreed with the plaintiff's contention that because the storm was not *well* forecasted, and was not *visually* foreseeable by the ship's watch, that the storm was not anticipated.<sup>162</sup> This contradictory holding makes it difficult to discern what the court considers sufficient warnings for the purposes of exercising due care.

It is probably safe to say that court review on a case-by-case basis will make the determination of whether a prior warning is sufficient. Clearly, the court in *Liberian Poplar* believed there was sufficient forecast of the storm to warrant the respondent to exercise due care to avoid the damage caused by the storm contrary to the respondent's belief, whereas the court in *Skandia* seems willing to accept the act of God defense in a circumstance where there was an insufficient warning.<sup>163</sup>

When a person is claiming that due care was exercised to prevent the loss, any act, omission or carelessness contributing to the loss, takes away the defense.<sup>164</sup> As such, an act of God must be caused exclusively and directly by natural causes, because when the cause is found to be in part the result of the participation of man, whether it is from active intervention or neglect, the whole occurrence is thereby humanized and not

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159. *Id.*

160. *Id.*

161. *See Liberian Poplar Transp., Inc.*, 26 Cl. Ct. at 226.

162. *Id.*

163. *See id.*; *Skandia Ins. Co.*, 173 F. Supp. 2d 1288.

164. *See Shea-S&M Ball*, 606 F.2d at 1249.

considered an act of God.<sup>165</sup> In order to relieve a defendant of responsibility for the consequences of his negligence, the intervening cause must be one that severs the connection of cause and effect between the negligent act and the injury.<sup>166</sup> Nonetheless, an intervening cause must be both independent and unforeseeable.<sup>167</sup>

Lack of due care may be evident when a defendant deliberately ignores avoidance of impending danger. For instance, in *Apex*, the court rejected the plaintiff's act of God defense for an oil spill which occurred after the plaintiff's tug captain knowingly towed barges, some of which were laden with slurry oil, up the Mississippi River.<sup>168</sup> The captain, in the face of intensifying current in close proximity to the bridge and just below a sharp bend in the river chose to negotiate a bridge with his tug and tow.<sup>169</sup>

The apparent lack of due care and deliberate disregard that strong fast currents were precipitating damage to navigational aids are what the court believed led to the spill.<sup>170</sup> The fact that the captain disregarded all warnings in an attempt to tow the barges led to the incident and any resulting violation could not be excused as an act of God.<sup>171</sup>

In another case, the court rejected the act of God defense, in part because the court concluded that the effects of the hurricane could have been prevented if only the plaintiffs had exercised due care by not dumping hazardous waste into mine workings in the first place.<sup>172</sup> Similarly, the act of God defense was also rejected in *Stringfellow*, where the plaintiffs sought to recover the costs of remediation from owners and operators of a toxic waste facility.<sup>173</sup> The court's rejection of the act of God defense was based in part on the court's finding of lack of exercise of due care and the belief that any harm caused by the rain event could have been prevented through the design of proper drainage channels.<sup>174</sup>

Suffice it to say that while lack of negligence is not sufficient to successfully prove an act of God defense, one cannot

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165. *Id.*

166. *Wolff v. Light*, 156 N.W.2d 175, 180 (N.D. 1968).

167. *Id.*

168. *See Apex Oil Co.*, 208 F. Supp. at 657.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See Alcan Aluminum Corp.*, 892 F. Supp. at 658.

173. *See Stringfellow*, 661 F. Supp. at 1053.

174. *Id.* at 1061.

successfully invoke the act of God defense if one's failure to exercise due care is a contributing factor to the resulting violation. This is another reason the act of God defense is almost impossible to meet, because on one hand, one's negligence deprives one of the defense, and on the other hand, one's lack of negligence does not always exonerate one from liability because the defense is cause-based and not fault-based.

*F. Liability is strict*

The starting point for interpreting a statute is the language of the statute itself.<sup>175</sup> "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."<sup>176</sup> The definition of what constitutes an act of God in the federal environmental statutes is very strict, leaving no room for second guessing. This strict liability scheme, found in environmental statutes, means that one is held liable for violation of environmental regulations unless one shows the violation occurred due to one of the liability exceptions which includes an act of God. The courts have stated that the liability exceptions under section 1321(f)(1) of the CWA must be narrowly construed to effectuate Congress' strict liability scheme.<sup>177</sup> In the congressional record of the CWA, Senator Boggs explained that, "such exemptions have the effect of protecting the public in nearly every case, while safeguarding private interests at rare times of great disaster."<sup>178</sup> Clearly, the courts' priority is to protect the public health and safety if at all possible, while leaving little room to excuse violations characterized as an act of God.

In that respect, the environmental statutes such as CWA impose strict liability upon the owner or operator unless he "can prove that one of the exceptions," which include an act of God defense, "does apply."<sup>179</sup> The goal of applying strict liability is evidenced in Congress' determination that a system of absolute liability with specified limits best protected the public interest.<sup>180</sup> Congress felt such a system properly placed the cost for an oil spill, for instance, on the responsible party, and not on the

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175. See *W. of England Ship Owner's*, 872 F.2d at 1196.

176. See *Consumer Prod. Safety Comm'n*, 447 U.S. at 108.

177. *U.S. v. LeBouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980).

178. *W. of Eng. Ship Owner's*, 872 F.2d at 1196 (citing 115 CONG. REC. 28957, reprinted in IV EPA COMPILATION at 1771 (1973)).

179. See *Sabine Towing*, 666 F.2d at 563..

180. *Reliance Ins. Co.*, 677 F.2d at 849.

general public.<sup>181</sup> Therefore, a plaintiff must carry an extraordinarily heavy burden to recover cleanup costs from the United States when the cause of the violation is characterized as an act of God.<sup>182</sup> The legislative history and intent of the OPA (namely to expand the liability of the discharger), combined with the textually similar and identical definitions of an act of God in the CWA and CERCLA, respectively, “strongly militates in favor of finding that Congress intended to establish a uniformly and singularly limited ‘act of God’ defense,” all with strict liability.<sup>183</sup> The act of God defense is narrowly construed, and only in the situation where the discharge was totally beyond the control of the discharging vessel (or beyond the control of the party invoking the act of God defense) would the responsible party be excused from liability.<sup>184</sup>

#### IV. OVERVIEW OF THE ACT OF GOD DEFENSE IN TEXAS

The Texas Commission on Environmental Quality (formerly known as the Texas Natural Resource Conservation Commission)<sup>185</sup> (“TCEQ,” “TNRCC” or “the Commission”), is the state’s environmental agency that enforces compliance with the state’s environmental laws, and responds to emergencies and natural disasters that threaten human health and the environment.<sup>186</sup> The TCEQ, in limited circumstances, may waive enforcement related to violation of the state’s environmental laws if the cause of the violation was an act of God. The Texas state legislature has recognized that acts of God may occur that may result in violations of the state’s environmental regulations, and as such, has provided a defense for those violations.<sup>187</sup> The act of God defense not only provides a defense to an enforcement action, it also bars the findings of liability for violations of environmental statutes, rules, Commission orders and permits in extraordinary events beyond the control of the respondent. If a respondent can establish that an event that would otherwise be a violation was caused solely by an act of God, the event is not

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181. *Id.*

182. *St. Paul Fire & Marine Ins. Co. v. U.S.*, 4 Cl. Ct. 762, 768 (1984).

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

184. *Id.* (citing *Reliance Ins. Co.*, 677 F. 2d at 849).

185. *TNRCC Name Change Effective Today*, Amarillo.com, Sept. 2, 2002, [http://www.amarillo.com/stories/090202/tex\\_tnrcc.shtml](http://www.amarillo.com/stories/090202/tex_tnrcc.shtml),

186. OFFICE OF COMPLIANCE AND ENFORCEMENT, TEX. COMM’N ON ENVTL QUALITY (2008), <http://www.tceq.state.tx.us/about/organization/oce.html>.

187. *See* TEX. WATER. CODE ANN. § 7.251 (Vernon 2006); 30 TEX. ADMIN. CODE § 70.7 (2008).

considered a violation.<sup>188</sup> The act of God may be invoked as a defense in violations pertaining to air, water and waste. While acts of God are recognized as a defense, they do not excuse all violations over which the respondent had no control, rather, they are strictly limited to violations over which the respondent could not have had any control and could not have anticipated. Similar to the federal regulations, the Texas act of God defense places the burden of proof on the person asserting the defense.<sup>189</sup>

The main impact of the act of God defense is on enforcement actions seeking penalties.<sup>190</sup> Despite the fact that one's actions may be excused if the violation was caused by an act of God, the act of God defense would not prevent a court from enforcing by injunction any code requirement or prohibition, including the requirement of compliance with all provisions of permits, rules and orders of the Commission.<sup>191</sup> The act of God defense would prevent the imposition of a penalty for a past occurrence proven by the respondent to have been caused solely by an act of God, but would not preclude imposition of penalties for a continuing violation persisting after the original act of God ceases to be the sole cause.<sup>192</sup> The following codes recognize the act of God as a defense in Texas environmental laws.

#### A. Texas Statutes

##### i. Texas Health and Safety Code

###### § 361. 275. Solid Waste Disposal Act

The purpose and policy behind the Solid Waste Disposal Act is to “safeguard the health, welfare, and physical property of the people and to protect the environment.”<sup>193</sup> This goal and purpose are achieved by “controlling the management of solid waste, including accounting for hazardous waste that is generated.”<sup>194</sup> The state controls the management of solid waste by requiring

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188. 30 TEX. ADMIN. CODE § 70.7(a).

189. *Id.* § 70.7(b).

190. Letter from Dan Morales, Attorney Gen. of Tex., to Gerald Clifford, Acting Reg. Adm., U.S. Env't. Prot. Agency, Region VI (March 13, 1998) (on file with author), *available at*

<http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/municipal/agsupp-1.pdf>.

191. *Id.*

192. *Id.*

193. TEX. HEALTH & SAFETY CODE ANN. § 361.002 (2007).

194. *Id.*

hazardous waste to be stored, processed, and disposed of only at permitted hazardous industrial solid waste facilities.<sup>195</sup> Failure to comply with proper storage, processing and disposal of hazardous industrial solid waste could subject one to an enforcement action.

A person responsible for a violation involving an actual or threatened release of solid waste may be subject to an administrative order or a civil suit for injunctive relief unless the person can establish that the release or threatened release was caused solely by an act of God.<sup>196</sup> To successfully claim an act of God as a defense, the responsible party must establish by preponderance of the evidence that the respondent exercised due care and took precautions against foreseeable acts and the consequences that could foreseeably result from those acts.<sup>197</sup>

#### § 382.063. Issuance of Emergency Order Because of Catastrophe

The act of God is not only used as a defense by a respondent, but may provide the commission with justification for issuance of an emergency order due to a catastrophe.<sup>198</sup> To be characterized as a catastrophe, the incident has to be “an unforeseen event, including an act of God, . . . beyond the reasonable control of the operator that makes a facility or its functionally related appurtenances inoperable”.<sup>199</sup> If the incident were such that the operator could have reasonably prevented it, the act of God defense would likely fail.

#### ii. Texas Water Code

##### § 7.251. Act of God

The Texas Water code recognizes an act of God as a defense for the violation of a statute, rule, order or permit so long as there was no contributing factor. It states:

If a person can establish that an event would otherwise be a violation of a statute within the commission’s jurisdiction or a rule adopted or an order or a permit issued under such a statute was caused solely by an act of God or other catastrophe, the event is not a violation of

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195. *Id.* § 361.275(b).

196. *Id.* § 361.275(a)(1). *See generally id.* § 361.271 (defining a responsible person)

197. TEX. HEALTH & SAFETY CODE ANN. §§ 361.275(a)(1), (b)(1)-(2) (2007).

198. *Id.* § 382.063(a).

199. *Id.*

that statute, rule, order, or permit.<sup>200</sup>

§ 26.355. Recovery of costs

If the Commission has incurred any costs in the release of regulated substances from an underground or aboveground storage tank, the owner or operator is liable to the state for all reasonable costs.<sup>201</sup> However, the commission will not hold owners or operators of a facility liable for costs incurred in undertaking corrective action and will not initiate an enforcement action with respect to the release of regulated substances from an underground or aboveground storage tank, if the release was caused by an act of God.<sup>202</sup>

§ 5.515. Emergency Order because of Catastrophe

An emergency order may be used to authorize immediate action for the “addition, replacement, or repair of facilities, roads, bridges or other infrastructure improvements necessitated by a catastrophe and the emission of air contaminants during the addition, replacement, or repair of those facilities.”<sup>203</sup> Similar to Section 382.063 of the Health and Safety Code, catastrophe is defined as “an unforeseen event, including an act of God . . . beyond the reasonable control of the applicant, that makes a facility inoperable.”<sup>204</sup>

§ 26.267. Oil and Hazardous Substances Spill Prevention and Control Act

Under the Oil and Hazardous Substance Spill Prevention and Control Act, “no person shall be held liable . . . for any spill or discharge resulting from an act of God.”<sup>205</sup>

§ 26.504. Waste Application Field Soil Sampling and Testing

The operator of a concentrated animal feeding operation is required to contract for collection of one or more representative composite soil samples, at least once every 12 months, from each waste application field to determine the phosphorous level in the soil or test for any other nutrient designated by the Executive

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200. TEX. WATER CODE ANN. § 7.251 (Vernon 2006).

201. *Id.* § 26.355(a).

202. *Id.* § 26.355(b)(1)(A).

203. TEX. WATER CODE ANN. § 5.515 (Vernon 2008)

204. *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 382.063.

205. TEX. WATER CODE ANN. § 26.267.

Director (“ED”) of the TCEQ.<sup>206</sup> If the samples tested show a phosphorous level in the soil of more than 500 parts per million, the operator is required to file with the commission a new or amended nutrient utilization plan with a phosphorous reduction component.<sup>207</sup> If there is no reduction in phosphorous, the owner or operator will be subject to enforcement for a violation at the discretion of the ED.<sup>208</sup> The ED may not subject the owner or operator to enforcement if the reason for the failure to reduce phosphorous in the soil is caused by an act of God.<sup>209</sup>

### iii. Chapter 30 of the Texas Administrative Code

#### § 70.7. Force Majeure

The act of God defense found in section 7.251 of the Texas Water Code is also found in the Texas Administrative Code.<sup>210</sup> As in the Texas Water Code, if a person can establish that an event that would otherwise be a violation of a statute, rule, order, or permit was caused solely by an act of God or other catastrophe, the event is not a violation of that statute, rule, order, or permit.<sup>211</sup> The owner or operator of the facility has the burden of proof to demonstrate that any pollution or discharge is not a violation.<sup>212</sup> If the violation involves a permit, the permittee must submit notice to the ED as provided by §305.125(9) relating to Standard Permit Conditions.<sup>213</sup> If good cause exists, the ED may initiate and the Commission may order a major amendment, minor amendment, modification, or minor modification to a permit and the ED may request an updated application if necessary.<sup>214</sup> Good cause includes, but is not limited to an act of God.<sup>215</sup>

#### *B. Elements of the act of God defense in Texas*

In order to successfully invoke the act of God as a defense in

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206. *Id.* § 26.504(a)-(b).

207. *Id.* § 26.504(c).

208. *Id.* § 26.504(e) (Vernon 2008).

209. *Id.* § 26.504(e).

210. 30 TEX. ADMIN. CODE ANN. § 70.7(a) (2008).

211. *Id.*

212. *Id.* § 70.7(b).

213. *Id.* § 70.7(c). The permittee is required to report any noncompliance to the executive director which may endanger human health or safety, or the environment. 30 TEX. ADMIN. CODE 205.125(9) (2009).

214. 30 TEX. ADMIN. CODE § 305.62(d) (2009).

215. *Id.* § 305.62(d)(4).

Texas, one has to prove that the violation was indeed solely caused by an act of God and not caused by an act of man or any interference by man.<sup>216</sup> The act of God defense in Texas is similar to the act of God defense laid out in the federal environmental statutes. The similarity between the Texas and the federal environmental statutes is evidenced in the definition of what constitutes an act of God in Texas. According to the Texas Supreme Court, an act of God is:

[A]n accident that is due directly and exclusively to natural causes without human intervention and which no amount of foresight or care reasonably exercised could have prevented. The accident must be one occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause. The terms implies [sic] the intervention of some cause not of human origin and not controlled by human power. If the derailment resulted in whole or in part from human negligence it was not an act of God.<sup>217</sup>

Based on this definition, to successfully invoke an act of God defense in Texas, one has to prove the following:

i. The act of God must be unanticipated

Texas law provides a defense against an enforcement action where the respondent can prove that the violation was caused by an act of God and that the act of God was unanticipated.<sup>218</sup> If a respondent could have reasonably anticipated a discharge, and could have taken steps to prevent it by care and foresight, proper planning, or maintenance, then the act of God defense is unavailable.<sup>219</sup> For example, if a heavy rainfall is reasonably foreseeable due to a prior weather forecast and the respondent fails to take precautionary measures, the respondent would be unable to claim the act of God defense for a discharge caused by the rain.<sup>220</sup>

The court addressed the issue of foreseeability in an act of God case in an action brought against a railroad company as carrier for loss of steers owned by appellee.<sup>221</sup> The loss of the

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216. *Scott v. Atchinson, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273, 279 (Tex. 1978).

217. *Id.*

218. *See, e.g., Atchison, Topeka & Santa Fe Ry. v. Scott*, 551 S.W.2d 740, 741 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 572 S.W.2d 273 (Tex. 1978).

219. State Program Requirements' Approval of Application to Administer NPDES Program, 63 Fed. Reg. 51164, 51172 (Sep. 24, 1998).

220. *Id.*

221. *Mo.-Kan.-Tex. R.R. of Tex. v. Roegelien Provision Co.*, 260 S.W.2d 605 (Tex. Civ.

steers occurred when a flood struck the Kansas City area.<sup>222</sup> The court held that the storm was not foreseeable because, from the beginning of the flood, there was no notice or warning that the flood was expected.<sup>223</sup> The court concluded that the loss of the steers was due to an act of God because there was no evidence in the record indicating that the flood was caused by anything other than a wholly unexpected and unprecedented rise in the waters.<sup>224</sup> This lack of warning before the flood shows that it was not foreseeable.

ii. The act of God must be unprecedented

For a violation to be attributed to an act of God under Texas law, the incident has to be of an extraordinary nature. For instance, not all heavy rainfalls are necessarily considered an act of God. Instead, for a rainfall to constitute an act of God, it must be such an unusual or extraordinary rainfall as has no example or parallel in the history of rainfall in the general vicinity affected.<sup>225</sup> The rainfall characterized as an act of God should afford no reasonable warranty or expectation that it will likely occur again, and should not reasonably be expected to reoccur, even at long intervals.<sup>226</sup>

The act of nature leading to a violation must be unusual or unprecedented, and while it need not be the sole, greatest, or harshest violent act ever experienced, it need only be so unusual that it could not have been reasonably expected or provided against.<sup>227</sup> If the extraordinary event or rainfall is normal for that vicinity and has occurred “within the memory of men then living,”<sup>228</sup> the occurrence should be anticipated and is therefore not likely to be classified as an act of God.<sup>229</sup> In Texas, rainfall events beyond the 25-year, 24-hour rainfall event are typically considered an “act of God,”<sup>230</sup> because these events are not typical occurrences.

In a suit by a railroad employee to recover for personal

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App.—San Antonio 1953, writ ref'd n.r.e.).

222. *Id.* at 609.

223. *Id.*

224. *Id.* at 610.

225. *State v. Malone*, 168 S.W.2d 292, 300 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.).

226. *Id.*

227. *McWilliams v. Masterson*, 112 S.W.3d 314 (Tex. App.—Amarillo 2003, pet. denied).

228. *Id.* (citing *Gulf, Colo. & Santa Fe Ry. v. Pomeroy*, 3 S.W. 722, 724 (Tex. 1887)).

229. *Id.*

230. 31 Tex. Reg. 6033, 6036 (2006) (to be codified at 30 Tex. Admin. Code § 311.79).

injuries sustained when a train derailed, the plaintiff alleged his injuries were caused in whole or in part by the negligence of the defendant railroad company due to faulty construction and maintenance of the railroad track.<sup>231</sup> Defendant asserted an affirmative defense that the washout of its tracks, which led to plaintiff's injuries, was caused by an act of God in that there was an unprecedented rainfall in the area.<sup>232</sup> The unprecedented rainfall was confirmed by a 55-year resident of the area who testified that they had more than six inches of rain on the day of the accident.<sup>233</sup> According to the resident, the area had not experienced that type of unprecedented rainfall for at least 55 years.<sup>234</sup> In addition, meteorologists confirmed that the rain was substantially more than was likely to occur once in one hundred years and was an extraordinary rainfall.<sup>235</sup> This type of unprecedented weather condition is usually required for an act of God determination in Texas.

In another case, appellee-shipper, American Petrofina Marketing, Inc., brought a suit against appellant-carrier, Utilities Pipeline Company, for damages resulting from loss of the shipper's diesel fuel.<sup>236</sup> Utilities Pipeline appealed from a summary judgment in favor of the appellee-shipper.<sup>237</sup> The fuel loss occurred when the carrier's pipeline (in which the shipper's diesel fuel was located) broke during a flood.<sup>238</sup> The carrier attributed the incident to a rainstorm which resulted in a flood and claimed an act of God defense.<sup>239</sup> EPA investigated the spill and concluded that the cause of the spill was an unprecedented eleven inch rainfall causing floodwaters that were heavier than usually expected in that location.<sup>240</sup> The court concluded that the summary judgment proof raised genuine issues of material fact as to whether the pipeline break resulted from the intervention of flood waters and was an act of God.<sup>241</sup>

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231. *Atchison, Topeka & Santa Fe Ry.*, 551 S.W.2d at 741.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 720 (Tex. App.—Dallas 1988, no writ).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Utils. Pipeline Co.*, 760 S.W.2d at 724.

## iii. The act of God must be the sole cause of the disaster

To successfully invoke the act of God defense, one has to show that the act of God was the sole cause of the violation.<sup>242</sup> Damages resulting from an act of God are not ordinarily chargeable to anyone.<sup>243</sup> However, for one to attribute an incident to an act of God and be relieved of liability, there must be no negligence of the respondent concurring with the act of God to cause the violation.<sup>244</sup> Instead, the respondent must show that the violation was due directly and exclusively to natural causes without human intervention, and that no amount of foresight or care reasonably exercised could have prevented the harm.<sup>245</sup> The incident must be one occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause.<sup>246</sup> For example, if a facility is not designed, operated, or maintained properly, then any discharge resulting from such a facility would not be solely caused by an act of God, because the failure to properly design, operate or maintain the facility contributed to the discharge. In that case, the facility would be unable to claim the act of God defense for the discharge.<sup>247</sup>

The Office of the Attorney General of Texas (“AG”) has shed some light on the state’s application of the act of God defense in environmental regulation. In a letter to the EPA dated March 13, 1998, the AG discussed the use of act of God as an affirmative defense in Texas.<sup>248</sup> The letter centered on two main provisions, one in the Texas Water Code and the other in the Texas Administrative Code.<sup>249</sup> In the letter, the AG stated that the act of God defense for unauthorized discharges applied only if the event causing the discharge was completely outside the control of the person otherwise responsible for the discharge and only if the discharge could not have been avoided by the exercise of due

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242. Luther Transfer & Storage, Inc. v. Walton, 296 S.W.2d 750, 753 (1956).

243. *Id.*

244. *Id.*

245. *Scott*, 572 S.W.2d at 280.

246. *Id.*

247. State Program Requirements; Approval of Application to Administer NPDES Program, 63 Fed. Reg. 51164, 51172 (Sep. 24, 1998).

248. Letter from Dan Morales, Attorney Gen. of Tex., to Gerald Clifford, Acting Reg. Adm., U.S. Env’tl. Prot. Agency, Region VI (March 13, 1998) (on file with author), available at <http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/municipal/agsupp-1.pdf>.

249. *Id.* The Attorney General’s letter focused on TEX. WATER CODE § 7.251 and 30 TEX. ADMIN. CODE § 70.7.

care, foresight, or proper planning, maintenance or operation.<sup>250</sup> This interpretation of the act of God defense is consistent with the various courts' rulings already discussed in this article that state any contributing cause to the act of God disqualifies the incident from being characterized as solely caused by an act of God.

iv. Exercise of due care or foresight

The act of God defense does not shield a respondent from liability if the respondent's action or inaction contributed to the violation.<sup>251</sup> Even if a discharge at a facility was initially caused by an act of God, and the facility owner or operator in no way contributed to the discharge either through his action or inaction, if the facility owner or operator could have taken steps to stop the discharge from continuing, but failed to do so, the facility operator would be liable for the continuing discharge.<sup>252</sup> If the violation resulted in whole or in part from human negligence then it was not an act of God.<sup>253</sup> In *Utilities Pipeline*, a diesel spill caused by a pipeline broken during an unprecedented rainfall was by attributed to an act of God by the appellant-carrier.<sup>254</sup> The EPA spill report concluded that the discharge could not have been prevented using reasonable care because the excessive rains would have washed out any type of pipeline.<sup>255</sup> In addressing a summary judgment motion, the court held that genuine issues of material fact existed as to whether the pipeline break was due directly to natural causes which no amount of foresight or care reasonably exercised could have prevented.<sup>256</sup>

In *Gulf Refining Co.*, the court rejected an act of God defense and attributed the incident to appellant's negligence.<sup>257</sup> There, the plaintiff instituted a suit against the appellant to recover for damages alleged to have been caused to his land and crop due to appellant's negligence.<sup>258</sup> Plaintiff alleged that appellant corporation engaged in the transportation of crude oil by

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250. State Program Requirements for Approval of Application to Administer NPDES Program, 63 Fed. Reg. 33655, 33662 (Sep. 24, 1998).

251. Letter from Dan Morales, *supra* note 183.

252. State Program Requirements; Approval of Application to Administer NPDES Program, 63 Fed. Reg. at 33662 .

253. *Luther Transfer & Storage, Inc.*, 497 S.W.2d at 753.

254. *Utils. Pipeline Co.*, 760 S.W.2d at 721.

255. *Id.* at 722.

256. *Id.* at 724.

257. *Gulf Ref. Co. v. Nabers*, 134 S.W.2d 843 (Tex. Civ. App.—Amarillo 1939, no writ).

258. *Id.* at 843.

pipelines, one of which crossed a creek a few miles north of plaintiff's property.<sup>259</sup> On the night in question, the creek overflowed, appellant's pipeline broke, and great quantities of oil escaped onto plaintiff's property.<sup>260</sup> The appellant attributed the damages to excessive rains and flood waters in the creek that constituted an act of God.<sup>261</sup> The jury disagreed with the appellant and found that appellant's negligence in the construction and maintenance of its pipeline was the proximate cause of the oil overflow and the damage to plaintiff's land and crops.<sup>262</sup>

## V. CONCLUSION

The legislative history of the OPA,<sup>263</sup> the similar definition of act of God in the CWA,<sup>264</sup> and the identical definition in CERCLA,<sup>265</sup> considered together with the fact that OPA was intended to expand the liability of the discharger,<sup>266</sup> strongly militates in favor of finding that Congress intended to establish a uniformly and singularly limited act of God defense. "These defenses are narrowly construed and only in the situation where the discharge was totally beyond the control of the discharging vessel would the responsible party be excused from liability."<sup>267</sup>

The elements for proving an act of God defense present a very strict standard. Not only does one have to prove that the act of God was not anticipated, one also has to show that it was not merely a natural disaster, but rather a "grave" one.<sup>268</sup> Also, assuming that one successfully shows that the act of God was not anticipated and that it was a grave natural disaster, one then has to show that one's interference with the act of God did not contribute to the impact or effect of the act of God and that no amount of due care could have prevented the resulting impact of the act of God. Even after proving lack of negligence, one may

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259. *Id.* at 844.

260. *Id.*

261. *Id.*

262. *Gulf Ref. Co.*, 134 S.W.2d at 844.

263. *See* Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1990).

264. Clean Water Act, 33 U.S.C. § 1251 (2002).

265. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 33 U.S.C. §§ 1251-1387 (1980).

266. *Apex Oil Co.*, 208 F. Supp. 2d at 654 (citing S. REP. NO. 101-94, 101st. Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 723-24,726).

267. *See English*, 2001 WL 940946.

268. 33 U.S.C. §§ 2701(1).

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still be held liable for the violation because the act of God defense is causation-based, not fault-based.<sup>269</sup>

Texas statutes that allow an act of God defense are similar to the federal environmental statutes. Under both state and federal laws, the standard of proof seems very difficult to attain. This begs the question, is the act of God defense really necessary, or a waste of judicial resources? Should the act of God defense be either repealed or amended, as it is almost impossible to meet the burden of proof? After reviewing the statutory requirements relating to three major environmental statutes and the Texas statutes, it is clear that the act of God defense is one the courts are very reluctant to grant. Furthermore, it is a defense that should either be repealed or amended to make it possible for one to successfully invoke it.

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269. See 42 U.S.C. §§ 9601-9675.