

Testimony of

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before the

Subcommittee on Environment and Hazardous Materials

of the

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regarding

**Hurricane Katrina:
Assessing the Present Environmental Status**

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Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today to testify on Hurricane Katrina, its historic roots, and its current status. I testify today as an expert in environmental law and policy and a resident of New Orleans.

As you know, I am an evacuee. My wife and children are living this fall in the state of Washington, and I have taken up temporary residence in Houston, Texas, where my Law School, Loyola New Orleans, is about to begin its fall semester in space donated by the University of Houston. Several days ago, I was lucky enough to be able to return to New Orleans to check on our house (partially flooded, but remarkably intact) and my university's

campus (now partially occupied by the National Guard). I do not know when my family or I will be able to return, nor do I know for certain when the Law School will be able to resume its mission in its own building.

Like most New Orleans evacuees, my heart and my mind remain with the City. I monitor the worldwide Web constantly, I speak on the phone or e-mail with people who have remained in the area several times a week, and I regularly read the local blogs, including those associated with my city's newspaper, television stations, and schools. This is a tragedy that will stay with my family and me for quite a long time and, it now appears, with the country.

My testimony today focuses on the environmental ramifications of Katrina that involve the dispersal of toxic chemicals throughout the environment. Although I understand you want and need a briefing on conditions as they stand today, I am also going to trace some of the history of how we ended up in this mess. Mother Nature is overwhelmingly powerful, to be sure, but we made mistakes that rendered the situation much worse, and that must be corrected before we rebuild the city. My message today boils down to three points:

One. The environmental contamination left in the wake of Katrina is very serious and must be investigated thoroughly and remedied adequately *before* people are allowed back into affected areas of New Orleans. We cannot afford to repeat the mistakes of the past, many of which were rooted in the policies of neglect and racial and economic discrimination that were on full display in the immediate aftermath of the hurricane.

Two. To have credibility and to accomplish this difficult task, the investigation must ask the right questions and be conducted by an independent, bipartisan taskforce modeled along the lines of the September 11 Commission. A major goal of my testimony is to suggest the critical questions such an investigation must address.

Three. Now is not the time to repeal, roll back, or waive any of our crucial environmental laws, as some opportunistic members of regulated industries have suggested. We need the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Superfund law more than ever to make sure that people and natural resources are safe as New Orleans is rebuilt.

Katrina's Environmental Aftermath

Katrina left nine categories of environmental problems in her wake:

1. flooded and contaminated drinking water supplies;
2. several oil spills, typically from above-ground tanks;
3. leaking underground tanks containing fuel and other chemicals;
4. flooded sewage treatment plants;
5. flooded buildings, lagoons, lots, and individual containers containing a wide array of toxic chemicals that were washed out into the ambient environment;

6. the concentrated residue of many fires spread into the environment;
7. building debris that is cultivating harmful molds;
8. contaminated sediment and other sludge throughout the city; and
9. toxic exposure of cleanup and other workers as a result of this pollution.

On September 19, 2005, EPA estimated that in Louisiana, 498 of 683 drinking water facilities are operational and meeting EPA standards; 26 are operating on a “boil water notice”; and 159 are either inoperable or their status is unknown.¹ Together, the 683 facilities serve 2.5 million people. In Mississippi, 1,073 of the 1,368 drinking water systems are operational; 231 are operating on a boil water notice; and 64 are either inoperable or their status is unknown. The 1,368 systems serve 3.2 million people. In Alabama, 72 drinking water systems serve approximately 960,000 people. Seventy-one are operational, and one is operating on a boil water notice.

EPA estimates that there were five major oil spills in the New Orleans area to date;² one newspaper reported that six spills had occurred.³ The Coast Guard has estimated that the spills involved 160,000 barrels, and that it has recovered 50,000 barrels to date (a barrel holds 42 gallons).⁴ Additional petroleum contamination has resulted from the flooding of an estimated 350,000 vehicles. The Louisiana Department of Environmental Quality reported that oil storage tanks located near the Mississippi River, with a combined capacity of two million barrels, appeared to be leaking.⁵ The Coast Guard has estimated that more than seven million gallons of oil may have been spilled from industrial plants, storage depots, and other facilities in southeastern Louisiana as a result of Katrina.⁶ These spills have caused as-yet unclear damage to the Gulf and the River.

As for the floodwaters that swept New Orleans and coastal communities in Mississippi and Alabama, the most immediate threat to human health is biological

¹ All of the figures in this paragraph were reported in EPA, RESPONSE TO HURRICANE KATRINA UPDATE (Sept. 19, 2005), available at <http://www.epa.gov/katrina/activities.html#sep13> [hereinafter EPA, RESPONSE KATRINA].

² *Id.*

³ Marla Cone and Ashley Powers, *EPA Warns Muck Left by Floodwaters Is Highly Contaminated*, L.A. TIMES, Sept. 16, 2005, available at http://www.latimes.com/news/nationworld/nation/la-091605nola_lat.0,5316762.story?coll=la-home-headlines (last visited Sept. 21, 2005).

⁴ *Id.*

⁵ Ryan Parry, *Mississippi Burning: Pollution Hells as Fires, Explosions and Oil Spills Follow*, THE DAILY MIRROR (U.K.), Sept. 3, 2005, at 6, 7; see also Sewell Chan & Andrew Revkin, *Water Returned to Lake Pontchartrain Contains Toxic Material*, N.Y. TIMES, Sept. 7, 2005, at A1. The two spills occurred at a Bass Enterprise storage depot in Venice and at a Murphy Oil facility in Chalmette. The Bass spill was estimated at about 68,000-78,000 barrels and the Murphy spill at about 10,000 barrels. See Reuters, Jim Loney, *It's Almost Unimaginable, the Things We Are Going to Have to Deal With*, Sept. 6, 2005, available at <http://hartmannwatchwatch.blogspot.com/2005/09/its-almost-unimaginable-things-we-are.html> (last visited Sept. 21, 2005); Susanne Pagano, *EPA Finds Louisiana Floodwaters Contaminated with Lead, Coliform*, 36 Env't Rep. (BNA) 1870 (Sept. 9, 2005).

⁶ Associated Press, *Katrina and the Environment*, Sept. 16, 2005, available at <http://www.cbsnews.com/stories/2005/09/16/katrina/main855409.shtml> (last visited Sept. 21, 2005).

contamination.⁷ Experts have likened the bacterial concentrations in the floodwaters to untreated sewage.⁸ EPA also stated on September 19, 2005 that E. coli levels in flood waters are “greatly elevated” and remain “much higher” than EPA’s recommended levels for contact. Those exposed to the bacteria-laden floodwaters could contract diseases such as hepatitis-A and salmonella poisoning.⁹ Intestinal diseases can be transmitted by ingesting sewage or simply by being in the water without adequate protective clothing.¹⁰ These risks are particularly acute for children, the elderly, or those with compromised immune systems.

The bacterial contamination that creates these risks of infectious disease resulted in part from damage to sewage treatment plants located in the three states most directly affected by the storm, hundreds of which were damaged or rendered inoperable. Leaking sewage lines added to the problem.¹¹ The decomposition of dead people and animals contributed still further bacterial contamination to the floodwaters.

The waters covering New Orleans’ streets are also contaminated by a range of toxic chemicals,¹² posing significant health and safety risks. Significant amounts of lead, a heavy metal that creates risk of brain damage in young children, have been detected in the floodwaters. At one location, lead was detected at concentrations nearly 700 times higher than EPA standards for safe drinking water.¹³ Tests conducted by EPA and the Louisiana Department of Environmental Quality also found high levels of arsenic and

⁷ The Administrator of the federal Environmental Protection Agency (EPA) has indicated that all tests conducted by EPA of waters in the flooded residential areas of New Orleans exceed by at least ten times the levels determined by EPA to be safe for human exposure for bacteria that include E. coli and fecal coliform. See Pagano, *supra* note 5 (indicating that EPA stopped measuring the amount of bacteria in the water when the levels reached the ten-fold point). See also Press Release, EPA, EPA and LDEQ Report Potential Health Risks from Sediments (Sept. 16, 2005), <http://yosemite.epa.gov/opa/admpress.nsf/d9bf8d9315e942578525701c005e573c/387f99c6a7a0b7808525707e0062479d!OpenDocument>. By some accounts, fecal coliform has been found in some of the floodwaters at levels thousands of times higher than the levels designated by EPA as safe. Dina Cappiello, *Tainted Water*, HOUS. CHRON., Sept. 13, 2005, available at <http://www.chron.com/cs/CDA/ssistory.mpl/nation/3351081> (last visited Sept. 21, 2005). Several people have already died from exposure to bacteria closely linked to cholera and some people have fallen ill with *Vibrio vulnificus*, a common marine bacteria. Geneviève Roberts, *Bacteria in Floodwater Blamed for Three Deaths*, THE INDEPENDENT, Sept. 8, 2005, available at http://news.indephhttp://www.ezilon.com/information/article_9255.shtml (last visited Sept. 21, 2005); CNN, *At Least 30 Found Dead in Nursing Home*, Sept. 8, 2005, available at <http://www.cnn.com/2005/US/09/07/katrina.impact/index.html> (last visited Sept. 21, 2005); Pagano, *supra* note 5.

⁸ See Cappiello, *supra* note 7.

⁹ Marla Cone, *Floodwaters a Soup of Pathogens, EPA Finds*, L.A. TIMES, Sept. 8, 2005, at A18, available at <http://www.latimes.com/features/health/medicine/la-me-bacteria8sep08.1.7707135.story?coll=la-health-medicine> (last visited Sept. 21, 2005).

¹⁰ Pagano, *supra* note 5.

¹¹ Cone, *supra* note 9.

¹² E.g., Andrew Gumbel & Rupert Cornwell, *After Katrina: The Toxic Timebomb*, THE INDEPENDENT, Sept. 7, 2005, available at <http://www.commondreams.org/headlines05/0907-03.htm> (last visited Sept. 21, 2005).

¹³ See Cappiello, *supra* note 7.

hexavalent chromium.¹⁴ Other chemicals discovered in the floodwaters have been a variety of heavy metals and polycyclic aromatic hydrocarbons, all of which have been linked to cancer risk or developmental problems.¹⁵ Some experts have stated that they would be surprised if continued testing fails to detect unsafe levels of some of these contaminants.¹⁶

Some of these contaminants came from the kinds of products found in most homes and commercial businesses, such as chemical cleaners, bleach, and pest control products.¹⁷ EPA reports that it has collected 20,934 “orphan” containers with unknown contents – barrels lying in common areas with no apparent owner -- throughout the affected region.¹⁸ Others undoubtedly originated from inundated industrial facilities subject to environmental regulatory programs or from sites that managed hazardous chemicals improperly in the past.¹⁹

These problems are daunting, and will take months, even years, to clean up. Chemical contamination in many areas is likely to return existing hazardous waste sites to “imminent endangerment” status, and create brownfield sites that are unsuitable for redevelopment. Although our immediate focus is properly on the significant risks to human health and safety, it is worth noting that in the ensuing months, we will have to also confront the environmental impacts of this contamination: reports of a toxic plume moving through the Gulf of Mexico are already raising serious concerns about the environmental consequences for pristine and fragile resources surrounding south Florida, including its coral reefs and areas surrounding the Dry Tortugas.

Government officials responsible for removing the floodwaters from the city face a Hobson’s choice: they could wait to pump the water out of the city until a mechanism was put in place to remove at least some of the contamination, or they could pump the contaminated water back into Lake Pontchartrain and the Gulf of Mexico. Both the risks that would result from waiting to remove the water until it could be decontaminated and the costs of constructing the necessary bioremediation facilities were deemed unacceptably high.²⁰ The pumping of floodwater with so much bacterial waste, however, is likely to lower the dissolved oxygen content of the Lake and the Gulf, creating a risk

¹⁴ Associated Press, *EPA: Bacteria, Lead in New Orleans Floodwaters*, Sept. 15, 2005, available at <http://www.cnn.com/2005/TECH/science/09/14/katrina.environment.ap/> (last visited Sept. 21, 2005).

¹⁵ Juliet Eilperin, *Flooded Toxic Waste Sites Are Potential Health Threat*, WASH. POST, Sept. 10, 2005, at A15.

¹⁶ Cone, *supra* note 9. Some of these chemicals are known to cause or are suspected of causing adverse health effects such as cancer, birth defects, and neurological problems. Rebecca Claren, “*The Entire Community Is Now a Toxic Waste Dump*,” SALON, Sept. 9, 2005, available at <http://www.salon.com/news/feature/2005/09/09/wasteland/index.html> (last visited Sept. 21, 2005).

¹⁷ Sewell Chan & Andrew Revkin, *Water Returned to Lake Pontchartrain Contains Toxic Material*, N.Y. TIMES, Sept. 7, 2005, at A1.

¹⁸ EPA, RESPONSE KATRINA, *supra* note 1.

¹⁹ A few days after the hurricane hit New Orleans, an explosion occurred at a chemical factory located 15 blocks from the French Quarter and two miles from the Superdome and the Ernest N. Morial Convention Center, which housed the bulk of the city’s refugees. Ryan Parry, *Mississippi Burning: Pollution Hells as Fires, Explosions and Oil Spills Follow*, THE DAILY MIRROR (U.K.), Sept. 3, 2005, at 6, 7.

²⁰ See Reuters, Jim Loney, *Few Choices to Rid New Orleans of Poisoned Water*, Sept. 6, 2005.

that many fish and other water-dependent organisms will die.²¹ Moreover, the intentional discharge of this contamination is a sad sequel to hard-won success in cleaning up Lake Ponchartrain to the point that portions were recently deemed safe for swimming.²²

EPA has deployed hundreds of workers to the Gulf Coast and is working against the clock to test floodwaters, soil, air, and drinking water sources to determine whether they pose unreasonable risks to the environment. When the Agency discovers hazardous conditions, it will face the challenging tasks of figuring out to remove, neutralize, or contain the contamination before people return to the area. All decisionmakers should defer to this expert judgment.

Environmental Enforcement and Superfund

Two fundamental issues warrant serious investigation in the wake of this disaster: first, could any of the harm to health and the environment have been avoided; and second, how to conduct and fund an adequate cleanup of the contamination.

Compliance Issues

On the first question, one important inquiry is into the degree of compliance with the Clean Water Act requirement that facilities that store petroleum products in above-ground containers prepare Spill Prevention Control and Countermeasure Plans. Such plans must include physical containment, as necessary, to prevent oil spills because, among other things, it is a civil and criminal violation of the Act to allow such spills either intentionally or negligently. Similarly, the Resource Conservation and Recovery Act requires virtually all facilities that manage, store, or dispose of hazardous waste to have emergency plans that prevent the waste from escaping into the environment in the event of an accident, including foreseeable events like a hurricane. Once again, the aftermath of Katrina must include an investigation of the compliance by New Orleans businesses with these important requirements.

With hindsight, it also seems appropriate to consider questions such as: Were factories and oil storage facilities located too close to the Coast? Did responsible industries secure them sufficiently in anticipation of a natural disaster that had been predicted for years? Were efforts to clean up toxic waste dumps before the hurricane adequate, or did superficial cleanups leave these dangerous sites vulnerable to the inevitable floods? The Clean Water Act and the Resource Conservation and Recovery Act could have prevented the environmental damage caused by Katrina if they had been implemented effectively,

²¹ Gumbel & Cornwell, *supra* note 70.

²² Amy Althans, *Presentation to Focus on Revival of Lake Basin Foundation, Chief Talks to AAUW*, TIMES PICAYUNE (New Orleans), Jan. 13, 2005; Leslie Williams, *Beach Group Has Game Plan, Natural Feel Desired for Area Along Lake*, TIMES PICAYUNE (New Orleans), Sept. 6, 2004.

Superfund Sites

Finally, there is the troubling question of flooded Superfund sites, with damage that was exacerbated by poor initial cleanups. There are three National Priorities List sites that lay in the path of the hurricane, and the *Washington Post* reported on September 10, 2005 that one site in the northeast section of New Orleans is submerged in water and that two sites are flooded, with their dangerous contents joining the sewage and household hazardous chemicals in the water that will soon be pumped into the Gulf of Mexico or Lake Ponchartrain.²³

As you are well aware, the National Priorities List (NPL) is limited to the 1238 worst abandoned toxic waste sites in the country. In an interview with CPR, long-time Louisiana environmental consultant Wilma Subra confirmed the accuracy of the *Post* story, as well as the following analysis of its implications.²⁴

Agriculture Street Landfill -- The Black Love Canal

The site that was the hardest hit by Katrina is the Agriculture Street Landfill, sometimes referred to as the “black Love Canal.” The 95-acre site, located three miles south of Lake Pontchartrain in a community that is 60-80 percent African-American, is an old municipal landfill where ordinary garbage was mixed together with liquid hazardous waste to a depth of between two and 32.5 feet.²⁵ In 1969, the City of New Orleans built a low-income housing project on top of the site, as well as the Moton Elementary School.²⁶ In 1993-94, after community leaders demanded that EPA conduct a full investigation of the site, the Agency decided that contamination at the site warranted an emergency cleanup and placement on the NPL.

In a health assessment prepared for the site by the Agency for Toxic Substances and Disease Registry (ATSDR), a unit of the Centers for Disease Control, experts concluded that the undeveloped portions of the site posed a “public health hazard” and that if the land was ever used for residential housing, exposure to lead, arsenic, and

²³ Eilperin, *supra* note 15.

²⁴ Ms. Subra is a nationally recognized expert who testified before the U.S. Senate Environment & Public Works Committee on Superfund Reauthorization in 1997. The testimony is available at http://epw.senate.gov/105th/sub_9-04.htm. She can be reached at either (337) 367-2216 or (337) 578-3994.

²⁵ It operated from 1912 until 1959, but was reopened in 1965 to receive debris created by Hurricane Betsy. The combination of garbage and service station oil waste often caused fires at the site, and during that period, local residents called it “Dante’s Inferno.”

²⁶ Among the issues surrounding the site, in addition to the inadequacy of the remedy, explains Darryl Malek-Wiley, an environmental justice organizer with the Sierra Club, is the government’s role in the 1970s in “encouraging first-time black homebuyers” to settle in a development that residents later learned to be on top of the former landfill. Eilperin, *supra* note 15.

polycyclic aromatic hydrocarbons (PAHs) in the soil could pose an “unacceptable health risk.”²⁷ All of those toxic materials are now floating through the streets of New Orleans.

EPA’s choice of a remedy for the site has significantly exacerbated this damage. Instead of excavating the site, treating contaminated soil in situ, or even installing a liner that would prevent the landfill’s contents from washing away, EPA decided that its final remedy would be limited excavation of less than two-thirds of the site and the placement of two feet of “clean fill” on top of the buried waste.²⁸

Residents asked to be relocated from their housing on top of the site, a project that would have cost approximate \$12 million, and have even filed suit demanding that relocation. EPA refused and has instead spent \$20 million on the cleanup described above. In desperation, a delegation traveled to Geneva Switzerland in 1999 to ask for help from the U.N. Commission on Human Rights.²⁹

Bayou Bonfouca

This 54-acre site located in Slidell, Louisiana, was a wood treatment facility using creosote that operated since the late 1800s. Some 26,000 people live in the community, and the house nearest the site is 400 feet away.³⁰ Even though the site is supposedly cleaned up, the Louisiana Department of Environmental Quality warns citizens not to swim, and to avoid contact with over seven miles of Bayou Bonfouca, identifying the pollutant of concern as creosote.³¹ The ATSDR health assessment concluded that the site is a “public health hazard” and worries that because swimming advisories are “voluntary,” the potential for immediate skin burns and long-term illnesses is ongoing.³² The companies that created the site paid to install a fence around it. EPA then used the site to burn hazardous wastes from another nearby Superfund site, ultimately burying the concentrated ash from that process in Bayou Bonfouca. The only “remedy” installed at

²⁷ AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH ASSESSMENT: AGRICULTURE STREET LANDFILL, *available at* http://www.atsdr.cdc.gov/HAC/PHA/agriculturestreet/asl_p1.html.

²⁸ EPA picked up 52,615 tons of soil, or an average of 86 tons per acre, and put down 177,293 cubic yards of clean fill in its place. See EPA, AGRICULTURE STREET LANDFILL NPL UPDATE (Sept. 2005), *available at* <http://www.epa.gov/earth1r6/6sf/pdffiles/0600646.pdf>.

²⁹ For an account of the trip, see http://www.ejrc.cau.edu/unchr_ej.htm. For further information about environmental justice issues at Superfund sites, see *infra* *The Two Americas: Race, Class, and Injustice*; ALICIA LYTTLE, AGRICULTURE STREET LANDFILL: ENVIRONMENTAL JUSTICE CASE STUDY (U. Mich., Jan. 2003, *available at* <http://www.umich.edu/~snre492/Jones/agstreet.htm> ; <http://www.ejrc.cau.edu/POCEG-02.PDF>; and Robert D. Bullard, *Environmental Justice in the 21st Century* (Envtl. Justice Res. Ctr.), *available at* <http://assets.cambridge.org/052166/0629/sample/0521660629ws.pdf>.

³⁰ See EPA, MADISONVILLE CREOSOTE WORKS NPL UPDATE (Sept. 2005), *available at* <http://www.epa.gov/region06/6sf/pdffiles/0600653.pdf> [hereinafter EPA, MADISONVILLE CREOSOTE WORKS].

³¹ See LA DEP’T OF ENVTL. QUALITY, FISH CONSUMPTION AND SWIMMING ADVISORIES (Jan. 11, 2005), *available at* <http://www.deq.state.la.us/surveillance/mercury/fishadvi.htm#table>.

³² See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH ASSESSMENT: BAYOU BONFOUCA, *available at* http://www.atsdr.cdc.gov/HAC/PHA/bonfouca/bon_p3.html.

Bayou Bonfouca was the construction of a plastic and clay cap over the top of the creosote piles, the remnants of which were likely washed out in the flooding.

Madisonville Creosote Works

This 29-acre site is also a former wood treatment facility.³³ EPA excavated some contaminated soil, treated it, and put it back down at the site. To cope with the thousands of gallons of creosote waste still under the surface, the Agency installed “recovery” trenches beneath the surface that would capture the creosote waste, keeping it out of local drinking water supplies. Flooding is likely to have disrupted those trenches, potentially spreading contamination into the community’s water.

Why did the cleanup of these three sites turn out to be so vulnerable to a foreseeable and foreseen natural disaster like Katrina? The Superfund created under that statute was intended to provide the necessary legal authority to enable an adequate response to releases of hazardous substances into the environment. However, the Superfund program has been critically weakened in recent years, just when it must play a central role in cleaning up after the disaster.

Among the sources of revenue for the Superfund toxic waste cleanup program were taxes on the production of crude oil and the manufacture of feedstock chemicals, as well as general tax revenues. The industry taxes that provide the bulk of the program’s funding expired in 1995. Since the taxes expired, the program has limped along on limited funds from general tax revenues and cost recovery actions against companies that created the sites.³⁴ The industry taxes provided about \$1.45 billion in annual funding from 1990-1995.³⁵ Current levels of general revenue funding are \$1.3 billion.³⁶ The cost of the remediation of toxic waste washed out by Katrina remains to be determined.

The result of this disastrous set of policies has been to shift a significant share of the burden of financing hazardous substance cleanups away from the industries that generate the bulk of the substances found at contaminated sites and onto the shoulders of the taxpaying public. The limited funds available in the Superfund have unintended consequences, it can delay cleanups and lead EPA to choose remedies that are not adequately protective of human health. With reduced funding, EPA may be tempted to reduce its expenses by choosing remedies that are temporary and very vulnerable to bad weather along the Gulf Coast. Indeed, the remedies installed at the three sites in the New Orleans area were fated to fail.

³³ See EPA, MADISONVILLE CREOSOTE WORKS, *supra* note 30.

³⁴ Unfortunately, there are no “deep pocket” corporations in evidence around the three sites described above, and the only alternative is for the Superfund to pick up the tab.

³⁵ Meredith Preston & Susan Bruninga, *Amendment to Reinstate Industry Tax to Support Trust Fund Defeated in Senate*, 35 Env’t Rep. (BNA) 536. For more information on the battle to reinstate the tax, see Dean Scott, *Senators Criticize Cut in EPA Water Fund, Challenge Pace for Superfund Cleanups*, 36 Env’t Rep. (BNA) 263.

³⁶ President Bush has recommended holding Superfund spending level, adding only \$32 million to the program in his most recent budget. Because of the missing money, EPA will only be able to address 40 sites in the upcoming year, down from an average of 80 during the Clinton Administration. *Id.*

The Two Americas: Race, Class, and Injustice

The devastating effects – the lost lives, the demolished homes, the shattered communities, the affronts to dignity – were suffered disproportionately by people of color and low-income people in New Orleans. “Natural disasters” such as hurricanes, earthquakes, and floods are sometimes viewed as “great social equalizers:” they strike unpredictably and at random, affecting black and white, rich and poor, sick and well alike. However, as Katrina has laid bare, the harms are not visited randomly or equally in our society. A reporter for *The New York Times* put it bluntly: “The white people got out. Most of them, anyway. . . . it was mostly black people who were left behind.”³⁷

Twenty-eight percent of people in New Orleans live in poverty.³⁸ Of these, 84 percent are African-American.³⁹ Twenty-four percent of the adults living in New Orleans are disabled.⁴⁰ An estimated 15,000 to 17,000 men, women and children in the New Orleans area are homeless.⁴¹ The lowest lying areas of New Orleans tend to be populated by those without economic or political resources.⁴² The city’s Lower Ninth Ward, for example, which was especially hard hit and completely inundated by water, is among its poorest and lowest lying areas.⁴³ Ninety-eight percent of its residents are African-American.⁴⁴ As Craig E. Colten, a geologist at Louisiana State University and an expert on New Orleans’ vulnerable topography explains: “[I]n New Orleans, water flows away from money. Those with resources who control where the drainage goes have always chosen to live on the high ground. So the people in the low areas were the hardest hit.”⁴⁵

Moves to eviscerate government protection of health, safety and the environment are most tenable where those burdened can be viewed as “other” or where their circumstances are not lived or imagined by many Americans.⁴⁶ The current Administration in particular has endorsed a shift in responsibility for basic health, safety

³⁷ Jason DeParle, Broken Levees, Unbroken Barriers: What Happens to a Race Deferred, *The New York Times*, Section 4, Page 1 (Sunday, Sept. 4, 2005).

³⁸ U.S. Census, “Louisiana Quick Facts,” (2000), available at <http://quickfacts.census.gov/qfd/states/22/2255000.html>.

³⁹ U.S. Census, “Poverty Status in 1999 by Sex by Age,” (2000), available at http://factfinder.census.gov/servlet/DTTable?_bm=y&context=dt&re...-geo_id=16000US2255000&-search_results=01000US&-format=&-lang=en.

⁴⁰ U.S. Census, “Social Characteristics: 1990,” available at http://factfinder.census.org/servlet/QTable?_bn=n&lang=eng&q_r_name=DEC_1990_STF3_DP2&ds_name=DEC-1990_STF3&geo_id=05000US22071.

⁴¹ City of New Orleans Health Department, “Homeless Healthcare,” available at <http://www.cityofno.com/portal.aspx?portal=48&tabid=6>.

⁴² Jason DeParle, supra note 37 (quoting Craig E. Colten, Louisiana State University).

⁴³ Id.; Greater New Orleans Community Data Center, “Lower Ninth Ward Neighborhood: Income & Poverty,” available at <http://gnocdc.org/orleans/8/22/income.html> (poverty rates in the Lower Ninth Ward ten percent higher than in Orleans Parish generally).

⁴⁴ Greater New Orleans Community Data Center, “Lower Ninth Ward Neighborhood: People and Household Characteristics,” available at <http://gnocdc.org/orleans/8/22/people.html>.

⁴⁵ Jason DeParle, supra note 37.

⁴⁶ See, e.g., Catherine A. O’Neill, Risk Avoidance, Cultural Discrimination, and Environmental Justice for Indigenous Peoples, 30 *Ecology L. Q.* 1 (2003).

and environmental protections. It has sought to diminish the government's role in assuring even minimally healthful conditions for all, leaving it to those at risk to protect themselves. The effect of this shift is to burden people of color and the poor – because these groups are disproportionately the ones who are most exposed and most vulnerable, they will be the ones left to fend for themselves.⁴⁷ They are also the ones with the fewest resources to do so.

Katrina also raises questions of justice in cleanup and rebuilding. Community members and environmental justice leaders have raised concerns about when and how these contaminants will be cleaned up, citing evidence of inequities in environmental cleanups more generally. They and others have also questioned the rush to waive standard health, safety, environmental and social protections. While it might have been important to waive normal Clean Water Act permits to allow the waters to be pumped out of a flooded city as quickly as possible, other waivers are unjustified.⁴⁸

Conclusion

In the aftermath of Katrina, we must rethink our past policies and priorities in order to avoid similar disasters in the future. We must be sure that EPA and other relevant agencies have adequate resources to respond to the unavoidable consequences of future disasters. We urge the Committee to support the creation of an adequately funded, bipartisan, and independent commission to address the following critical questions:

⁴⁷ Id.

⁴⁸ See, e.g., Michael Janofksy, *Bill Would Let E.P.A. Relax Rules for Cleanup*, N.Y. TIMES, Sept. 16, 2005, at A18 (national edition).

Critical Questions

1. Katrina caused serious damage to the infrastructure that supports oil and gas production, as well as hundreds of facilities handling significant quantities of hazardous chemicals.
 - a. How does EPA plan to conduct an independent assessment of the environmental releases that occurred at such facilities, including air emissions, spills of chemical product and waste, and fires caused by such events?
 - b. What monitoring is being undertaken and what additional monitoring should be planned to adequately determine the nature and extent of hazards to health and environmental contamination?
 - c. Is information from all appropriate government and non-governmental sources being incorporated into assessment of the releases?
2. What are the protocols for testing drinking water for the broader suite of chemicals likely to have migrated into supplies as a result of the storm and how are federal and state authorities ensuring that such testing gets done?
3. What plans have been made to rebuild the area's publicly owned treatment works so that they can deliver adequate services before the city is re-populated?
4. How will EPA ensure that the re-habitation of New Orleans, Mississippi, and other areas affected by Katrina is safe in light of remaining toxic deposits in soil and water?
5. Is all information relevant to public health and safety being shared with the public in a timely fashion?
6. To what extent did the chemical and biological contamination that has been discovered in New Orleans since Katrina result from noncompliance with or inadequate enforcement of the federal environmental laws described above?
7. Have the EPA and Congress undertaken the necessary assessment of the funding needed to fully implement and enforce federal environmental laws in order to protect public health and the environment in cases of natural and manmade disasters and reduce potential future cleanup costs?
8. Had state and local officials complied with their planning responsibilities under EPCRTKA, and, if not, did inadequate planning exacerbate the risks to health and safety now facing New Orleans?
9. A long, intentional, and successful effort to weaken the Superfund program has left it without adequate funds to address the new dimensions of risk posed by

Superfund sites that Hurricane Katrina has made apparent. In addition, the aftermath of the hurricane has created need for an emergency response and may produce new sites that warrant cleanup under Superfund.

- a. What is the vulnerability of all Superfund sites, including those near waterbodies, to natural and manmade disasters? Does EPA have adequate funding to undertake such an assessment?
 - b. How will EPA and the states deal with the potentially responsible parties who created the sites in the first place, and either never stepped forward to pay for cleanup, or paid for a remedy that now appears inadequate?
 - c. What sources of funding will EPA employ in its broader response to the contamination in the wake of the hurricane?
10. What steps must be taken to ensure that race or class disparities don't affect the cleanup methods selected and used in different areas?
11. What steps are being taken to ensure that the affected communities have adequate opportunities to participate in the relevant decision-making processes?

Thank you, Mr. Chairman and members of the Subcommittee for the opportunity to appear before you today.