Boats, Hurricanes, and the Law: What Owners Should Know

by Barry J. Bleicher

The high winds, heavy rains, and storm surge associated with hurricanes can wreak havoc on commercial and recreational vessels located in or near the storm's path. If a vessel is properly moored in a safe location, the owner may well weather a hurricane or tropical storm unscathed. However, the devastation wrought by Hurricanes Katrina and Rita to vessels and other property along the Gulf Coast constitutes strong evidence that widespread damage is likely to occur. For example, an estimated 3,000 commercial fishing and 40,000 recreational vessels were damaged or lost in Louisiana following Hurricanes Katrina and Rita.[1] It is thus incumbent upon the vessel owner to recognize the legal issues that may arise when a hurricane strikes the area. The goal of this article is to inform vessel owners of the legal standards and factual circumstances involved in prior hurricane litigation and thereby assist owners in developing the preparations necessary to avoid damage/liability from future hurricanes.

A review of the relevant case law reveals that disposition of litigation involving hurricane-induced damage to, and from, vessels frequently turns on two salient features of admiralty law. One principle is known as the *Louisiana Rule* and provides that, when a moving vessel strikes a stationary object, the moving vessel is presumed to be at fault.[2] The presumption derives from "the common-sense observation that moving vessels do not usually collide with stationary objects unless the moving vessel is mishandled in some way." [3] As stated by the court in *The Louisiana*, a drifting vessel is presumptively liable "unless it can show affirmatively that the drifting was the result of an inevitable accident, or a *vis major*, which human skill and precaution and a proper display of nautical skill could not have prevented."[4] To successfully rebut the presumption, the vessel must show that the accident was either "the fault of the stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident."[5]

Another determinant often arising in such cases is the "Act of God" or "inevitable accident" defense. The "Act of God" defense is frequently employed to challenge liability based on incidents occurring during a violent storm. "Act of God" has been defined as

> [a]ny accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented, [or as a] disturbance ... of such anticipated force and severity as would fairly preclude charging a [defendant] with responsibility for damage occasioned by the [defendant's] failure to guard against it in the protection of property committed to its custody.[6]

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The defense imposes two caveats that are essential to bear in mind. First, vessel owners are responsible for proving the "Act of God" defense. Owners are not automatically absolved of liability simply because a severe hurricane blows through the region.[7] The first prong of the defense requires the owner to prove that the intensity of the storm is of such a magnitude as to be considered an "Act of God" – a garden-variety tropical storm may not be sufficient.

Secondly, the vessel owner must still take reasonably prudent actions to ensure the safety of their vessels. Should evidence of concurrent negligence of the owner be found, the defense is negated. Thus, the vessel owner's actions when confronted by an approaching hurricane must be reasonable under the circumstances. In other words, the vessel owner must still take necessary precautions to prevent damage from occurring.

Unmoored vessels are often tossed about by the wind and waves of a hurricane, frequently resulting in property damage when colliding with neighboring vessels or shore-side structures.[8] This article will detail several cases where a marina or dock has sought compensation against vessel owners for such damage – damage that may have been avoided through proper mooring configurations. The aftermath of Hurricanes Audrey (1957), Betsy (1965), and Camille (1969) witnessed several cases dealing with sunken barges along the Mississippi River. Analysis of the facts and reasoning in those cases is instructive, especially as liability existed in several of the examined cases despite the ferocity of those particular storms.

The article will also briefly discuss a recent development in the law in the State of Florida – home to a significant number of recreational boats and, as 2004 witnessed, the frequent target of hurricanes.[9] In 1993, the Florida Legislature passed a statute that prohibited marinas from compelling owners to move their vessels after the issuance of a hurricane watch or warning. The article will look at two recent cases involving application of the Florida statute, both involving suits brought by marinas for property damage caused during hurricanes.

Hurricanes, the *Louisiana Rule*, and the "Act of God" defense

One of the leading opinions interpreting application of the "Act of God" defense in the wake of a violent storm is that of Judge Brown in *Boudoin v. J. Ray McDermott & Co., Inc*.[10] The case involved damage to plaintiff's dock caused by a barge that shifted during Hurricane Audrey (1957). Both the barge and the tug towing the barge were owned and/or operated by defendant, McDermott.

As Audrey approached the Gulf coast, McDermott directed the tug captain to move the barge to a dock located in Cameron, Louisiana. [11]The captain complied and the oceangoing barge was tied up to the specified dock.[12] However, the dock was only approximately three feet higher than the level of the adjacent river.[13] The draft of the oceangoing barge was also only approximately three feet.[14] Ultimately, the barge was carried up and over the dock with the storm surge from Audrey, striking plaintiff's dock and causing the damage forming the basis of the suit. Not surprisingly, the defendant claimed that the damage occurring during Audrey was an "Act of God" and that they should therefore be absolved of any liability.

The court *did* agree with McDermott's contention that Audrey was indeed an "Act of God" and that "once Audrey had hit, there was nothing that could then be done."[15] Despite the finding, however, the court refused to find in defendant's favor. Crucial to the court's decision were the actions of the defendant, specifically the tug captain, as the hurricane approached the coast. Notwithstanding his instructions, the tug captain was or should have been aware that the expected storm surge was likely to carry the barge over the low-lying dock.[16] The court found further that the captain had adequate time to move the barge to a less vulnerable position.[17]

Accordingly, the court ruled that the decision to leave the vessel at the dock, close to shore, when there was adequate time to find a different location, was enough to negate the "Act of God" defense. The court specifically stated that

> [a]t no place does it reflect that as tug master with heavy responsibilities imposed upon him, he was undertaking consciously to make relative judgments. It was incumbent upon

Louisiana Coastal Law

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> him to establish that he had no reason to apprehend that Audrey would strike and if she struck would cause his barge to lose her moorins and do damage to other structures. The record shows ample warning that the hurricane would hit where it hit with storm tides high enough to float the barge from her mooring. To exonerate himself in the face of that actuality, the captain was required to make a convincing showing that while that was actually so, he had reasonable grounds for thinking the truth to be otherwise.[18]

According to the court, a successful Act of God or inevitable accident defense required that the vessel "exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required."[19]

The next major hurricane to hit the Louisiana Gulf coast was Hurricane Betsy in September 1965, also resulting in a spate of cases due to damage caused during the hurricane. In *Massman-Drake v. Towboat M/V HUGH C. BLASKE,*[20] a barge struck and damaged a cofferdam erected in the Mississippi River. The plaintiffs sued the tug and barge owner for the damage, contending that the damage was caused solely through the fault of the tug and its crew.[21] Liability rested in part on the *Louisiana Rule*, whereby a floating object (tug and barge) that collides with a stationary object (cofferdam) is presumed to be at fault.

The defendants asserted that they should be exonerated from liability on the basis of inevitable accident, or "Act of God", and the absence of negligence on behalf of the crew.[22] The defendant also third-partied the owner of several other barges located on the river, contending that those barges, which had come loose during the storm and struck defendant's barge, were responsible for any damages caused to plaintiff. Pronouncing the applicable law, the court stated that

> [a]s a general rule the moving vessel is liable for the resulting damages unless she can show affirmatively that her drifting was the result of an inevitable accident or a *vis major*, which human skill and precaution and a proper display of nautical skill could not have prevented.... [T]he burden of proving inevitable accident or Act of God rests heavily upon the vessel or owner asserting such a defense.[23]

The defendant's tug and tow was moored along the Mississippi River in Baton Rouge, which was agreed to be a rather long and congested stretch of the river.[24] The plaintiff's assertion of negligence was based on the proposition that a "breakout" of the other barges should have been anticipated and thus the defendant should have moved its vessels to a narrower stretch of the river with less congestion.[25] Relying in part on Boudoin, *supra*, and *United Geophysical Co. v. Vela,*[26] the defendants countered that "the law requires that there be more than a mere mistake in judgment by the master when he is faced with a hard choice between competing courses of action, and makes his decision in extremis."[27]

Conceding that it is generally safer to ride out a storm along a short stretch of the river, the court declined to hold the defendant negligent under the circumstances. The court found that the defendants had successfully proven that the vessels had been moored with extra lines and probably would have safely ridden out the storm had the vessels not been struck by the other floating barges.[28] Specifically, the court held that the defendant could not be expected to account for the eventuality that "as many as two hundred barges would part their moorings and fill the harbor with danger to other vessels and property."[29] The court was of the opinion that the "record amply indicate[d] that that no better mooring spot was available to [the captain] and his tow."[30] Accordingly, the court held that the accident was the result of an Act of God over which the captain had no control and ruled in favor of the defendant.

The facts of *In re Marine Leasing Services, Inc.*[31] similarly involved damages caused during Hurricane Betsy. The issue in this matter was whether the owner of a chlorine barge would have to reimburse the U.S. government for the costs of locating, marking, and removing the vessel after it sunk in the Mississippi River during the storm. The court recognized straightaway that the hurricane amounted to an "Act of God." The court's decision rested, then, on whether the defendant "acted with ordinary prudence in anticipating when, where, and with what force the storm would strike."[32] Finding that the barge could not have been safely moved once the full extent of the impending danger was known, the court held that there was no negligence on the part of the defendant.

Nevertheless, the court was compelled to determine whether the barge owner could still be held accountable for the expenses incurred by federal entities in removing the barge. The government's claim was based on 33

U.S.C.A. § 409, which requires the owner of a sunken vessel to remove the wreck from navigable waters when the vessel poses a threat to navigation.[33] Interpreting the statute closely, the court found that costs can be recovered only when the vessel is sunk "voluntarily or carelessly," according to the clear intent of the statute. Because the sinking was not caused by the negligence of the owner, the government was prevented from recovering the costs of removal. The court did find, however, that the statute did not contain such limiting language in terms of the requirement to locate and mark a sunken vessel.[34] Thus, the court found in favor of the government on this count and assessed those costs related to locating and marking the wreck against the defendant.

In re International Marine Development Corp.[35] involved a suit for damages by cargo interests against the owner of three barges that sunk in the Port of Gulfport during Hurricane Camille (1969). The plaintiff contended that the owner and crew of the barges were negligent and/or that the vessels were unseaworthy. The plaintiffs' negligence claim was based on the contention that (1) the barges should have been either moved out to sea or transferred to the Port of Mobile or Port of New Orleans in preparation of the storm; and (2) the barges were inadequately moored to survive the storm.[36] The defendants claimed the accident was an "Act of God".

The court spent little time in determining that Hurricane Camille was an "Act of God," noting that the hurricane was "the most intense hurricane to ever strike the North American continent" and whose "fury, power, and destructiveness constitut[ed] a freak of nature almost beyond human comprehension."[37] Given this statement, it is not surprising that the court determined that the hurricane was the sole cause of the accident, noting that "there was no negligence on the part of either of the owners or Masters in any of these vessels which proximately caused or proximately contributed" to the ensuing damage.[38] Thus, the vessel owners were able to overcome the presumption of the *Louisiana Rule*, as well as claimants' contention that the vessels were unseaworthy.[39]

The above cases highlight that determination of a vessel owner's liability is a highly fact-specific inquiry. The court must first decide whether the storm approaches such severity as to be defined as "Act of God." Obviously, the more intense the storm, the less time will be spent on this deliberation. For instance, the court in *International Marine Development Corp., supra,* had no difficulty in pronouncing Hurricane Camille, with sustained winds at or near 200 mph, to be an Act of God. In *Bunge Corp*.,[40] the trial court had determined that the winds generated by Hurricane Opal at the time of impact were between 85 and 105 mph. Given such, the appellate court agreed that the conditions of the storm were not so severe as to absolve the defendant from liability.

More importantly, however, are the actions of the vessel owner as the storm approaches. Important questions to be answered include whether sufficient time existed to move the vessel, whether the vessel should have been moved at all, the appropriateness of the mooring location, the quality and effectiveness of the mooring configuration, and the quality and effectiveness of the mooring apparatus, such as the lines, cleats, anchors, etc. that were used.

Moreover, whether an owner's preparations are reasonable and prudent under the circumstances, the applicable legal standard, will also depend upon the experience of the owner. The actions of mariners with more experience and expertise are judged according to a higher standard by the fact-finder. The *Boudoin* court stated that

> what the ordinary prudent shipmaster would do under the circumstances... is not to be measured by what hundreds or even thousands of ordinary persons... either did or would have done. [I]t is the nature of the calling of the shipmaster to know of the tempestuous forces of wind and tide and seas.... Hence, he may not justify an erroneous judgment merely because others not similarly trained or charged with responsibility reached a like conclusion.[41]

Accordingly, commercial boat owners are held to a higher degree of scrutiny that than the recreational owner. Regardless of the owner's expertise, however, the cases cited above make clear that the responsible vessel owner must be reasonable measures to assure that his/her vessel can safely ride out a storm.

Proper preparations in advance of an approaching hurricane are important for a variety of reasons. Obviously, the desired result of preparations is that the vessel safely weather the storm with no or minimal damage. Nevertheless, evidence of responsible planning and preparations may afford the vessel owner a degree of protection from later lawsuits when his vessel does cause damage. As mentioned above, the responsible owner can also avoid the imposition of salvage costs when the

vessel has foundered and threatens navigation. Thus, preparation and implementation of an effective hurricane plan before the necessity arises may be crucial for the owner to escape a violent hurricane with as little actual and financial damage as possible.

The Florida Cases

In 1993, the Florida Legislature passed Florida Statute § 327.59, titled "Marina evacuations." The law prohibits marina owners from adopting any policy or contractual clause through which the marina may compel vessels to be moved from the marina after issuance of a hurricane watch or warning. The import of the statute is to relieve vessel owners from the dangers of moving one's vessel as a hurricane approaches the coast.

The provisions of § 327.59 were examined in *Burklow & Assoc., Inc. v. Belcher*,[42] which involved damage to a marina caused by vessels shifting during Hurricane Opal (1995). The marina owner requested several vessel owners to move their boats in light of the advance of Hurricane Opal toward the Florida coast. The owners failed or refused to move their vessels, which subsequently caused damage to plaintiff's marina during the storm. The plaintiff's complaint averred that the defendants' "election not to move their boats from the marina, but instead to put Plaintiffs' marina and adjacent property owners at risk" amounted to negligence.[43] The defendants claimed that the action was barred by Florida Statute § 327.59, which prohibits marinas from adopting, maintaining, or enforcing any policy which "require[s] vessels to be removed from marinas following the issuance of a hurricane watch or warning."[44] The statute is based on public policy grounds, insofar as its purpose is "to ensure that protecting lives and safety of vessel owners is placed before interests of protecting property."[45]

In an effort to circumvent the prohibition clearly contained within the Florida statute, the plaintiffs argued that reasonable care required defendants to move their vessels *before* the watch or warning was issued. Not surprisingly, the court rejected the argument, finding instead that "the insufficient probability, actual or apparent, at any time prior to issuance of an official hurricane watch or warning, of a hurricane causing the boat owner's vessel to damage the marina" precluded such a requirement.[46] Thus, the court concluded that although the boat owners "owed a duty to the marina owner to exercise reasonable care for the protection of marina property," such duty did not extend so far that the owners would be required to move their vessels prior to or after issuance of a hurricane warning or watch.[47]

Section 327.59 was again examined in *Stuart Cay Marina v. M/V SPECIAL DELIVERY*,[48] an opinion rendered on cross-motions for summary judgment. The factual circumstances are somewhat similar to *Burklow*, insofar as the defendant vessel owners were sued for damage to plaintiff's marina following a hurricane (Hurricane Frances (2004)). The main distinction between the two cases is that there was no relationship between the plaintiff and defendant prior to the storm. The defendants' vessel was not regularly moored at plaintiff's marina but instead was moved to that location as the hurricane approached, which decision was based on the defendants' belief that the marina offered superior protection from the hurricane.

The marina charged that the owner was negligent both in failing to move the vessel to its "pre-planned safe harbor" before the hurricane arrived and in failing to properly moor the vessel.[49] In response to the charges, the owner claimed that the plaintiff's entire case rested on the premise that the vessel should have been moved from the marina prior to the hurricane's arrival.[50] According to the defendant, the claim was thus void as a matter of law, relying in part on the provisions of § 327.59 and the decision in *Burklow*.[51]

The court denied both motions for summary judgment based on its determination that issues of fact still remained, such as the adequacy of the vessel's moorings and whether it was prudent to leave the vessel in its pre-storm location.[52] Importantly, the court found that the plaintiffs successfully made out a *prima facie* case for negligence. The fact that defendant's vessel had allided with plaintiff's dock was undisputed, and under the *Louisiana Rule*, the defendant was presumed to be at fault. The court held further that § 327.59 did not bar application of the *Louisiana Rule*. Because there was no privity of contract between the two parties, the court determined that the statute could not be used as a defense to the claim.[53] Thus, given the plaintiff's *prima facie* case of negligence, the defendants would have to present evidence that their actions were reasonably prudent under the circumstances.[54]

Conclusion

Unfortunately, a search of the case law within Louisiana and the Fifth Circuit reveals a dearth of recent cases dealing with the particular issues mentioned above. One would expect that additional vessel damage cases will be reported as litigation from Hurricanes Katrina

and Rita continues to filter through the courts. Still, the citations to *Boudoin* in the Florida cases cited above reveal that the legal standards implicated in that opinion remain good law.

The clear lesson to be learned from *Boudoin* and similar opinions is that the responsible vessel owner must employ proper safeguards in order to (1) prevent damage from occurring; or (2) avoid liability in the event that his or her vessel causes damage during a violent storm. It is incumbent upon vessel owners, and all coastal residents, to develop and utilize effective hurricane preparations well before a hurricane threatens. These preparations should include either removing one's vessel from the water or moving one's vessel to a well-situated storm harbor. The responsible vessel owner will also ensure that sufficiently strong mooring lines and mooring configurations known to be effective will be utilized. As the cases cited above make clear, an owner cannot simply abandon his vessel to the fate of the hurricane under the misguided notion that the severity of the storm will absolve him of liability.

Endnotes

1 Impact Assessment, Inc (IAI). 2007. *Preliminary assessment of the impacts of Hurricane Katrina on Gulf of Mexico coastal fishing communities.* Final Technical Report, NOAA National Marine Fisheries Service, Southeast Regional Office. Retrieved on May 18, 2007, from http://sero.nmfs.noaa.gov/economics/pdf/FINAL-PUBLIC-N.pdf.

2 *See, The Louisiana,* 70 U.S. 164 (1866).

3 *Bunge Corp. v. Freeport Marine Repair*, 240 F.3d 919, 923 (11th Cir. 2001).

4 70 U.S. at 173. *See also*, *Bunge Corp.*, 240 F.3d 926.

5 *Id.* (interpreting *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977)).

6 18 U.S.F. Mar. L.J. at 5.

7 For an excellent overview of the legal issues implicated following hurricanes, see James M. Mercante, *Hurricanes and Act of God: When the Best Defense is a Good Offense*, 18 U.S.F. Mar. L. J. 1 (2006).

8 One of the most obvious precautions an owner can take is to assure that one's vessel is adequately moored, preferably in a "safe" or "storm" harbor. An upcoming publication by Bleichner, B. and J. Farrell (in prep) will summarize methods to be employed for proper siting and use of storm harbors.

9 Four separate hurricanes (Charley, Frances, Ivan, and Jeanne) made landfall on the Florida coast during the 2004 hurricane season.

10 281 F.2d 81 (5th Cir. 1960).

11 *Id.* at 82.

12 *Id.*

13 *Id.* at 85.

14 *Id.*

15 *Id.* at 82.

16 The weather reports indicated that tides would reach five to eight feet along the coast. *Id.* at 84.

17 The court made a point of noting that it was speculative whether the barge could have successfully ridden out the storm further upriver. *Id.* at 87. The court also stated that the dock was "one of the finest and newest in the area." *Id.* at 84. Nevertheless, the fact that the barge's exposed location at plaintiff's dock was inadequate, especially in light of the expected height of the storm surge, was enough to render these the aforementioned concerns inapposite.

18 *Id.* at 87.

19 *Id.* at 88 (citation omitted).

20 289 F.Supp. 700 (E.D. La. 1968).

21 *Id.* at 701.

22 *Id.* at 702.

23 *Id.* at 704.

24 *Id.*

25 *Id.*

26 231 F.2d 816 (5th Cir. 1956),

27 *Id.* at 705.

28 *Id.*

29 *Id.* at 704.

30 *Id.*

31 328 F.Supp. 589 (E.D. La. 1971)

32 *Id.* at 598.

33 *Id.* at 598.

34 *Id.* at 599-600.

35 328 F.Supp. 1316 (S.D. Miss. 1971)

36 *Id.* at 1317.

37 *Id.* at 1329.

38 *Id.*

39 *Id.*

40 240 F.3d at 926

41 *Id.* at 84-5

42 719 So.2d 31 (Fla. App. 1st Dist. 1998),

43 *Id.* at 33.

44 *Id.* at 34.

45 *Id.*

46 *Id.* at 36-37.

47 *Id.* at 37.

48 2007 WL 951519 (S.D. Fla.)

49 *Id.* at *1.

50 *Id.* at * 1. It should be noted that both owners of the SPECIAL DELIVERY possessed U.S. Coast Guard 100-ton captain's licenses.

51 *Id.*

52 *Id.* at *10.

53 *Id.* at *7.

54 *Id.* at *10.

A Perfect Storm of Opportunities to Establish and Fund a Program to Reduce Misery and Protect Water Resources

By Edward A. Thomas, Esq.

A confluence of six recent events has created a flood of opportunity for those of us concerned about how the nation can best deal with hazards created by human occupancy of areas that are particularly afflicted by the normal processes of nature, and that we, often wrongfully, call "natural hazards." As the father of modern floodplain management, Gilbert White, correctly pointed out, floods are not disasters until humans occupy hazardous areas without due regard for what nature will do in the area.

The six events that have brought this matter to prominence in the public consciousness are

- The growing awareness that even in the water-rich United States, many areas, including some of our most rapidly expanding regions, are facing a critical shortage of potable water and for that matter, any water at all;
- The recent human fatalities and more than $1 billon in damage due to the current and ongoing (as of Nov. 28, 2007) wildfires in Southern California;
- The failure of the levees in New Orleans during Hurricane Katrina, and the $278 billion in litigation that followed that disaster;
- The huge financial settlement resulting from the catastrophic failure of levees in California, as seen in the *Paterno* case;
- The recent U.S. Supreme Court decision in the wetland regulation case *Rapanos-Carabell*; and
- The nationwide effort being undertaken by the Federal Emergency Management Agency to update Flood Insurance Rate Maps, known as Map Modernization.

The concept of No Adverse Impact helps us develop linkage between hazard managers and other groups of people, such as the development community, community development officials, water quality managers, stormwater managers, wetland managers, wildfire managers, earthquake managers, and the public. Such connections have the potential to serve as the foundation of a transformation of public policy towards land use and public protection.

No Adverse Impact

The Association of State Floodplain Managers (ASFPM) has defined No Adverse Impact (NAI) as "…an approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others." This principle makes a community look at what really needs to be done to prevent damage to people, property, and the environment. This concept requires looking beyond business as usual, including role reliance on local, federal, and state minimum standards.

NAI is a *principle* that leads to a *process* of decision-making that is legally acceptable, nonadversarial (neither pro- nor anti-development), understandable, and palatable to the community as a whole. The National Flood Insurance Program (NFIP) and its Community Rating System (CRS) can serve as the foundation and conceptual basis for No Adverse Impact floodplain management.

The NAI principle kicks the NFIP up a notch or two.

The concept of No Adverse Impact is supported by numerous recent court cases, as well as by truly ancient legal and moral concepts. NAI has profoundly deep legal roots, and if properly applied, it should resist legal challenge as much as anything can in this uncertain world. The NAI process clearly establishes that the "victim" in land development is not the developer, but rather the other members of the community who could be adversely affected by an ill-conceived proposed development. Developers are liberated to understand what the community's concerns are so they can plan and engineer their way to a successful, beneficial development.

NAI management

- Is consistent with no net loss of ecological functions,
- Provides a pragmatic standard for regulation,
- Complements good wetland and stormwater regulation, and
- Makes sense on a local and regional basis.

NAI is, however, not a new concept. Rather, NAI is a very old idea — so old that it is in fact a maxim of ancient Roman law expressed in Latin as *sic utere tuo ut alienum non laedas*, which translates to, "Use your own property so that you do not injure another's property." Mohandas K. Gandhi, the father of Indian independence

and one of the great moralists of the twentieth century called *sic utere tuo ut alienum non laedas* "a grand doctrine of life" and the basis of loving relationships among neighbors. Other commentators have indicated that this NAI-type philosophy is central to the tenets of virtually all major religious beliefs.

The Non-Issue of Takings in Hazard Regulation

No Adverse Impact is consistent with ancient common law, as well as being sound moral doctrine. It is also fully in accord with modern law. The Fifth Amendment to the U.S. Constitution says, "…nor shall private property be taken for public use without just compensation." There have been some famous court cases that clarified the amendment, notably *Pennsylvania Coal Company vs. Mahon,* which stated that a government regulation can restrict the owner's freedom to use her property to such an extent that it can constitute a "taking" of that property without compensation.

This is often referred to as the "takings issue." One reason cited by local officials for not fully considering hazard regulations when they issue building permits is the fear that a limitation of what a property owner wishes to do might be considered to be an unconstitutional "taking" of private property. Such concerns are not well founded. Over the last few decades, there has been an increase in takings cases and related controversies involving development. However, a careful case-by-case review of these cases discloses a common thread: the courts have modified common law to require an increased standard of care as the state of the art of hazard management has improved.

State and local governments are far more likely to be successfully sued for permitting development that causes problems, such as poorly engineered and designed roads, stormwater systems, and bridges, than they are for prohibiting or requiring safe and proper design of such development. Almost no hazard-based regulations have been held to be a taking. On the other hand, there have been many cases in which communities and landowners were held liable for harming others.

Takings Law Clarified

The United States Supreme Court recently issued a ruling in the case of *Lingle v. Chevron,* 125 S.Ct. 2074 (2005). The Court summed up its reasoning by stating that the tests articulated in *Lingle,* and previously used by the Supreme Court to determine if government action is a "taking," seek to identify regulatory actions which "....are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." This clear statement by the nation's highest court tremendously supports both the principles of the NFIP and NAI floodplain and stormwater management. Both the NFIP and NAI seek to require the safe and proper development of land subject to a hazard. Neither the NFIP nor NAI floodplain and stormwater management require or support government regulations that oust people from their property.

The NFIP does, however, make a good start at encouraging the sort of regulation that will be needed at the local level to safely regulate all forms of land use in hazardous areas. As one of our nation's most prominent water resource engineers pointed out in a recent article, "There is little leverage at the national level beyond the flood insurance program to steer development away from areas vulnerable to flooding." (See, Lewis E. Link, "Katrina Policy Lessons Learned: Coping with Change is A Risky Business," *National Wetlands Newsletter,* 29(5) August- September 2007.) The bottom line is that the takings issue is really a non-issue for fair and equally applied hazard management regulations. However, whether we can successfully incentivize changes in attitude at the local level — where most development decisions to regulate hazardous areas are made — is quite another question.

The Six Recent Opportunities

(1) Growing Awareness of the Increased Scarcity of Fresh Water. As the population in the United States increases at an unprecedented pace, we are seeing a growing scarcity of water due to increased demand, pollution, climate change, and even sea level rise endangering fresh surface and groundwater. This phenomenon was well documented in the lead article in the Oct. 21, 2007, *New York Times Sunday Magazine*, "The Future is Drying Up," by Jon Gertner. We are not making a sufficient effort to develop and protect our water resources both as we develop land for housing, businesses, agriculture, and industry and as we design the nation's water infrastructure. Proper engineering and planning can do much to help alleviate a potential crisis.

(2) The California Wildfires. Much as they did after the devastation from Hurricane Katrina, many commentators on the recent devastating fires in California have opined something like "Why do people occupy hazardous areas? They should not be allowed to rebuild!" Unless otherwise constrained, people will live

where they want due to location, location, and location. Most often proper land use and building codes can work to make occupancy of all but the most hazardous areas possible. Sometimes, there are areas that are too dangerous or environmentally sensitive for some types of occupancy and use. The people who make the extremely difficult decisions as to what will be required to regulate the development of hazardous areas are local officials who right now have little incentive to say no to development, as development is needed to pay local taxes. The challenge we face is how to incentivize all connected with development in such a manner as to encourage sound engineering and proper planning in areas that can be developed and constrict improper development.

(3) The Katrina Disaster. So much has been written about Katrina from the perspective of a hazards manager that we need say little about it. The United States has an official policy, set forth in legislation, that this nation is committed to encouraging the provision of housing for all Americans which meets four criteria: decent, safe, sanitary, and affordable. Katrina serves as a reminder to all involved in community development that housing that does not take natural hazards into account cannot be decent, cannot be safe, is highly unsanitary, and is not affordable by the disaster victim, by her community, by his municipality, by her state, or by the nation. The ongoing battle in the courts over $278 billion in claims for damages after the Katrina levee breaches may also help us focus on prevention and safe planning and engineering. (See E. A. Thomas, "Recovery Following Hurricane Katrina: Will Litigation and Uncertainty Today Make for an Improved Tomorrow?" *National Wetlands Newsletter*, August-September 2007, found at http://www.floods.org). Hazard managers can supply the information about natural hazards at a particular site, which can serve as a "no adverse impact," sustainable foundation for a decent, safe, sanitary, and affordable community.

(4) The *Paterno* Case. The civil litigation against the State of California in the *Paterno* case involves assigning damages for a catastrophic failure of levees in California. The state has been required to pay nearly one half billion dollars to recompense a large number of property owners for the failure of levees. The result in this case is illustrative of modern legal trends towards a concept based on an NAI-type legal philosophy with respect to payment for damage caused by the failure of dams and levees. The State of California now has embarked on a massive program to prevent levee failure, and the California voters recently approved an even larger and more ambitious program of repair. The steps already taken by California to seriously address concerns about its deteriorating levees are illustrative of the positive benefits of NAI, even when it must be required by a court.

(5) Map Modernization. The Federal Emergency Management Agency (FEMA) has embarked on a nationwide effort to digitize and update all the Flood Insurance Rate Maps in the country. As part of that effort, some states and municipalities are studying future-conditions hydrology that documents that, in certain situations and if floodplains are fully developed, future flood heights may increase by as much as six feet. Modern hydrology and hydraulic modeling will be able to be used by municipalities and plaintiffs to encourage adherence to NAI. Many other communities, though some grudgingly, now recognize the existence of flood hazards that had been ignored in development decision-making.

(6) The *Rapanos-Carabell* Case. Recently the U.S. Supreme Court issued a strange and confusing opinion that can be understood as a call for coordination among all those concerned with water—stormwater, floodplain, and wetland managers alike. The Court in the *Rapanos-Carabell* case is concerned with the geographic extent of the area that the federal government may regulate as "wetlands" under the Clean Water Act. The plaintiffs claimed that the land in question was not properly subject to the jurisdiction of the U.S. Army Corps of Engineers under the federal system of government. The Court held that in determining whether the areas in question were subject to federal jurisdiction, courts must determine whether there was a demonstrable connection between the area and "waters of the United States." When one is seeking to quantify the impact of filling a wetland, floodplain/stormwater hydrology and hydraulics are invaluable analytical tools. Courts have historically been extremely sensitive to protecting public safety by supporting fair and proper regulation of development so that it does not cause harm (including flooding) to others.

A Comprehensive Program for Water

The six events discussed above present an enormous opportunity for everyone who has anything to do with decisions as to how to safely design and engineer structures that occupy hazardous areas. The principles of public safety and safe land use are essentially the same for deciding how to plan and engineer for safe occupancy of a hazardous location, whether the location's hazard

is caused by flood, wildfire, levee failure, hurricane, earthquake, tornado, stormwater, or drought.

To best serve everyone in our nation, developers, regulators and the public need to work in partnership by developing win-win relationships with each other to meet the challenges posed by Mother Nature. One place to start such transformation would be with water, which is essential for our economy and our existence itself. We should begin to address the problem of development in hazardous areas by again considering water resources, not in our usual stovepipes, referred to by one wag as our "cylinders of excellence," and instead have floodplain, drought, stormwater, wetland, water quality, and water quantity regulators and experts begin to work harmoniously. The development community and the public should fashion strategies that will begin to meet the need for the safe delivery of potable water to our rapidly growing population, while protecting the public from the un-mitigated adverse consequences of ill-planned development.

The first portion of the model for the accomplishment of this goal would be to adapt some of the concepts of several successful programs in such a way as to focus on unifying support for water resources. At one time our nation suffered from urban fires far more than any other hazard. As a result of a concerted push to reward good fire management and dis-incentivize less effective fire management behavior, we have progressed to the point that the average homeowner who occupies a home in the so called 100-year floodplain is far more likely to suffer flood damage than fire damage. This effort was spearheaded by America's insurance industry through the establishment of organizations such as the Underwriters Laboratory and the Institute for Business and Home Safety as well as the formulation of a system whereby each community was rated on its individual ability to prevent and fight fires. Similar efforts are underway to rate the ability of building codes in each individual community to protect buildings from loss due to high winds.

A similar rating program could be developed for rating communities' unified water resource efforts. The NFIP established such a rating program for local efforts that exceed the minimum standards of the NFIP to protect against floods. An expansion of this program to cover unified water resources protection — flood, quality, stormwater, wetlands, water availability, groundwater and more — should be considered.

Insurance companies as well as the federal government could use this rating system to reward communities that were taking steps to protect water resources through reduced insurance premiums, as well as more favorable treatment on cost sharing for disaster assistance and water resources related funding from the Environmental Protection Agency, the U.S. Department of Agriculture, and all other agencies.

The second prong of this effort would be the establishment of a fund to assist communities in paying for their efforts to protect water as a valuable resource. One way to find the money for such a fund would be to further the concepts of the Coastal Barrier Resources Act (CBRA). CBRA is an effort to relieve development pressures on an especially hazardous and environmentally sensitive location: undeveloped coastal barrier beaches. This was accomplished by forbidding federal expenditures for anything that supported such development. The ban on federal expenditures means no funding for roads, bridges, water and sewer plants, disaster assistance, or flood insurance. When CBRA was being considered, a ban on federal support for development through the tax code was considered to no avail. Therefore, IRS casualty losses, as well as deductions for interest on loans for development and purchase of these hazardous properties remain in effect.

CBRA is generally considered to have been effective in areas where local governments zoned the area in question so as to constrict development. CBRA has been less effective in areas where there are no effective land use restrictions. Suppose we developed a system whereby federal tax incentives were removed or lessened on a sliding scale from any development that did not meet safe land use, engineering, and planning standards. Any funds that would otherwise accrue to the U.S. Treasury could be diverted into a revolving fund to pay for future improvements in water resources, with priority in funding to communities that are protecting their water resources. Additional funding could come from a variety of changes in the formulas for providing federal water resources funding.

Opportunities to work together do exist. The law favors protecting the public from harm.

Techniques for protecting the public and developing most parcels of land to the highest and best use also exist. Partnerships, incentives for proper conduct, and finding the will to transform are next steps.

This article is a pro bono presentation on behalf of the Association of State Floodplain Managers. It reflects the personal views of the author and is not legal advice. This article was inspired by a conversation with Congressman Earl Blumenauer of Oregon and is dedicated with thanks to him and his efforts to effectively and efficiently protect our nation's water resources.

My thanks also to the engineering firm, Michael Baker Jr., Inc. which is providing generous financial support to enable me to conduct the research necessary to develop this article as well as the series of lectures and publications on behalf of the Association of State Floodplain Managers. Further information on No Adverse Impact, including articles and White Papers that explain the concepts set forth in this article in much more detail, is located at http://www.floods.org.

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Marc Hershman - A Remembrance

By Michael Wascom

Marc Hershman, founder of the Louisiana Sea Grant Legal Program, passed away on Feb. 17, 2008, in Seattle, WA.

At the beginning of the modern environmental law era, Marc came to Louisiana Sea Grant to become the first director of the Sea Grant Legal Advisory Service. The goal of the service was to answer legal questions related to coastal and oceanic issues for state and local government agencies and the Louisiana public. Marc was a year out of Temple University Law School. Within his fist year at LSU, he had renamed the program the Sea Grant Legal Program (SGLP), and history was made. Marc's SGLP was copied by several other state Sea Grant programs over the years and has left its permanent imprint on Louisiana, where the SGLP is still going strong 38 years later.

While at LSU, Marc had a professorial appointment at the LSU School of Law. He taught land use law and created the coastal zone management law course which was open to law students and non-law graduate students alike, a truly multidisciplinary course.

Marc created the Louisiana Coastal Law publication (this is LCL No. 89) to serve the Louisiana public. His chief legal interest was laying the groundwork for the new coastal zone management program that had been passed by Congress in 1972. To spur academic interest and discussion in this new program, Marc became, at age 29, the founding editor of the internationally respected *Coastal Zone Management Journal*. He continued to serve as editor until a few months ago. He also served as director of research of the Louisiana Advisory Commission on Coastal and Marine Resources, a legislatively created body whose research and final report led to the creation of Louisiana's CZM program in 1978.

In 1976, Marc left LSU to become a professor and later chair of the School of Marine Affairs at the University of Washington. While there, he served as a member of the Congressionally-created United States Oceans Commission with LSU's Boyd Professor Jim Coleman. The commission's report is the basis of current improvements in U.S. ocean governance and policy.

As a former student of Marc's, my lasting impression of him, shared by the hundreds of students he mentored, is that he was a wonderful professor always willing to help further his students' careers. As a personal remembrance, Marc helped me obtain my first job out of LSU Law School with the National Oceanic and Atmospheric Administration in Washington, DC. NOAA is the parent organization of the National Sea Grant College Program.

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The Louisiana Sea Grant Legal Program disseminates an e-mail/web-based update to our biannual newsletter four times a year. These updates cover environmental law news relevant to the LSL's audience, summaries of recently introduced environmental legislation and regulations and recent court decisions. To subscribe to the LCL E-mail Update Service, send an e-mail to *jwilkins@lsu.edu*.

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