How Do We Deal With This Mess? A Primer for State and Local Governments on Navigating the Legal Complexities of Debris Issues Following Mass Disasters

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When the world is storm-driven and the bad happens and the worse that threatens are so urgent as to shut out everything else from view, then we need to know all the strong fortresses of the spirit which men have built through the ages.

- David McCullough²

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² David McCullough, Historian, quoted in Anon., *Medal Honors McCullough*, THE ADVOCATE, Dec. 22, 2006 at 8B.

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I. Introduction

The devastation wrought by the 2005 hurricane season brought into bold relief the need for comprehensive debris management plans in the United States. As cleanup efforts commenced following Hurricane Katrina, it became abundantly apparent that the local governments were not prepared to deal with the massive scope of the debris problem.

As the State government in Louisiana attempted to bridge the communication and readiness gap between the Federal Emergency Management Agency (FEMA) and the impacted local governments, the Louisiana Attorney General's Office issued several opinions that addressed the rights and duties of the various parties.³ While these opinions were helpful to guide the process for debris management following Hurricanes Katrina and Rita, it became apparent to the authors that this was a national, not just a local,

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 $^{^{3}}$ La. Atty. Gen. Op. Nos. 05-0360, 05-0360A, 05-0373, and 05-0381.

problem.⁴ Because of this realization, the opinion authors (most of whom are authors of this article) felt it necessary to provide guidance to other United States jurisdictions in the hopes that they will thus be better prepared to handle debris issues if and when they are faced with natural or anthropogenic disasters in the future.⁵

This article is a culmination of the research for the original Attorney General opinions as well as subsequent work. It should provide lawmakers and local administrators with the knowledge to navigate the confusing FEMA rules on debris management from a legal perspective and to ensure that they are prepared for the worst in their own communities before the worst happens.

Although recent events have focused the nation's attention on hurricane damage in the southeastern United States, the need for comprehensive debris management plans exists nationwide. There is virtually no portion of the United States that is immune from disaster. The western portion of the country suffers from periodic earthquakes, mudslides, fires, and volcanic activity; 6 the Pacific region is under yearly threats from

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[t]he United States is at [a] 'significant risk' of natural disaster. In the past two decades, the President has declared over 700 major disasters. Many of these disaster events have generated substantial volumes of debris that result in enormous challenges for local communities.

Kathryn A. Wasik, *Municipal Liability for Disaster Debris Disposal*, 19 Tul. Envt'l. L. J. 339, 353 (2006) (internal footnotes omitted).

⁴ This sentiment is supported by the information presented in a recent article, which noted that,

⁵ It should be noted that anthropogenic disasters are treated somewhat differently from natural disasters by FEMA. For a comprehensive discussion of the differences, the reader is directed to Abbott. Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URBAN LAWYER 467, 468 (2005).

⁶ See e.g., Martin Weil, Violent Earthquake Strikes Northern California, Killing Dozens, Causing Widespread Damage; Sections of Bridge, Highway Collapse In Rush Hour, THE WASHINGTON POST, Oct. 18, 1989, A1 (discussing the impacts of the 1989 San Francisco earthquake); Steve Fetbrandt, Mudslides Weigh on San Jacinto: Strategy – Residents Push For Precautions As Officials Tout Long-term And Multiagency Plans, THE PRESS ENTERPRISE (Riverside, CA), Sept. 23, 2006, B01 (discussing mudslide problems in California); Richard K. DeAtley, Fatigue Factor: 4,000 Firefighters On Hand, Largest Blaze 50 Percent Contained, Man's Body Found, THE PRESS ENTERPRISE (Riverside, CA), Jul. 16, 2006, A01 (discussing one instance of Western wildfires); Peggy Anderson, Scientists Say Two-Year St. Helens

typhoons and perennial dangers from seismic activity and tsunamis;⁷ the Midwest is at risk for floods, tornadoes, and earthquakes;⁸ the southeast, Atlantic seaboard, and Caribbean territories are in the annual path of tropical cyclones;⁹ and the entire nation is, from time-to-time at risk of such anthropogenic disasters as those resulting from terrorist activities.¹⁰ All of these events have the potential to leave massive amounts of debris, both on public and private property,¹¹ in their wake that can present threats to public

Eruption Seems To Be Slowing, AP WIRE, Sept. 30, 2006 (discussing recent volcanic activity in Washington state).

⁷ See e.g., Mark Hagen, Midwest Farmers Still Feel '93 Flood's Effects, CHICAGO SUN TIMES, Feb. 27, 1994, 30 (discussing the impacts of substantial Midwest flooding); Anon., More Twisters Hit Texas; 6 States Clear Wreckage, St. Louis Post-Dispatch, Mar. 15, 1990, 11A (discussing the fallout from tornado damage in six Midwestern states); FEMA, MIDWEST TORNADOES OF MAY 3, 1999: OBSERVATIONS, RECOMMENDATIONS AND TECHNICAL GUIDANCE (FEMA 1999) (reviewing the impacts of one day of devastating tornadoes in Oklahoma and Kansas); Betsy Taylor, New Madrid Earthquake Preparation Poses Unique Challenges, AP STATE & LOCAL WIRE, Nov. 2, 2006 (discussing the potential for Midwest earthquakes).

⁸ See e.g., Anon., President Bush Declares Major Disaster in Northern Mariana Islands, AP STATE & LOCAL WIRE, Aug. 28, 2004 (discussing the devastation following a typhoon in the United States' Pacific territories); Anon., Quake Disaster Loans Run Into the Millions, AP STATE & LOCAL WIRE, Nov. 15, 2006 (discussing expenses related to a magnitude 6.7 earthquake in Hawaii in 2006); Alexandre da Silva, Hawaii Tests Double Whammy: Hurricane, Tsunami, AP STATE & LOCAL WIRE, May 17, 2006 (discussing mock disaster drills in Hawaii).

⁹ See e.g., Katherine Bouma, Stormy Years Predicted For State – Global Warming Invites Droughts, Hurricanes, The Birmingham News (Alabama), Pg. 1C Vol. 119 No. 235 (discussing predictions for increased hurricanes and other calamities in Alabama in the coming years); Anon., Tropical Storm Chris Nears Caribbean, The Chatanooga Times Free Press, Aug. 2, 2006, C6 (discussing the threats posed to the United States' Caribbean territories from a 2006 hurricane); James A. Henry, Kenneth M. Portier & Jan Coyne, The Climate and Weather of Florida, at 169-218 (Pineapple Press 1994) (reviewing Florida's hurricane history); Pete Davies, Inside the Hurricane: Face to Face with Nature's Deadliest Storms (Henry Holt & Co. 2000) (reviewing general hurricane history); Jay Barnes, North Carolina's hurricane history); Steve Mullins & John Burbage, And Hugo Was His Name (The News and Courier & The Evening Post 1989) (reviewing the devastation of Hurricane Hugo in South Carolina); Gordon E. Dunn & Banner I. Miller, Atlantic Hurricanes, at 244-278 (LSU Press 1960) (reviewing general hurricane history).

¹⁰ See e.g., Anon., Two Planes Strike World Trade Center; Terrorists Blamed; Aircraft Crashes Near Pentagon, THE BUFFALO NEWS (New York), Sept. 11, 2001, A1 (an early news report of the 9/11 terrorist attacks); Julie DelCour, Why? Oklahoma Scarred by Incomprehensible Tragedy, THE TULSA WORLD, Dec. 31, 1995, N1 (reviewing the devastation wrought by home-grown terrorists in the wake of the Oklahoma City bombing in 1995).

See e.g., Patrick Whittle, A Lesson From The Panhandle; Escambia County Finds a Way to Win FEMA's Help With Cleanup, SARASOTA HERALD-TRIBUNE, Dec. 3, 2004, A1 (discussing Florida's problems with debris removal from private property in 2004). Joe Cantlupe & Dana Wilkie Copley, San Diego Battles FEMA For Millions Over Fire Debris, COPLEY NEWS SERVICE, Sept. 22, 2004 (review of San Diego's recent problems getting FEMA reimbursement for the removal of fire debris from private property, despite studies showing its hazardous nature); Shearon Roberts, Jefferson

health and safety and the environment, and can hinder the rebuilding and recovery process.¹² It is hoped that local lawmakers and administrators will heed the suggestions herein and use them as a roadmap to creating their own debris management plans and protocols so that they are prepared when disaster next strikes their locale.

II. We're From the Government and We're Here to Confuse You

Interpreting federal law is never an easy task. It usually takes slow, careful consideration. However, when disaster strikes, there often is not much time for quiet contemplation. One of the major concerns that emerged not long after the 2005 storms was: What do we do with all of the debris and who is going to pay for the cleanup? While the tax base for the local governments had been scattered across the country during the mass exodus from south Louisiana due to Hurricanes Katrina and Rita, ¹³ the political subdivisions were rightfully concerned that they would not be able to afford the costs of debris removal and cleanup. They turned to the State for answers and the State, in turn, turned to the feds – FEMA to be exact. Thankfully, FEMA does have reimbursement provisions in its Public Assistance (PA) program; however, interpreting the law correctly in the wake of a disaster to ensure that the local governments were covered for their expenses can be maddening. Being able to correctly navigate the complex maze of FEMA laws, rules, and regulations is essential, for, as noted by Abbott,

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Makes Mulch After the Wind Blows; Plan Streamlines Storm Debris Removal, THE TIMES-PICAYUNE, Aug. 4, 2005, 1 (noting substantial amounts of green debris on public and private property in the New Orleans area following Tropical Storm Cindy in 2005).

¹² See e.g., Paul Rioux, Reconstruction Plans Begin in St. Bernard But Oil Spill Adds to the Health Risks, THE TIMES-PICAYUNE, Sept. 10, 2005, A13 (commenting that "Rebuilding...will be a gargantuan task in a parish where almost every structure took in from 10 to 20 feet of water and roads were still blocked by debris.").

¹³ Melinda DeSlatte, *Katrina Leaves Louisiana's Budget Tattered*, AP STATE & LOCAL WIRE, Sept. 8, 2005. ¹⁴ "Under the PA Program, which is authorized by the Stafford Act, FEMA awards grants to assist State and local governments and certain Private Nonprofit (PNP) entities with the response to and recovery from disasters." FEMA, PUBLIC ASSISTANCE: PUBLIC ASSISTANCE GUIDE, FEMA-322 at 3 (1999) (hereinafter "FEMA-322"). Much of this assistance is provided in the form of reimbursement grants. *Id.* at 4.

because FEMA programs are reimbursement programs, where FEMA provides grant funding of expenditures already made by a community, it becomes particularly important for a community to understand what is eligible for federal assistance.¹⁵

The potential penalty for not getting eligibility right is that the local governments may not be able to obtain reimbursement for their massive expenditures on debris management.¹⁶

A. The Stafford Act

The Robert T. Stafford Act (the Stafford Act), originally enacted as the Disaster Relief Act of 1974,¹⁷ provides broad authority for FEMA to assist local governments with debris removal.¹⁸ The primary provision of the Stafford Act that FEMA trots out for disaster-related debris matters is Section 403(A)(2).¹⁹ This provision allows the President to authorize grants to "any state or local government for the purpose of removing debris and wreckage resulting from a major disaster from publicly or privately owned lands and waters."²⁰ At first blush, this provision appears to be a godsend for local governments that are inundated with debris and debt following a disaster. As can be seen *infra*, the same picture emerges from the regulations promulgated pursuant to Stafford Act authority. However, as FEMA makes clear in its internal rules and publications, the facially simple process for securing certain types of debris removal reimbursement grants, especially for debris removed from private property, is not simple in reality. The actual application of the law and regulations becomes convoluted as it works its way through FEMA's process. This makes navigation of the specific requirements to ensure

¹⁵ See Abbott, supra, note 5 at 468.

¹⁶ See e.g., FEMA 322, supra, note 14 at 90 (noting that "FEMA may be required to deobligate funds after the initiation of a project" for failure to comply with certain laws).

¹⁷ P.L. 93-288. The name was changed to the Stafford Act by P.L. 100-707.

¹⁸ P.L. 93-288, § 403; 42 U.S.C. 5173.

¹⁹ 42 U.S.C. 5173(A)(2).

²⁰ *Id*.

that reimbursement does occur difficult. However, the understanding of these provisions is essential for embattled local governments to assure their very survival.

B. FEMA Rules and Regulations

The regulations that control reimbursement for debris removal from FEMA are found at 44 CFR 206.224.²¹ Part (a) of this Section reads that,

[u]pon a determination that debris removal is in the public interest, the Regional Director may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters.²²

Although this portion of the regulation largely parrots the debris removal provisions of the Stafford Act, it does not go on to detail what is meant by "public interest." This term is explicated in 44 CFR 206.224(a)(1-4), thus:

Such removal is in the public interest when it is necessary to:

- 1) Eliminate immediate threats to life, public health, and safety; or
- 2) Eliminate immediate threats of significant damage to improved public or private property; or
- 3) Ensure economic recovery of the affected community to the benefit of the community-at-large; or
- 4) Mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired through a FEMA hazard mitigation program to uses compatible with open space, recreation, or wetlands management practices.²³

Read as a whole, this portion of the regulation seems to set in place a rather straightforward process to allow for reimbursement for debris removal. FEMA has somewhat complicated this easy read with 44 CFR 206.224(b), the next part of the regulation. This part singles out debris removal from private property despite the fact that this type of debris appears to be covered in 44 CFR 206.224(a). Part (b) states that:

²¹ See e.g., FEMA, Recovery Division Policy Number 9523.13 at \P 7(A). Copy on file with authors. ²² 44 CFR 206.224(a).

²³ *Id.* (in pertinent part).

When it is in the public interest for an eligible applicant to remove debris from private property in urban, suburban and rural areas, including large lots, clearance of the living, recreational and working area is eligible except those areas used for crops and livestock and unused areas.²⁴

This singling out of private property, though not seeming to imply any different approach from public property, does indicate that FEMA intends to treat private property differently from public property. In addition to this oddity, the "may provide" language in 44 CFR 206.224(a) gives Regional FEMA Directors broad discretion to condition the award of reimbursement funds for local governments, complicating the cleanup process by ensuring that no cleanup will follow the exact same rules for each disaster. As a practical matter, even though the Regional Directors have latitude to vary, the requirements are often the same.

Pending approval by a Regional Director, cleanup on public property is easily reimbursable. Generally, this should be broadly approved, with reimbursement proceeding according to a fixed schedule, at the outset of cleanup operations, allowing for debris removal from public roads and waterways, among other things, to proceed post-haste.²⁵ Thus, although local governments should not rely on history to assure them that they will be reimbursed for expenditures for cleanup on public property (due to the broad discretion granted to the Regional Directors to provide such assistance), there is a reasonable expectation that, pursuant to a declared emergency, such reimbursement will be authorized by FEMA.²⁶

The same situation does not exist for debris removal from private property. Generally, FEMA requires private property owners to utilize their own resources to

²⁴ 44 CFR 206.224(b).

²⁵ See e.g., FEMA-322, supra, note 14 at 45.

Abbott also cautions that municipalities should wait for FEMA clearance for debris removal to ensure that funds are available. Abbott, *supra*, note 5 at 482-483.

cleanup their private property.²⁷ The assumption behind this approach is that, unlike local governments who might be self-insured or whose operation is necessary for the continued function of an area, damage to private property is typically insured and its rapid cleanup is not always necessary to ensure the economic and social viability of an area.²⁸ Basically, FEMA does not want to pay if someone else will pay. However, FEMA does contemplate that local governments may, under extreme circumstances, have to pay for (and thus will need reimbursement for) the cleanup of certain private property. FEMA recognizes this possibility thus:

[i]f debris on private business and residential property is so widespread that public health, safety, or the economic recovery of the community is threatened, the actual removal of debris from the private property may be eligible...Debris removal from private property shall not take place until the State or local government has agreed in writing to indemnify FEMA from a claim arising from such removal and obtained unconditional authorization to remove the debris from private property.²⁹

So, what then is the problem? Why is it so complicated to initiate cleanup operations on private property? The answer to this lies in the policy statements issued by FEMA following a disaster that set forth the requirements for obtaining approval for FEMA reimbursement for conducting debris operations of private property.³⁰ Part of the boilerplate language of these agreements require that all local laws must be complied

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²⁷ FEMA 322, *supra*, note 14 at 46.

²⁸ *Id.* An example of private property debris removal that would not be essential for the recovery process of a community to proceed would be a few fallen tree limbs in the yards of private residences. Such debris may be obnoxious to the landowners, but its removal is by no means essential to the function of society. ²⁹ *Id.*

 $^{^{30}}$ See e.g., FEMA, Recovery Division Policy Number 9523.13. This document notes that local laws must be complied with in order for approval to be granted. *Id.* at $\P7(C)$. It also notes that the affected states' attorneys general must prepare a document that discusses and analyzes the constitutional and statutory authority for right-of-entry, demolition, and debris removal on private property in the event that the local and state laws cannot be complied with due to extenuating circumstances. *Id.* at $\P7(F)$. Copy on file with authors.

with in the execution of debris cleanup. The punishment for noncompliance is that the local governments will not be reimbursed by FEMA for their share of the expenses.³¹

Such a reality can be a deal-breaker for local governments that seldom have the wherewithal to cover the full expenses of this debris removal. Thus, in order to secure reimbursement funding, all local laws, in addition to state and federal laws, must be complied with.

What is meant by compliance with local laws? Generally, this means that any local or state laws that set forth the due process procedures for right-of-entry onto private property as well as for condemnation or demolition of private structures must be obeyed.³² In short, in an effort to facilitate the rehabilitation of a battered area, governments cannot run roughshod over the rights of citizens to their private property. As is discussed more fully below, in times of emergency, these requirements can be burdensome, if not impossible, to comply with and difficult to navigate with the precision and expediency necessary to return life to a state of normalcy.

There is a real tension here. On the one hand, dire circumstances call for quick and decisive leadership to clean up the mess left by massive disasters so that the rebuilding process can commence. In that sense time is of the essence. Without prompt action, there is a real danger that recovery in a devastated area may never occur. On the other hand, FEMA requires that unless due process is afforded to victims, it will not reimburse local governments for the cleanup. The linchpin of this policy is to guarantee that people who have already been victimized by disasters are treated fairly and even-handedly by their governments and are compensated for any taking that may occur. The

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³¹ See e.g., FEMA 322, supra, note 14 at 90 (noting that "FEMA may be required to deobligate funds after the initiation of a project" for failure to comply with certain laws).

³² See FEMA, Recovery Division Policy Number 9523.13 and the accompanying discussion in footnote 30.

irony is, however, that these requirements have the effect of bringing the entire process to a standstill. Giving notice to every landowner whose property has been impacted is often impractical because, in many instances, it is difficult to locate the landowners in the aftermath of massive disasters. Additionally, the cost of following state statutes or local ordinances that typically apply in condemnation/demolition situations is often unduly expensive. The central question in this instance becomes: Is there any way to relax due process requirements in a disaster to permit the cleanup and recovery to begin? The answer to that question is in the affirmative. But any disaster debris programs set in place in advance of inevitable calamities must follow a strict set of triggering mechanisms and roll-back procedures so that they cannot be misused in either times of calm or after the emergency has abated and compliance with normal due process is once again possible.

Governments contemplating the implementation of *ad hoc* debris management programs are cautioned that in no way can they be authorized to summarily dispense with due process requirements in an emergency or any other situation. Some measures of process must always be afforded. The entire purpose of such programs is to provide a means for streamlining existing methods for conducting demolition and debris removal on private property, while maintaining as many due process protections as possible and continuing to comply with all state and local laws.

Such streamlining does not constitute authorization for the haphazard or indiscriminate demolition of structures that threaten public health. We strongly recommend that the determination as to whether to demolish structures or to enter private

³³ See e.g., Anon., *A Statistical Look at the Aftermath of Hurricane Katrina*, AP STATE & LOCAL WIRE, Sept. 10, 2005 (noting that more than one million people were forced to leave their homes).

property be made on a structure-by-structure or tract-by-tract basis. This is especially true in the case of the historic properties discussed *infra*. Each determination to enter or to alter or demolish structures must be undertaken with due respect and sensitivity to the rights and interests of those affected by such action. Ultimately though, the final decision regarding debris removal, right of entry, and demolition rests with the local authorities.

III. Right-of-Entry, Debris Removal, and Demolition

Although common sense would dictate that the initial action triggering the ability to receive federal reimbursement for debris removal would be the disaster, in typical bureaucratic style, the federal government requires a "major disaster" declaration for the affected areas from both the President and the relevant state governor.³⁴ If a state does not get the Presidential declaration, it does not have access to FEMA debris reimbursement. It is as simple as that.³⁵ That being said, in disasters requiring federal assistance, it would be unusual for the President not to make such a declaration.

One problem that was experienced in Louisiana after Hurricane Rita was the declared disaster areas were not wide enough to capture all of the areas that had been substantially impacted by the storm.³⁶ There were reports of massive damage outside of the emergency zone,³⁷ putting the citizens in those areas in a situation where they could

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³⁴ FEMA 322, *supra*, note 14 at 2-3. *See also*, Abbott, *supra*, note 5 at 470-471. Abbott also notes that it is imperative that what the President issues is a "major disaster" declaration and not merely an "emergency" declaration, as the former allows FEMA to provide more comprehensive assistance under the PA program. *Id*

³⁵ *Id.* Under the Stafford Act, FEMA is not authorized to provide assistance without a Presidential declaration. 42 USC 5170, *et seq*.

³⁶ Bob Anderson, *Livingston Finally Declared Federal Disaster Area*, THE ADVOCATE, Oct. 16, 2005, 3-B (noting the problems of access to federal assistance for Livingston Parish as a result of having been left out of the declared emergency areas following Hurricane Rita).

³⁷ *Id*.

not get FEMA assistance.³⁸ Local governments need to be aware of the possibility of such an oversight on the part of politicians, because debris cleanup operations in those areas will not be eligible for reimbursement, leaving the locals to bear the burden of those costs alone. The lesson to be learned from this is that local leaders need to ensure that their state and federal counterparts are aware of the devastation that their area has endured in order that they are not left out of federal assistance programs when the cleanup begins.

With the declaration of a "major disaster" by the President, FEMA will issue a local disaster-specific policy for debris removal.³⁹ After this, the state and local governments will be presented with indemnification agreements that they must enter into before FEMA will authorize reimbursement for cleanup activities.⁴⁰ It is from these documents that the rules regarding how a specific debris operation must be conducted emerge. We cannot underscore enough the necessity that the provisions of these documents be complied with by state and local governments. The penalty for failing to do so is severe. Although FEMA liberally writes checks to facilitate cleanup and reconstruction on the front-end of a disaster, if the Inspector General later finds discrepancies or a failure to adhere to the confines of the agreements, state and local

³⁸ "The damaged facility must be located, or the work must be performed, within the designated area to be eligible for public assistance." FEMA 322, *supra*, note 14 at 24. This problem has also been discussed by Abbott, *supra*, note 5. In discussing the scope of a disaster declaration, Abbott notes that

[[]i]f a county is included in the declaration for purposes of the public assistance program, then all public entities in that county, and certain nonprofit ones, who have incurred damage from the disaster event are eligible for federal disaster grants. If a county is not included, or a particular assistance program is not activated for that county, then no federal assistance is available, without regard to the scope of damage suffered by any particular entity.

Id. at 472.

³⁹ See e.g., FEMA Recovery Division Policy No. 9523.13.

⁴⁰ FEMA-322, *supra*, note 14 at 46.

governments might very well find themselves stuck with a bill from the federal government for reimbursement.

Another cautionary note is that state and local governments must wait for FEMA's approval to begin debris removal from private property.⁴¹

FEMA will work with each State to designate those areas where the debris is so widespread that removal of the debris from private property is in the "public interest" under 44 C.F.R. § 206.224 and thus, eligible for FEMA reimbursement ⁴²

This example from Louisiana's experience with Hurricane Katrina clearly demonstrated the unique nature of cleanup operations on private property and the need to await guidance from FEMA before proceeding with such activities.

In extreme situations, debris removal may very well require the complete demolition of a private structure in order to ensure the protection of public health and safety. At a minimum, it will require entry onto private property, which could constitute a trespass without the proper waivers. However, we caution that the demolition of structures should be a last resort in the recovery process, only used when no other option is available. Additionally, to the extent that private owners can be identified and located in a timely manner, we urge the local authorities to secure waivers of right-of-entry, debris removal, and demolition from them. However, in light of the reality that disasters often lead to mass exoduses of local populations, making property owners difficult to locate, 43 the following analysis provides for methods whereby local authorities can

⁴¹ See Abbott, supra, note 5 at 482-483 (cautioning municipalities to await FEMA clearance before commencing debris operations).

⁴² FEMA Recovery Division Policy No. 9523.13 at ¶2A.

⁴³ See e.g., Michael Graczyk, Legacy of Hurricanes Katrina and Rita is Thousands of New Texans, AP STATE & LOCAL WIRE, December 23, 2005 (noting the mass exodus of New Orlenians to Texas in the wake of Hurricane Katrina).

expedite the debris removal and demolition process while continuing to comply with the law.

Basically, in order to comply with FEMA regulations, debris removal and entry onto private property must be accomplished according to established municipal ordinances. This basic tenet raises two major problems: (1) many localities affected by a disaster may not have municipal ordinances that grant them a right-of-entry onto private property or assist in expediting the demolition or debris removal process for the purposes of abating or removing public health or safety hazards or to mitigate imminent threats to property; (2) where such ordinances do exist, they are often burdened with time delays for notice and other due process matters that would substantially hamper the necessary expediency of recovery efforts.

Because of these shortcomings in local laws, we strongly encourage all state and local governments to enact provisions now that will be triggered only upon the declaration of a state of emergency that will provide for right-of-entry, debris removal, and demolition in the interests of protecting the public's health and safety. In this vein, we have created a proposed statute that covers many of the problems identified in this article. That proposed statute may be found in Appendix 1. However, recognizing that this charge will probably go largely unheeded until it is too late, we here propose the following scheme, based on Louisiana law⁴⁵ and United States Supreme Court precedent, to provide for dealing with inadequate or absent local laws in the event of a disaster.

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⁴⁴ FEMA, *Public Assistance Debris Management Guide*, *FEMA-325*, 35 (FEMA 1999) (hereinafter, "FEMA-325").

⁴⁵ It is expected that other jurisdictions will likely have the same type of jurisprudence. *See e.g.*, *Friedman v. City of Los Angeles*, 52 Cal.App.3d 317, 125 Cal.Rptr. 93 (Cal. App. 1975) (noting that due process for demolition may be relaxed in emergency situations with the following language: "[i]n the absence of an absolute emergency, essential elements of due process of law include notice and opportunity to be heard." *Id.* at 321. *See also, Thain v. City of Palo Alto*, 207 Cal.App.2d 173, 24 Cal.Rptr. 515 (Cal. App. 1962)

Speaking directly to the issue of debris removal or property demolition, the Louisiana jurisprudence provides ample support for municipal activity undertaken in the best interests of the general public that would otherwise constitute a derogation of due process if not occurring during an emergency situation. In 1882, the Louisiana Supreme Court noted, with respect to the police power, that,

[t]here are cases where it becomes necessary for the public authorities to interfere with the control by individuals, of their property, and even to destroy it, when the owners themselves have fully observed all their duties to their fellows and to the State, but where, nevertheless, some controlling public necessity demands the interference or destruction. Strong instances exist where it becomes necessary to take, use or destroy the private property of individuals, to prevent the spreading of a fire, the ravages of pestilence, the advance of a hostile army, or any other great public calamity. 46

Thus, it is well settled that the activities of debris removal and demolition contemplated by the local governments supercede the interests of individual citizens during this state of emergency as the activities are in the best interests of the people.⁴⁷ As has been shown, legal precedents support the suspension of due process in exigent circumstances; however, there is no guarantee that this authority to suspend due process insulates municipalities from lawsuits for takings of private property.

In situations where no such municipal ordinances exist that would grant a rightof-entry or a right to demolish, local laws cannot be followed because no law exists,

⁽similarly noting that "[i]t is of course long and well recognized that as a general rule municipalities have the power to provide for the summary abatement of nuisances by municipal officials, particularly where an emergency exists."). Id. at 189. See also, City of Rapid City v. Boland, 271 N.W.2d 60 (S.D. 1978) (commenting on the process that is due in emergency situations thus: "the destruction of sound and substantial buildings has been allowed without due process and without compensation where the destruction or damage was, or reasonably appeared to be, necessary to prevent an impending or imminent public disaster from fire, flood, disease, or riot") (internal citations omitted). Id. at 66.

⁴⁶ Bass v. State of Louisiana, 34 La. Ann. 494 (1882) (emphasis added). This case has also been cited in more recent Louisiana Supreme Court cases as authority for justifying takings without compensation. See Avenal v. State, 886 So.2d 1085, 1106 (La. 2004).

⁴⁷ See also, Givens v. Town of Ruston, 55 So.2d 289 (La.App. 2 Cir. 1951) (noting that tree limb removal from privately-owned trees following a wind storm was in the best interests of the public and trumped the plaintiffs property interests in the trees).

making compliance with FEMA requirements impossible.⁴⁸ Therefore, in instances where local ordinances have not already been enacted, the local governing authority must create them before reimbursable work can commence. Many states' statutes provide for the creation of such new ordinances.⁴⁹

In Louisiana, for example, the legislature enacted La. R.S. 33:1236 which defines the powers of local governing authorities. Several of the sections of this title deal with the authority of local governing authorities to enact ordinances prohibiting public nuisances, specifically—regulating unhealthful growths, trash, debris, refuse, or discarded or noxious matter, and trash and debris, and relating to the repair and condemnation of buildings, dwellings, and other structures that have become derelict and present a danger to the health and welfare of residents.⁵⁰ They also give the local governing authorities the power to enact ordinances regulating both debris removal from private property and the condemnation and demolition of structures for public health and safety reasons.⁵¹ We suggest that all states identify the legal scheme for creating such laws in advance of their urgent need in a disaster situation and understand how to navigate and apply them.

Alternatively, in Louisiana, and likely as well as in other jurisdications, legal provisions exist that permit local leaders to unilaterally accomplish the above-noted goals. For example, La. R.S. 29:737 grants municipal chief executive officers the authority to issue orders "to preserve the public peace, property, health, or safety within

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⁴⁸ What is meant by this is that FEMA does have basic right-of-entry and demolition requirements that must be followed in order to ensure reimbursement. Without a municipal-level process for following such requirements, there is no clear way to comply with the FEMA mandates.

⁴⁹ See e.g., Ks. St. § 17-4759.

⁵⁰ See e.g., La. R.S. 33:1236(21)(b)(1).

⁵¹ See generally, La. R.S. 33:1236.

the municipality." Under this authority, it is possible that the municipal chief executives have the power to issue orders accomplishing the same goals as the above discussed ordinances. However, because such an approach would require a new order for each disaster and would not be in place when a disaster occurred, we suggest that the above-discussed approach for creating municipal ordinances is a more secure method of ensuring compliance with the law to assure FEMA reimbursement. Additionally, the former approach avoids the possibility that an elected official may not want to institute such measures for political reasons when they are urgently needed. The former approach also likely avoids the numerous *ultra vires* attacks on government officials that have been instituted in Louisiana in the wake of Hurricanes Katrina and Rita.

We also recommend that such ordinances or orders be narrowly tailored to fit the specific needs of the local government for the effects of potential disasters that are unique to a given area so as to minimize the use of what would be a substantial impairment of due process rights under nonemergency conditions. Additionally, in enacting such ordinances, the governing authorities of the affected local governments must comply with the standard laws and practices for the creation of ordinances. Failure to so comply could result in the federal government's declaring local ordinances not in accordance with the FEMA reimbursement requirements. This, of course, would thwart the attempts of local governments to obtain FEMA reimbursement for their work later.

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⁵² This is based on the presumption that it might be politically unpopular for a municipal chief to unilaterally order the demolition of private structures, while the enacting of ordinances to do so by a municipal legislative body might not present such a political gamble.

⁵³ See e.g., G&T Investments of LA, L.L.C. v. Jefferson Parish, et al., Docket No. 537681, Nineteenth Judicial District Court, Section 23, East Baton Rouge Parish, Louisiana, filed Nov. 2, 2005 (claiming that various state and local officials exceeded their authority in the issuance of emergency orders following Hurricane Katrina).

There are instances where local ordinances do contain some language that would permit government agents or their designees to enter private property. In instances where such authority may exist, there are still concerns about providing due process to the affected landowners if their property is to be substantially altered or demolished in order to protect the public health and safety.

The suspension of constitutional requirements, as imbedded and reflected in local ordinances, must be addressed here as well. First, if ordinances do exist that are sufficient to satisfy the reimbursement requirements of FEMA, then the notice and due process delays must sometimes be circumvented in emergency situations. The reason for circumventing these due process protections is simple: It may be impossible to provide adequate notice to affected landowners before entering or altering their private property in an expedient enough manner to get a locality back in working order quickly. Indeed, FEMA, in Policy No. 9523.13, ¶7B, recognized that such circumstances existed in certain areas in south Louisiana, making compliance with the normal condemnation and abatement procedures impractical.

In order to return the affected areas to some semblance of normalcy and or operability, it is necessary that debris removal and health-hazard abatement begin post haste following a disaster. In the interests of accomplishing these goals, it may be impractical, if not completely impossible, to comply with the typical due process requirements associated with right of entry and/or condemnation proceedings. As a basic notion, the law does not require anyone to perform vain and useless acts.⁵⁴ In some situations, attempts to contact all of the affected residents of a disaster area in order to gain right-of-entry waivers or to provide them with notice and hearing, or both, before the

⁵⁴ See e.g. Moore v. St. Paul Fire and Marine Insurance Company, 251 La. 201, 203 So.2d 548 (La. 1967).

removal of debris from their property could indeed represent a vain effort on behalf of local governments and would unduly hamper recovery efforts. Thus, in rare instances where notice is not possible, and only in instances where a hearing is not practical, such measures must be circumvented.

Persuasive legal authority from various jurisdictions around the country exists that support the ability of a governmental entity to bypass the due process requirements of notice and hearing in the wake of a disaster.⁵⁵ By FEMA's own admission, it is not always possible to obtain the necessary waivers prior to commencing such work.⁵⁶ In such instances, FEMA recommends that local authorities document their reasons for not obtaining such waivers.⁵⁷

The most notable case that allows for the suspension of due process requirements under emergency circumstances is North American Cold Storage Co. v. Chicago. 58 In North, the United States Supreme Court held that if a public health hazard justifies immediate action, governmental actors can bypass the need for preaction hearings to vet out the interests of the interested parties. The scenario in this case is analogous to the situation following many disasters, where the potential threat to public health caused by hazards on private property necessitates a quick response that may be hampered in the likely event that the private owners may not be servable or even locatable for some time, owing to the circumstances of the evacuations. Similarly, in Hall v. McGuigan, 59 the Delaware Superior Court found that if following due process procedures prior to a taking

⁵⁵ See e.g., Friedman v. City of Los Angeles; Thain v. City of Palo Alto; City of Rapid City v. Boland; Bass v. State of Louisiana, supra, note 46. See FEMA-325, supra, note 44 at 36.

⁵⁸ 211 U.S. 306, 29 S.Ct. 101 (1908)

⁵⁹ 743 A.2d 1197 (1999).

was impractical due to exigent circumstances, the application of these procedures on a *post-hoc* basis was sufficient.⁶⁰ These cases stand for the premise that, even in situations where compensation may be necessary, the notice and comment period may be suspended until after the debris removal or demolition has occurred and the emergency has abated. More to the point, the Ninth Circuit Court of Appeals has stated that, "[s]ummary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process."⁶¹

The cases noted above clearly provide for a suspension of due process and notice requirements in the event of a disaster. Additionally, the emergency declarations that will exist prior to the commencement of debris operations further add to the immediacy for rapid responses to public health and safety hazards. In light of the foregoing, in local governments where ordinances exist for right-of-entry and demolition/debris removal from private property, we recommend that the local leaders issue an executive order that suspends notice and due process rights related to right-of-entry and demolition matters. We caution that such a suspension should be narrowly tailored to meet the immediate needs of the particular disaster recovery and that it should be set to expire within a reasonable time.

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⁶⁰ See also, Srb v. Board of County Com'rs, Larimer County, 601 P.2d 1082 (1979).

⁶¹ Armendariz v. Penman, 31 F.3d 860, 866 (1994). See also, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73 (1981); U.S. v. Caltex (Philippines), Inc., 344 U.S. 149, 73 S.Ct. 200 (1952); Customer Co. v. City of Sacramento, 10 Cal.4th 368 (Cal. 1995); Miller v. Campbell County, Wyo., 722 F.Supp. 687 (D.Wyo. 1989); Rose v. City of Coalinga, 190 Cal.App.3d 1627 (Cal.App. 5 Dist. 1987).

IV. Vehicles as Debris

In major disaster situations it is not unusual for cars, boats, and other vehicles to be moved from their normal places, sometimes landing them on private property.⁶² Dealing with these objects presents different problems from other constituents of the debris stream. For one, the private property that these objects come to rest on may not be the property of their owners, raising questions about entry onto one party's property to recover another party's debris. Another problem, once again, is notice. Who is the proper party to receive notice of a salvaged vehicle?

Many states have specific laws regarding abandoned vehicles,⁶³ but they seldom contemplate disaster situations. However, these laws contemplate scenarios whereby the title owner of the vehicle intentionally abandons the vehicle, never intending to return to retrieve it. When the forces accompanying a disaster are the cause of a vehicle's transfer to the property of another, can the vehicle truly be considered abandoned? We think not. Rather, the owners of these vehicles have simply yet to be determined.

Thus, the typical procedures that apply to dealing with abandoned vehicles should not apply in the removal of these items from public or private property. Additionally, many of these vehicles are covered by insurance policies or other lien holders and there is little doubt that any person or entity having an interest in the vehicles would want to identify these movables prior to their final disposition.

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⁶² See e.g., Anon., Hurricane Katrina Crushes 350,000 New Orleans Cars, NEW ORLEANS CITYBUSINESS, Sept. 23, 2005 (noting that thousands of vehicles were destroyed and moved by Hurricane Katrina). See also, Steve Ritea, Cars, Boats Can Be Hauled Off For Free; FEMA to Finance Removal of Vehicles, THE TIMES-PICAYUNE, Oct. 26, 2006, 1 (noting the numerous vehicles that ended up on private property following Hurricane Katrina).

⁶³ E.g., Ak. St. § 28.11.010 et seq.; 21 Del.C. § 4401 et seq.; Hi. St. § 290-1 et seq.

As a basic matter, vehicles are included in FEMA's general definition of debris.⁶⁴ Thus, the removal of vehicles from private property falls squarely under the debris removal discussed above. As with all of the debris located on private property that was discussed above, there must be an "immediate threat" to life, public health and safety, or public or private property in order to justify the public entity's removal of the debris, including vehicles, and ensure FEMA reimbursement for this action.

Vehicles, including but not limited to, cars and boats present a significant threat to the public health and safety as well as to the environment, necessitating their expedient removal from wherever they are located. These threats include posing a safety hazard to children who might use the derelict vehicles as playgrounds, rusting automobiles representing a health hazard to those who may come into contact with them as they repopulate the devastated areas, and the damage that such debris is sure to cause to the underlying property through the leakage of hazardous fluids into the surrounding ground or water. The environmental and health hazards of these vehicles have been noted by the Louisiana Department of Environmental Quality (DEQ). 65 The hazards from automobiles include.

gasoline and diesel fuel, refrigerants, lubricating oils, mercury ABS switches, mercury convenience switches, lead acid batteries, brake and transmission fluid, antifreeze, and tires.⁶⁶

The hazards from boats include,

gasoline and diesel fuel, refrigerants, lubricating oils, mercury bilge switches, propane tanks, large appliances, lead acid batteries, transmission fluid and electronics, such as, radar sets, radios, GPS units, and depth finders.⁶⁷

⁶⁴ See, FEMA-325, supra, note 44 at 28; FEMA-322, supra, note 14 at 45.

⁶⁵ DEO. Hurricane Katrina Debris Management Plan (DEQ 2005).

⁶⁶ *Id.* at 6. 67 *Id.* at 7.

The removal of such vehicles from private property, in addition to advancing the health, safety, and environmental goals noted above, also substantially advances a return to normalcy for both vehicle owners and their insurers who are awaiting the identification and location of their property.

In furtherance of the goal of protecting the public's interests, and thereby complying with the requirements to secure FEMA reimbursement for recovery work, we note that the expedient removal of vehicles from both public and private property reduces the chance that the vehicles will be acquired by individuals who would attempt to mask the damaged nature of the vehicles and sell them as used vehicles to unsuspecting consumers. Thus, entry onto private land to remove vehicles left there by disasters is well within the scope of activities sought to protect the public's interests, health, safety, and the environment.

As for notice and other due process rights, the above procedures for other types of debris apply to vehicles as well. Some measure of *post-hoc* notice and hearing is due the underlying property owners and, once the owners of the vehicles have been identified, notice to them is necessary as well. Additionally, because most vehicles will be insured, it is advisable not to dispose of them once the owners have been notified. Instead, the vehicles should be held in a staging area where insurance adjusters can gain access to assess claims.⁶⁹

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⁶⁸ See e.g., Greg Thomas, Car Trouble; In Katrina's Wake, Abandoned Cars By The Acre Were A Long-Term Blight. But Many Thousands Were Stolen, Chopped or Crushed, THE TIMES-PICAYUNE, Aug. 13, 2006, 1 (noting that it is suspected that numerous cars damaged by Hurricane Katrina may have been stolen and sold as used cars in other states).

⁶⁹ See e.g., Anon., *Hurricane Katrina Crushes 350,000 New Orleans Cars*, supra, note 62 (noting that the vehicles destroyed by Hurricane Katrina will be taken to staging areas for insurance inspection).

Once a disaster situation has abated, vehicles can continue to present a problem for governmental entities. One example of such a situation arose more than a year after Hurricanes Katrina and Rita in Louisiana. Louisiana's DEQ and Department of Public Safety ("DPS") were charged with collecting and disposing of vehicles that had entered the debris stream as a result of these storms. 70 Pursuant to Louisiana Motor Vehicle and Traffic Regulation laws, La. R.S. 32:471, et seq., DEQ sent registered or certified letters, return receipt requested, "to the last known owner of the vehicles at his last known address informing him to remove the vehicle within ten working days from date of receipt of notice."⁷¹ If the vehicle is not removed by the title owner in accordance with these laws, the motor vehicle may be removed and disposed of by DPS, the municipality, or a parochial authority.⁷²

Although the State agencies complied with the relevant laws, likely due to the massive population movements following the storms, the varied responses received did not make compliance with the laws seamless. The replies or responses to the certified letters to the last known owners of the vehicles held in the various staging areas discussed above included: (1) a response; (2) no response; (3) the certified letter was returned as undeliverable; and (4) in some circumstances, the last known owner could not be identified due to missing VIN numbers on the vehicles. The last three categories present problems not contemplated by the DPS laws noted above.

⁷⁰ Anon., Storm Cleanup Falls to La. DEQ: Huge Job Involves Homes, Cars, Cities, THE ADVOCATE, Oct. 31, 2005, 2-B (noting DEQ's massive cleanup tasks following the 2005 storms, including the responsibility for vehicles).

⁷¹ La. R.S. 32:475(A). ⁷² La. R.S. 32:475(B).

Ultimately, the Louisiana Legislature had to create special legislation to deal with the latter three categories.⁷³ This bill would have enacted La. R.S. 32:477 to provide for a streamlined procedure for the handling and disposal of motor vehicles seized during a gubernatorially declared state of emergency.⁷⁴ The bill would have established a procedure whereby vehicles with no responses to the certified letters noted above can be disposed of by the governmental authority holding such vehicles.⁷⁵ Additionally, the bill would have ensured that vehicles damaged by disaster events will have their titles properly flagged to serve as a warning to potential buyers that the vehicle is unfit for operation.⁷⁶

We suggest that other jurisdictions compare their legislation to the recent Louisiana attempt to pass a law on this matter to assess whether action should be taken preemptively to avoid the post-Katrina/Rita problems with vehicles faced by the Louisiana agencies. If such procedures are lacking, we further suggest that the Louisiana bill be used as a model and that other jurisdictions strive to ensure that similar mechanisms are in place prior to an actual disaster. Note that, although this legislation would have provided for proper notice procedures, it took Louisiana nearly eighteen months to attempt to cure the legislative gap exposed by the 2005 hurricanes. Even with this attempt, because the bill did not pass, no legislation yet exists in Louisiana to close this gap. Such a situation is avoidable by a proactive review and revision of relevant legislation in other jurisdictions.

⁷³ See, S.B. 27, Louisiana Second Extraordinary Legislative Session, 2006. It should be noted that the bill did not pass.

⁷⁴ *Id.* at Section 1.
⁷⁵ *See generally*, S.B. 27, *supra*, note 73.
⁷⁶ La. R.S. 32:477(D)(2).

V. Human Remains as Debris (No, This is Not a Joke)

A. Problems With Unearthed Remains

Although it is commonly held that, once buried or otherwise interred, a human body will remain in a state of perpetual repose forever, this is far from reality. Such a belief is merely a manifestation of our own culture's desire for death to be out of sight and out of mind as quickly as possible and what better way to do that than to perpetuate the myth that once the funeral is over, so are our worries about what has happened to the remains. Natural disasters, among other forces, have proven, on numerous occasions, that human remains can and will become disinterred and sometimes they will be forcibly moved to a new location. When this occurs, as we sadly learned during our experience with Hurricanes Katrina and Rita, FEMA rules merely classify these remains as a form of debris. Admittedly, FEMA does provide for some amount of identification to be done on disinterred human remains, but not much. It is apparent, though, that the classification of remains as debris is pervasive within FEMA in a Sapir-Whorfian manner.

⁷⁷ Edwin Murphy, AFTER THE FUNERAL: THE POSTHUMOUS ADVENTURES OF FAMOUS CORPSES, ix-xii (Barnes & Noble 1998) (noting the proclivity of folks to disinter the remains of famous individuals over time); see also, Ryan M. Seidemann, Sisters of Destruction: Hurricanes Katrina and Rita Wreak Havoc on Southern Louisiana and Its Cemeteries, 1(3) EPITAPHS 22 (2006) (noting that, among the impacts of the 2005 hurricanes in Louisiana was the disinterment of numerous previously deceased individuals from their "final" resting places).

⁷⁸ See Peter Metcalf & Richard Huntington, CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL, 200-204 (Cambridge University Press 1995) (describing the history of America's fear of death and how it has evolved into our collective ignorance of the body after death).

⁷⁹ See e.g., Seidemann, supra, note 77.

See e.g., Anser Analytic Services, Inc., LOUISIANA FAMILY ASSISTANCE CENTER CEMETERY REINTERNMENT ASSESSMENT, 4 (ANSER 2006) (noting that, because the Stafford Act does not contain language to deal with cemetery reinterment, such matters have "been dealt with by analogy to the rules, policies and procedures applicable to debris removal." *Id.* [emphasis in original]).

⁸¹ FEMA, Hurricanes Katrina and Rita, FEMA-DR-1603/1607-LA Information Sheet #007 at 2 (FEMA 2006).

⁸² The theory referenced here is a concept in linguistic anthropology, known as the Sapir-Whorf Hypothesis, that basically holds that language constrains thought and action. Stanley R. Barrett, Anthropology: A Student's Guide to Theory and Method, 20 (Univ. of Toronto Press 1997). The

authority to treat these deceased human beings as nothing more than discarded refrigerators. The practical effect of this is that remains are subjected to minimal identification analysis and then pushed off on the local governments from whence they came for handling. No funding is provided for DNA analysis, intensive forensic anthropological analysis, or reburial in anything other than a public cemetery (regardless of the cemetery of origin).⁸³

Aside from the fact that we here urge FEMA to set up a new classification for human remains and to pay those remains some measure of respect, there is little guidance available to local governments trying to cope with warehouses full of pine-boxed human remains. One possibility that we suggest is that states play a similar semantics game. With respect to reburial, because FEMA will only pay for reburial in a "public cemetery," we suggest that all states statutorily redefine "public cemeteries." We propose the following language to accomplish this goal.

"Public cemetery" means a cemetery owned and operated by a political subdivision. The term "public cemetery" also includes abandoned private cemeteries for which a political subdivision has assumed legal, operational, and maintenance responsibility, whether explicitly or implicitly. The term "public cemetery" also includes any privately owned cemetery that is open to the public for the purposes of interment subject only to their ability to pay the fees of burial and other necessary expenses.

theory was based on Benjamin Lee Whorf's observations of workers carelessly handling fuel drums labeled as "empty," when, in fact, they were anything but empty. The workers were lulled into a false sense of safety by the "empty" label on the drums when, in fact, the drums contained highly explosive fumes that were much more dangerous than the liquid fuel that made up their original contents. In this situation, language (i.e., "empty") directed the workers to act a certain way towards the drums. Benjamin Lee Whorf, The Relation of Habitual Thought and Behavior to Language in John B. Carroll (ed.), LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF, 135 (Technology Press 1997). Similarly, at FEMA, because human remains are labeled as debris, they are treated with about as much respect. This helps to explain the attitude that lets hundreds of unidentified human remains that were disinterred during Hurricanes Katrina and Rita sit in warehouses with little or no effort to return them to rest. Why bother? It's just debris.

⁸³ See FEMA Information Sheet #007, supra, note 81.

The determining factor for the classification of a cemetery as "public" or "private" for the purposes of Stafford Act compliance is based on the cemetery's "use" rather than its "ownership." A cemetery can be privately owned but still be classified as a "public cemetery" if it consists of burial plots or sites that are or were sold to the public without restriction other than costs.

The functional significance of this definition, which is supported by some jurisprudence, ⁸⁴ is that all cemeteries that have open burials (i.e., anyone from the public who can pay can be buried there) will be considered "public" whether publicly or privately owned. It is hoped, though it has not yet been tested, that this semantic difference will allow FEMA to allocate funding for reburial even in privately-owned cemeteries.

As for FEMA's refusal to provide for or to conduct adequate identification analyses, there is no clear answer to solving this problem. Legislative action is needed on a federal level in this respect. Aside from a change to FEMA's operating procedure and regulations forced by legislative action, there is little hope for a change in this policy.

B. Archaeological Concerns with Unearthed Remains

Following Congress' enaction of the Native American Graves Protection and Repatriation Act (NAGPRA)⁸⁵ in 1990, virtually every state in the Union created

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This piece of legislation, which was the culmination of more than twenty years of lobbying on the part of the Native American community, set in place a mechanism for the return and reburial of Native American skeletal remains and sacred objects from museum and university collections across the United States.

Ryan M. Seidemann, Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries, 64 LA. L. REV. 545, 546 (2004). See also, Ryan M. Seidemann, Time for a Change? The Kennewick Man Case and Its Implications for the

 ⁸⁴ See e.g., Provident General Corporation v. AMI, Inc., 33 B.R. 241, 244 (W.D. La. 1983).
 ⁸⁵ 25 U.S.C. 3001 et seq.

NAGPRA-like laws to protect the sanctity of human remains and burial sites not contained within traditional cemetery confines.⁸⁶ Both the federal and state versions of these laws must be considered in disaster situations.

The Louisiana version of NAGPRA, passed in 1992 and known as the Louisiana Unmarked Human Burial Sites Preservation Act (LUHBSPA)⁸⁷ is fairly representative of the state NAGPRA-like laws. The law was enacted to protect "prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites"⁸⁸ from land development and pothunters.⁸⁹

This law, and others like it around the nation, becomes relevant to debris situations when human remains that are not identifiable as having derived from a traditional cemetery⁹⁰ end up, through the destructive forces of disasters, as a part of the debris stream. When this occurs, certain extra requirements may be imposed on those dealing with debris.

Under LUHBSPA,

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Future of the Native American Graves Protection and Repatriation Act, 106 W. VA. L. REV. 149, 155-158 (2003) for a discussion of how NAGPRA works and what remains it applies to.

⁸⁶ See e.g., La. R.S. 8:671 et seq. For a review of such state laws, see generally, Michael T. Olexa, Tracey L. Owens & Nancy C. Hodge, No Grave Like Home: Protecting the Deceased and Their Final Resting Places from Destruction Without Going Six Feet Under, 11 DRAKE J. AG. L. 51 (2006) (discussing Florida's protections for unmarked graves); see also, Adam Goldberg, Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects, 53 UCLA L. Rev. 1031, 1053 (2006) (noting protections for burials and associated artifacts in Louisiana, Indiana, Washington, and Alabama).

⁸⁷ La. R.S. 8:671 *et seq*.

⁸⁸ La. R.S. 8:672. *Cf.* NAGPRA, which only applies to Native American remains.

⁸⁹ A pothunter is defined by the Oxford English Dictionary as "[o]ne who finds or obtains objects of archaeological interest or value, esp. by unscientific or illicit methods, and for the purpose of private collection or profit."

⁹⁰ Actually, LUHBSPA applies to cemeteries not "operated under the authority of the Louisiana Cemetery Board, or any recognized and maintained municipal, fraternal, religious, or family cemetery." La. R.S. 8:674(1). This may mean that sites that appear to be "traditional" cemeteries (i.e., a distinct area with headstones marking the graves) may also be covered by the law if they are not included in the above list of exempted cemeteries.

[a]ny person who has reason to believe he or she has discovered an unmarked burial site or received human skeletal remains from an unmarked burial site shall notify the law enforcement agency of the jurisdiction where the site or remains are located within twenty-four hours of discovery. Any person who has reason to believe he or she has discovered or received burial artifacts shall notify the board through the division of archaeology within seventy-two hours of the discovery. 91

Failure to so notify carries criminal and civil penalties. 92 The law enforcement agency also has an obligation to notify the Division of Archaeology. 93

What does this mean for the folks on the ground dealing with debris removal? There may very well be instances when human remains covered by NAGPRA-like state legislation, or indeed by NAGPRA itself, end up in the debris stream. In order to both avoid running afoul of these laws and to ensure that all potentially interested stakeholders and descendants have an opportunity to participate in decisions regarding the final disposition of such disinterred remains, debris managers need to notify local law enforcement and their state historic preservation officer or state archaeologist in the event that human remains are found outside of exempted cemeteries. Such notice would also be in keeping with the much-belabored "compliance with all local, state, and federal laws" for the purposes of reimbursement discussed above and is thus mandatory.

VI. **Problems**

All of the foregoing proposals for how to adequately and expediently deal with debris following a disaster leave open many questions. First, what is to be done with all of the collected debris? Second, is there any basis for immunity from liability for local governments conducting debris operations? Third, how do states with prohibitions

⁹¹ La. R.S. 8:680. "Burial artifact" is defined, in La. R.S. 8:673, as "any item of human manufacture or use that is in an unmarked burial site."

⁹² La. R.S. 8:680(A). ⁹³ La. R.S. 8:680(C).

against the use of public things to benefit private property justify governmental cleanup of private property? Fourth, what about historic preservation? In this section, we review these problems and propose possible resolutions. This listing of potential problems raised by the above discussions is not exclusive. Rather, it merely represents what we feel are some important issues that warrant discussion. The answers to these questions will require independent investigation of local laws to elaborate on our proposals, a tangent that is not covered in this article.

A. What Do We Do With All of This Stuff?

As recent disasters have demonstrated, massive amounts of debris must be managed and, ultimately, disposed of.⁹⁴ The urgency of dealing with the debris has historically led to the reopening of closed landfills, as occurred following the September 11 terrorist attacks in the Fresh Kills Landfill on Staten Island⁹⁵ and following Hurricane Katrina in the Old Gentilly Landfill in New Orleans.⁹⁶ The problems inherent in reopening closed landfills are substantial. In New Orleans, for example, Old Gentilly had been shut down, due to hazard concerns of federal regulators, more than twenty years before Katrina hit.⁹⁷ These hazards did not go unnoticed by the citizenry. Concerned groups quickly filed suit against the Louisiana Department of Environmental Quality citing problems with the renewed use of the landfill such as the fact that it did not comply

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⁹⁷ See Dart, supra, note 94.

⁹⁴ Bob Dart, *Big Easy Chokes On Flood Debris Before It Can Rebuild, New Orleans Must Deal With the Overwhelming Mountains of Garbage Left in Katrina's Wake*, THE ATLANTA JOURNAL CONSTITUTION, Dec. 13, 2005, 1A (noting that "Katrina left about 55 million cubic yards of debris in southeast Louisiana ...and [a]nother 40 million to 50 million cubic yards is piled up around Mississippi, with 2 million more in the Mobile area").

⁹⁵ See John Marzulli & Corky Siemasko, Sad and Slow Sifting: Tons of Wreckage Scrutinized at S.I. Landfill, DAILY NEWS (New York), Sept. 19, 2001, 66 (noting the reopening of Fresh Kills to receive World Trade Center debris).

⁹⁶ See Dart, supra, note 94. See also, Gordon Russell, DEQ Replaces Landfill Order; But Lawsuit Says Site is Still Defective, THE TIMES-PICAYUNE, Jan. 25, 2006, 1 (noting the reopening of Old Gentilly and some of the problems associated with the reopening).

with modern environmental protection standards.⁹⁸ In addition to the problems experienced in the wake of the Old Gentilly reopening, one commentator has noted that there may be further problems for such sites lurking down the road.

Both the federal government, namely the United States Army Corps of Engineers which lead the agency for removal of Hurricane Katrina debris, and local municipalities, like the City of New Orleans, may be at risk for future CERCLA actions on account of the actual and threatened releases of hazardous substances at sites being used to dispose of the hurricane debris ⁹⁹

Such potential problems could be avoided or at least substantially mitigated by planning ahead for debris storage.

In light of the problems caused by reopening these landfills for a lack of other immediate options during desperate times, we recommend that state and local officials act preemptively, during times of calm, to identify areas where certain types of debris can be permanently stored without potentially endangering local populations and the environment. Such a suggestion is also supported by FEMA.¹⁰⁰ Additionally, preparing contingency plans for the recycling of uncontaminated woody and green debris is also advisable. The separation of these materials from the debris stream will reduce the impact on landfills.

Further recycling and debris reduction methods proposed by FEMA include contracting with "large-scale recycling operations...to segregate and recycle debris as it arrives at...storage and reduction sites" (good candidates for this activity, aside from the

⁹⁸ See Russell, supra, note 96. Similar concerns were raised by critics of the reopening of Fresh Kills. See e.g., Marjorie J. Clarke, Soapbox: Con: Reopen Fresh Kills: Brilliant or Bonehead?, The New York TIMES, Apr. 14, 2002, Sec. 14, Col. 2, Pg. 11.

⁹⁹ Wasik, *supra*, note 4 at 354.

¹⁰⁰ See, FEMA-325, supra, note 44 at 11-14.

wood and green debris are metals and soil)¹⁰¹ and shredding nonrecyclables such as "cloth, [certain] plastic, mattresses, rugs and trash" so that volume can be reduced.¹⁰² Additionally, construction materials such as "concrete, asphalt, gypsum, wood waste, glass, red clay bricks, clay roofing tile, and asphalt roofing tile" can be recycled.¹⁰³

The key to ensuring that as much debris is recycled as possible and as little debris as possible makes it to landfills is to investigate options for handling such matters before a disaster strikes. The lessons of Fresh Kills and Old Gentilly should be heeded in this respect. Our landfills are already becoming overburdened without a massive influx of disaster debris.¹⁰⁴ Local and state leaders need to plan ahead to avoid repeating the mistakes of the past.

B. Liability Issues

Another matter of some importance is the immunity of local governments from liability for damages caused as a result of debris operations. Experience from Louisiana, in dealing with Hurricanes Katrina (2005), Lili (2002), and Georges (1998), has demonstrated that the question of immunity from liability is not an easy one. Below, we present the current state of Louisiana law on this matter in order to demonstrate the conflicting jurisprudence and legal thought in one jurisdiction of the nation. Each state will have to address this issue individually, as a review of each state's immunity status is beyond the scope of this article.

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¹⁰¹ *Id*. at 48.

¹⁰² *Id*.

 $^{^{103}}$ *Id.* at 49.

¹⁰⁴ See e.g., William Rathje & Cullen Murphy, RUBBISH! THE ARCHAEOLOGY OF GARBAGE: WHAT OUR GARBAGE TELLS US ABOUT OURSELVES, 238-245 (Harper Collins 1992) (noting that we have not yet reached crisis-stage with respect to non-debris garbage, but that our output of regular waste is remaining steady, necessitating a long-term, comprehensive approach to handling our waste issues in the United States. Part of this comprehensive plan should be measures to proactively deal with disaster debris before it becomes a problem as it has in New Orleans).

As was recently noted in a Louisiana Attorney General's Office opinion, La. R.S. 29.735

grants general immunity to personnel of the State or any political subdivision thereof, for any actions carried out pursuant to the [The Louisiana Homeland Security and Emergency Assistance and Disaster Act resulting in the death of, or injury to persons, or damage to property as a result of such actions. 105

This notion of local immunity was supported by the recent case of Castille v. Lafayette City-Parish Consolidated Government, 106 which dealt with people injured as a result of debris operations following Hurricane Lili in 2002. The court in this case found that La. R.S. 29:735(A) did immunize the City of Lafayette "from liability for injuries or damages sustained as a result of the City's emergency preparedness activities." ¹⁰⁷

A somewhat divergent outcome was reached in De La Cruz v. Riley, ¹⁰⁸ a case with similar facts to Castille. This case involved a fatality and injuries resulting from debris from Hurricane Georges causing an automobile accident. However, for unknown reasons, the defense of immunity was never mentioned by the municipality in De La Cruz. Thus, although the facts are similar to Castille and the case deals with posthurricane debris liability, it is our opinion that the legal issues upon which the case was decided are substantially distinguishable from Castille. However, if De La Cruz can be cited for anything with respect to debris operations, it certainly stands for the notion that cleanup crews, despite their probable immune status, must exercise the utmost care in

¹⁰⁵ La. Atty. Gen. Op. No. 05-0360.

¹⁰⁶ 896 So.2d 1261, 2004-1569 (La. App. 3 Cir. 3/2/05), writ denied, 902 So.2d 1029, 2005-0860 (La. 5/13/05).

¹⁰⁷ *Id*. at 1262.

¹⁰⁸ 895 So.2d 589, 2004-0607 (La. App. 4 Cir. 2/2/05), writ denied, 899 So.2d 581, 2005-0513 (La. 4/22/05).

their debris removal activities in order to ensure the best possible protection of lives and property.

In light of the conflicting Louisiana jurisprudence noted above, we strongly suggest that states adopt immunity provisions as part of their emergency legislation. This action by a legislature could clear up the confusion faced in Louisiana and would avoid outstanding questions of liability that may dissuade local governments from undertaking debris removal operations.

C. Using Public Things to Benefit Private Property

In Louisiana, as in many other jurisdictions, there exist clear prohibitions against the use of public things (including manpower) to benefit private property without appropriate compensation to the relevant public body.

Under La. Const. Art. VII, Sec. 14, in nonemergency situations, it is a violation of the prohibition against the donation of public resources for the benefit of private interests to use public equipment or labor to remove debris from private property, absent a preexisting obligation on behalf of the State or its political subdivisions. However, as noted at length above, as long as debris removal from private property occurs during a declared state of emergency and further when the debris located on private property constitutes an "immediate threat" to public health and safety, such removal activity is validly classified as serving a necessary public purpose to which such prohibitions do not apply. Although state-to-state variations of this prohibition make a blanket statement of inapplicability impossible, it is probable that the public purpose of returning life to some

Numerous other jurisdictions have similar prohibitions that should be taken into account when considering this problem. *See e.g.*, Cal. Const. Art. 16, Sec.6; Ok. Const. Art. X, Sec. 15(A). La. Const. Art. VII, Sec. 14.

¹¹¹ La. Atty. Gen. Op. 05-0360 and 05-0360-A.

semblance of normalcy and the protection of the public's health and safety would justify the use of public things to conduct debris operations on private property in virtually all United States jurisdictions.

D. Historic Preservation Concerns

1. Compliance With Historic Preservation Laws

During the debris removal and the reconstruction processes it is incumbent upon the local governments to ensure the protection of historic and archaeological resources for future research and education. Despite the power that some local governments may have to suspend their local historic preservation ordinances in order to "expedite" the recovery process, this does not eliminate the requirement that these entities must continue to comply with state and federal preservation laws and regulations.

Section 106 of the National Historic Preservation Act¹¹² requires FEMA, in consultation with the State Historic Preservation Office, to identify properties eligible for or listed on the National Register of Historic Places (NRHP) and to adequately consider the effect of any FEMA-funded undertaking, including potential demolition of private and public property, on identified historic properties.¹¹³ FEMA's historic preservation responsibilities must be fulfilled before FEMA funded activities can be initiated.¹¹⁴ If an applicant for FEMA assistance proceeds with an undertaking before FEMA has satisfied these requirements, FEMA reimbursement will be jeopardized.¹¹⁵ Therefore, local governments should not summarily suspend or abolish their local historic preservation boards or commissions. Rather, in order to expedite the notice and hearing process

¹¹² 16 USC 470f.

¹¹³ FEMA-322, *supra*, note 14 at 108-109.

¹¹⁴ FEMA-325, *supra*, note 44 at 35-37.

¹¹⁵ FEMA-322, *supra*, note 14 at 89.

associated with how to deal with badly damaged historic properties, we would suggest issuing an ordinance or proclamation that streamlines this process. This approach is more prudent than eliminating the process altogether, and thereby potentially jeopardizing FEMA reimbursement funding if a NRHP eligible structure or site is damaged or altered in the cleanup process.

2. Archaeological Artifacts

Recent non-hurricane disaster events in Louisiana turned up yet another debris problem that does not appear to have been legislatively addressed nor is it covered in the FEMA literature: What is to be done with archaeological artifacts that turn up in the debris stream?

States have an interest in being able to obtain ownership of these artifacts so that they can be maintained in a controlled manner and made available for research purposes. However, it is a generally accepted tenet that archaeological artifacts derived from private land are generally the private property of the landowner. Thus, when artifacts turn up in the debris stream, there may be multiple parties vying for their control and ownership.

Because government entities or their contractors are often the ones dealing with debris removal, they will, most probably, be the first to have custody of such artifacts.

¹¹⁶ Such an interest derives from general archaeology ethical principles, which hold that preservation of archaeological remains should be accomplished so as to benefit society as a whole through their study. *See generally*, Society for American Archeology, PRINCIPLES OF ARCHAEOLOGICAL ETHICS, http://www.saa.org/aboutSAA/committees/ethics/principles.html, accessed December 31, 2006. Such an end is thwarted through private ownership, because the public seldom has an opportunity to view privately owned artifacts or to learn anything about our shared human history from them. States have enacted many of their preservation laws to forward this dogma. *See e.g.*, Olexa *et al.*, *supra*, note 86 at 61 (noting that the Florida Legislature has enacted archaeological laws with the benefit of increasing the public's knowledge of their past in mind).

¹¹⁷ See, Olexa et al., supra, note 86 at 60 (noting that "ownership of artifacts generally depends upon where they are found. Artifacts discovered on private property belong to the landowner").

The question then is whether or not the government has to give the private landowners a right of first refusal to the artifacts. Because archaeological remains located on private property are the property of the private landowner, if the artifacts are clearly identifiable as having come from one landowner's tract, the government should notify those landowners and allow them the right to reclaim their property. Such notice should be accompanied with the suggestion that it would be more beneficial for educational and research purposes for the government to retain the materials.

However, when a disaster is so widespread and the debris of multiple landowners is commingled, making it unclear whose tract the artifacts have derived from, the solution is not so simple. It may be unconstitutional for a government to return the artifacts to just anyone without evidence of their locale of origin, as such may constitute a divestiture of the true landowner's private property rights should the government get the recipient wrong. There seems to be no clear or correct answer regarding what to do in such situations. The best that we can hope for at this time is to offer a suggestion to those faced with this problem that may or may not be the best course of action to follow. As with so many scenarios discussed in this paper, the best thing for local governments to do when faced with such a situation is to analyze their state and local laws first to determine if they would provide any guidance. In the absence of such guidance, we suggest the following.

In such a case, perhaps the governmental entity should transfer custody of the artifacts to the relevant state archaeological authority. This authority could then hold the artifacts until a claim is made by a landowner (and such claim can be evaluated). The authority is probably under a duty to advertise that it has the artifacts and to allow people

to make claims for them. In the event no claim is made, the state authority should continue to curate the artifacts until the time for which private claims to property have been deemed abandoned. At that time, the government would become the owner of the artifacts through abandonment.

This matter probably represents the least clear issue presented in this paper. At this time, the above discussion contains our best suggestions for what we believe should be done in the event that artifacts appear in the debris stream and it is not possible to tell from whose property they derived. Because this area of the law is so unclear, it is a ripe area for legislation at the state-level that could avoid problems before they occur.

VII. Conclusion

It is impossible in one paper to identify every possible debris-related eventuality and problem that any particular United States jurisdiction may encounter in the wake of a disaster. However, it is hoped that the above review of the basic legal procedures for initiating the debris cleanup process and the lessons learned in Louisiana as a result of Hurricanes Katrina and Rita can help other similarly situated jurisdictions to expedite their recovery processes in the future.

The simple reality, based on the situations cited in the Introduction, is that disasters will occur. It is not a matter of if, but a matter of when. The entire nation is at risk of being struck by some type of disaster at some time. The best way to deal with the outfall from these disasters is to be prepared for them to the best extent possible. Thus, state and local governments should act now to ensure that mechanisms, both legal and logistical, are in place to deal with such problems as debris management. Make a plan and make it now, in advance of the next inevitable disaster.

Appendix 1: A Proposed Debris Management Statute

The following is a proposed statute that deals with many of the shortcomings in state laws identified in this article. This proposed statute is intended for use as a model for state legislation. When constructing this proposed statute, we saw no need to reinvent the wheel on all matters. As such, large portions of the proposed statute have been quoted, with minor (noted) alterations, from existing state statutes. We also note which states, other than the ones whose statutes are actually quoted, have similar provisions on the books. Many states already have some of the provisions that we feel are important – they are noted in the footnotes. However, no state has as comprehensive a set of rules as we propose herein to deal with issues arising out of debris management following a natural or anthropogenic disaster. Thus, we recommend that states with some law on these issues consolidate their existing laws into one part of their statutes and then amend those laws with adaptations of our proposals, as necessary. States with no such laws should waste no time in enacting something akin to our proposal. The use of the novel portions of our proposed statute (identifiable by being the portions that are not set-off by quotation marks) should help to close the gaps in existing laws and avoid many of the problems identified in this article.

Section 1. Right-of-entry to private property in a state of emergency or major disaster.

- (A) "When the Governor has declared a [state of emergency], or the President, at the request of the Governor, has declared a major disaster or emergency to exist in this state, the Governor may".
 - (1) "through the use of state [or municipal] agencies [or private contractors of state or municipal agencies], clear from publicly or privately owned land

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¹¹⁸ AS 26.23.110(a) (Alaska). *See also*, C.G.S.A. § 28-9(c)(a) (Connecticut); I.C.A. § 29C.6(4) (Iowa); 37-B M.R.S.A. § 744(4)(A) (Maine); MCA 10-3-315(1) (Montana); O.R.S. § 401.145(1) (Oregon); 20 V.S.A. § 36(a) (Vermont); 23 V.I.C. § 1134(a) (United States Virgin Islands).

- or water debris and wreckage that may threaten public health, safety, or [public or private] property;"119
- (2) through the use of state or municipal agencies or private contractors of state or municipal agencies, "access property using privately owned roads for [the] purposes of providing ... debris cleanup;"120
- "apply for and accept funds from the federal government and use those (3) funds to make grants to a political subdivision for the purpose of removing debris or wreckage from publicly or privately owned land or water." ¹²¹
- **(4)** "Whenever the Governor provides for clearance or debris or wreckage [pursuant to a declaration described in subdivision (A) of this section], employees of [state or municipal agencies or private contractors of state or municipal agencies] are authorized to enter upon private land or waters and perform any tasks necessary to the [debris] removal or clearance operation."122
- "Authority under this section shall not be exercised [, subject to the exceptions in (B) subdivision D of this Section,] unless the affected political subdivision, corporation, organization or individual owning such property shall first present an unconditional authorization for removal of such debris or wreckage from public and private property and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the state against any claim arising from such removal "123
- (C) If, at any time, services for debris cleanup or demolition or any other activity contemplated by this Chapter are rendered on private property, such services "shall be limited to the cleanup of debris [, demolition] and repair damage caused by a ... disaster [to the extent that such work is essential to protect private property from further damage. Such services shall not be utilized for work relating to general home improvements [or any other non-disaster related work on private property]."124

¹²⁰ Ala. Code 1975 § 45-2-140 (Alabama).

¹¹⁹ AS 26.23.110(a)(1). See also, C.G.S.A. § 28-9(c)(a)(1); I.C.A. § 29C.6(4); 37-B M.R.S.A. § 744(4)(A)(1); MCA 10-3-315(1)(a); McKinney's Executive Law § 29(3) (New York); NDCC, 37-17.1-21(1) (North Dakota); O.R.S. § 401.145(1)(a); 25 L.P.R.A. § 172n (Puerto Rico); V.T.C.A., Government Code § 418.023(a) (Texas); 20 V.S.A. § 36(a)(1); 23 V.I.C. § 1134(a)(1).

¹²¹ AS 26.23.110(a)(2). See also, I.C.A. § 29C.6(4); 37-B M.R.S.A. § 744(4)(A)(2); MCA 10-3-315(1)(b); NDCC, 37-17.1-21(2); O.R.S. § 401.145(1)(b); V.T.C.A., Government Code § 418.023(b); 20 V.S.A. § 36(a)(2); 23 V.I.C. § 1134(a)(2).

¹²² 37-B M.R.S.A. § 744(4)(B)(2); MCA 10-3-315(2)(b); NDCC, 37-17.1-21(2); O.R.S. § 401.145(3); Gen.Laws 1956, § 30-15.4-2(b) (Rhode Island); V.T.C.A., Government Code § 418.023(d); 20 V.S.A. § 36(c); 23 V.I.C. § 1134(c).

¹²³ C.G.S.A. § 28-9(c)(b)(1). See also, I.C.A. § 29C.6(4); 37-B M.R.S.A. § 744(4)(B)(1); MCA 10-3-315(2)(a); NDCC, 37-17.1-21(2); O.R.S. § 401.145(2); 25 L.P.R.A. § 172n; Gen.Laws 1956, § 30-15.4-2(a); V.T.C.A., Government Code § 418.023(c); 20 V.S.A. § 36(b); 23 V.I.C. § 1134(b). ¹²⁴ 62 Okl.St.Ann. § 2202 (Oklahoma).

- (D) (1) In the event that it is not practicable or possible to obtain authorization or indemnification for the removal of debris from public or private property by reason of being unable to locate or identify the owner, the state or municipal agency or the private contractor of the state or municipal agency may enter upon such property for the express purpose of carrying out debris removal and demolition operations that are necessary for the protection of the public health, safety, or welfare; or
 - (2) for the purpose of securing public or private property from further damage, destruction, or conversion until such time as the owner can be identified or located.
 - (3) Once the owner of such property has been identified or located, all practicable due process shall be afforded the owner.

Section 2. Vehicles damaged during a disaster.

- (A) Notice to buyers and the Office of Motor Vehicles.
 - (1) "No person, firm or corporation shall knowingly sell in this state any motor vehicle the mechanical or electrical system of which has been previously damaged by the ravages of a ... disaster ... to an extent which rendered the vehicle inoperable for any period of time, unless notice, in writing, of the fact of such damage, the nature and extent thereof and the date and location in which it occurred is first given to each buyer of such motor vehicle. For the purposes of this Section, a vehicle shall be deemed to have been rendered inoperable if, as a result of the damage caused by the ... disaster, it would be necessary for such vehicle to undergo repair in order to pass inspection in the manner provided [by the Office of Motor Vehicles]." 125
 - (2) Nor shall any motor vehicle be sold in this state the body or interior of which has previously been damaged by the ravages of a disaster to an extent which required replacement of body or interior parts, "unless notice, in writing, of the fact of such damage, the nature and extent thereof and the date and location in which it occurred is first given to each buyer of such motor vehicle." For the purposes of this Section, interior damage includes the replacement of interior carpet in any portion of the vehicle.
 - (3) "Violation of this Section shall constitute a ... misdemeanor." 127

¹²⁵ McKinney's General Business Law § 396-k (New York).

¹²⁶ McKinney's General Business Law § 396-k.

¹²⁷ McKinney's General Business Law § 396-k.

- (4) If any vehicle has been damaged, whether sold or not, according to subdivisions A(1) or A(2) of this Section, the owner and the vehicle's insurer shall, within ninety days of completion of repairs to the vehicle, mail notice of the damages and the repairs to the Office of Motor Vehicles. The insurer is only required to comply with this subdivision if a claim was made.
- (B) "Abandoned motor vehicles; gubernatorial declared state of emergency; disposal by state and political subdivisions; notice requirements; disposition of proceeds.
 - (1) If a state agency or political subdivision seizes a motor vehicle that was illegally parked, stationed, or abandoned on a public street or highway within a [county] in which a gubernatorially declared state of emergency is in effect at the time of seizure, the provisions of this [subdivision] shall apply to the disposition of the motor vehicle, and the provisions of this [subdivision] shall supercede the provisions of [normal, non-disaster abandoned vehicle laws] to the extent that they are in conflict.
 - (2) Within ten days after seizing the motor vehicle, the state agency or political subdivision seizing the motor vehicle shall mail a written notice, by certificate of mailing, to the owner of the motor vehicle at his last known address on file with the [Office of Motor Vehicles]. The notice shall include the following information:
 - (i) The name of the state agency or political subdivision holding the motor vehicle and the manner in which it can be claimed.
 - (ii) That in order to claim the motor vehicle, the owner must pay all costs and charges imposed by the seizing authority for the removal and storage of the motor vehicle.
 - (iii) That in lieu of claiming the motor vehicle, the owner may remit fifteen dollars to the state agency or political subdivision holding the motor vehicle together with a completed certificate of authority to remove and dispose of the abandoned motor vehicle. The certificate of authority shall be on a form prescribed by the [agency] and shall be sent to the owner of the abandoned motor vehicle with this notice and with a self-addressed, stamped return envelope.
 - (b) The state agency or political subdivision shall retain adequate documentation concerning the mailing of this notice for no less than three years.

- (3) The motor vehicle shall be considered abandoned to the state or political subdivision if the owner of the motor vehicle has not done any of the following within three months of the mailing of the notice provided for in subdivision [B(2)] of this [subdivision]:
 - (a) Responded to the letter.
 - (b) Remitted the fifteen dollars and a certificate of authority.
 - (c) Claimed the motor vehicle.
- (4) If the motor vehicle is considered abandoned, the state agency or political subdivision holding the motor vehicle shall send a final notice to the owner of the motor vehicle indicating its intent to dispose of the abandoned motor vehicle. Final notification shall be provided for in accordance with the following procedure:
 - (a) (i) The state agency or political subdivision shall mail a final notice, by certificate of mailing, to the owner of the abandoned motor vehicle at his last known address informing such owner that the state agency or political subdivision is holding the abandoned motor vehicle.
 - (ii) The final notice shall inform the owner that the vehicle shall be sold to the highest bidder, crushed, dismantled, or otherwise disposed of unless the owner, on or before the date of disposal, claims the motor vehicle and pays to the seizing authority all costs, charges, and fees incurred by the seizing authority for the detention and storage of the abandoned motor vehicle.
 - (b) The state or political subdivision shall also publish an advertisement in the official journal of the state and the [county] or municipality in which the vehicle was abandoned, on no fewer than three separate occasions within a ten day period, prior to the date of disposal of the abandoned motor vehicle. The advertisement shall contain the following information:
 - (i) A complete list of the abandoned motor vehicles to be disposed of.
 - (ii) A description of each vehicle and, to the extent practicable, the name of the last registered owner of each abandoned motor vehicle.

- (iii) The date and location in which the abandoned motor vehicles will be disposed of together with notice that the abandoned motor vehicles may be disposed of individually or in lots.
- (c) The state agency or political subdivision shall retain adequate documentation concerning the mailing of the final notice, advertisement in the official journal, and appraisal for no less than three years.
- (5) Prior to disposal of the abandoned motor vehicle, the seizing authority shall have the motor vehicle appraised by a competent appraiser.
- (6) If the state agency or political subdivision receives no response from the owner within thirty days of mailing the final notice, the state agency or political subdivision shall proceed with disposal of the abandoned motor vehicle without the necessity of further notice to the owner of the abandoned motor vehicle. Upon final disposal of an abandoned vehicle, the state agency or political subdivision shall notify the office of motor vehicles of such disposition.
- (7) All funds received from the disposal of an abandoned motor vehicle under the provisions of this [subdivision] shall be set aside into a separate account established by the seizing authority. If, within one year following the date of disposal of the abandoned motor vehicle, the owner of a disposed of motor vehicle presents proof of his ownership, the owner shall be entitled to his share of the proceeds realized from the disposal of the motor vehicle minus all costs, fees, and expenses associated with the detention, storage, and sale of the abandoned vehicle. Any funds not claimed within one year following the date of disposal of the abandoned motor vehicle shall be deposited into the general fund of the seizing authority.
- (8) For purposes of this Section, "owner" shall mean the last registered owner of a motor vehicle, the holder of any lien on a vehicle, and any other person with an ownership interest in a vehicle." 128

Section 3. Debris management plan; debris recycling.

(A) "The [state, through its environmental management agencies,] shall develop and implement a comprehensive debris management plan for debris generated by state and federally declared disasters and debris generated from the rebuilding efforts resulting from these disasters. The management plan shall be to reuse and recycle material and to divert debris from disposal in landfills to the maximum extent practical, efficient, and expeditious in a manner that is protective of human health

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¹²⁸ Section 1, Senate Bill 27, Louisiana Legislature, Second Extraordinary Session, 2006.

and the environment. The plan shall be consistent with state and federal law and shall not supersede any ordinance adopted by a local governing authority. In developing such plan, the secretary shall utilize the following debris management practices in order of priority, to the extent they are appropriate, practical, efficient, timely, and have available funding:

- (1) Recycling and composting.
- Weight reduction. (2)
- Volume reduction. (3)
- **(4)** Incineration or co-generation.
- Land disposal." 129 (5)
- "Green and woody debris may be used in coastal restoration projects, as compost, (B) or as fuel. Green and woody debris shall not be disposed of in a landfill as the first option; however, such debris may be used as a component of the cover system for a landfill or a means for providing erosion control." ¹³⁰
- (C) "The comprehensive debris management plan shall utilize the most environmentally beneficial management techniques consistent with the health, safety, and welfare of the citizens of the state, to the extent funding is available, and shall promote the efficient and expeditious management of the debris.",131

Section 4. Historic preservation.

- (A) "No structure that is listed on the National Register of Historic Places, on the [State] Register of Historic Places, or on any local public register of historic places [, or is potentially eligible for such listing,] and that has been damaged due to a ... disaster ... may be demolished, destroyed, or significantly altered, except for restoration to preserve or enhance its historical values, unless the structure presents an imminent threat to the public of bodily harm or of damage to adjacent property, or unless the State [Historic Preservation Office] determines ... that the structure may be demolished, destroyed, or significantly altered." ¹³²
- (B) "Any local government may apply to the State [Historic Preservation Office] for its determination as to whether a structure meeting the description set forth in subdivision (A) of this Section shall be demolished, destroyed, or significantly altered.",133

¹²⁹ La. R.S. 30:2413.1(B) (Louisiana).

La. R.S. 30:2413.1(C).

¹³¹ La. R.S. 30:2413.1(D).

West's Ann.Cal.Pub.Res.Code § 5028(a) (California).

West's Ann.Cal.Pub.Res.Code § 5028(b)

- (C) Representatives from the State Historic Preservation Office or from the Historic Preservation Office of the Federal Emergency Management Agency, or private contractors hired by the state and having the same professional qualifications as the employees of the State Historic Preservation Office, shall,
 - (1) accompany all demolition crews working in the declared disaster area;
 - (2) have the authority to halt demolition activities in order to make an assessment of the historic value of structures;
 - (3) be onsite to monitor and document demolition activities on any structure determined to be listed on the registers in subdivision (A) of this Section;
 - (4) make recommendations for structures slated for demolition to be added to local, state, or federal registers of historic places; and
 - (5) to the maximum extent practicable, salvage all information of historic or scientific value from historic structures that are slated for demolition. Such information includes, but is not limited to, photographs of the structure, design plans of the structure and any significant architectural features, and actual artifacts from the structure.
- (D) In the event that the Governor has declared a state of emergency, or the President, at the request of the Governor, has declared a major disaster or emergency to exist in this state,
 - (1) local governing authorities shall not suspend or disband any municipal agency tasked with protecting historic structures;
 - (2) nor shall any state governing authority suspend or disband any state agency tasked with protecting historic structures;
 - (3) nor shall any state statutes or regulations or municipal ordinances relating to the protection of historic structures be suspended.

Section 5. Unearthed human remains found following a disaster.

- (A) For the purposes of this section, "unearthed human remains" means any and all human remains that have been disinterred, whether from a cemetery or other place of repose, by the forces of a disaster.
- (B) Upon the discovery of unearthed human remains, the discoverer shall contact local law enforcement and the state archaeologist and provide them with the

location of the remains. Local law enforcement and the state archaeologist shall coordinate efforts to determine if the remains are classified as being under the jurisdiction of an established cemetery or of the state's unmarked human burials laws.

- (C) At any time, should it be determined that any unearthed human remains derived from a known or unknown archaeological site, jurisdiction over such remains shall rest with the state archaeologist. The final disposition of such remains shall be controlled by the relevant portions of the state's unmarked human burials law or the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seg.*, whichever is applicable.
- (D) In no event shall any unearthed human remains be reburied, unless their identity is readily obtainable, without the extraction, by a forensic scientist, of a sample sufficient to conduct DNA testing on for identification purposes. It shall be the duty of the state health department to curate such samples until such time as they are used to perform DNA tests. Such DNA tests shall be conducted only if sufficient funding is available. The results of such tests shall be retained by the state health department for the purposes of identifying next of kin.
- (E) In no event shall any unearthed human remains be reburied, unless their identity is readily obtainable, without the completion of a complete forensic anthropological analysis of the remains and x-rays of the dentition for the purposes of identification. The results of the analysis and the x-rays shall be curated by the state health department in the same file as the DNA information in subdivision D of this Section.
- (E) Once the analyses and sampling described in subdivisions D and E of this Section are complete, and should no positive identification of unearthed human remains be made, the authority holding the remains shall reinter the remains in a manner to be prescribed by law. Such interment shall be in an active public cemetery. The grave shall be marked with a permanent marker that identifies the remains by the state health department file number. A photograph of the grave, along with global positioning system coordinates of the burial location shall be sent to the state health department. The state health department shall curate this documentation in the same file as the information in subdivisions D and E of this Section.
- (F) "Except for analysis on quality control samples, [DNA] tests performed on all unidentified human remains ... shall be used only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters." ¹³⁴

¹³⁴ La. R.S. 15:659(D).

- (G) Subdivisions D through F of this Part shall not be interpreted to supersede the state's unmarked burials law or the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001, *et seq*.
- (H) All cemeteries, whether public or private, following a disaster, shall notify local law enforcement and the state health department of any burials that appear to have been disturbed to the point that remains may have been unearthed by the disaster.

Section 6. Immunity from liability.

(A) "Except in cases of willful misconduct, gross negligence or bad faith, any state [or municipal] employee [or employee of a private contractor for a state or municipal agency], complying with orders of the Governor and performing duties pursuant thereto under [Sections 1 through 5 of this Chapter] shall not be liable for death of or injury to persons or damage to property occurring during performance of those duties." ¹³⁵

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^{135 37-}B M.R.S.A. § 744(4)(B)(3); See also, AS 09.65.091; West's Ann.Cal.Gov.Code § 8657; C.R.S.A. § 13-21-108.3 (Colorado); HRS § 128-18 (Hawaii); 20 ILCS 3305/21 (Illinois); K.S.A. § 60-4201 (Kansas); V.A.M.S. 44.023 (Missouri); N.C.G.S.A. § 83A-13.1 (North Carolina); NDCC, 37-17.1-21(2); 76 Okl.St.Ann. § 5.8; O.R.S. § 401.145(4); Gen.Laws 1956, § 30-15.4-2(c); V.T.C.A., Government Code § 418.023(d); 20 V.S.A. § 36(d); 23 V.I.C. § 1134(d).