

KATRINA 5 YEARS LATER WITHOUT THE RIGHT TO RECOVER

by Advocates for Environmental Human Rights²

On August 29, 2005, Hurricane Katrina struck America's Gulf Coast Region causing an estimated one million people to flee their communities – the largest number of internally displaced people in modern U.S. history. Years before the hurricane, the U.S. Government helped to develop an international standard for the recovery of people around the world who become displaced by a natural or human-induced disaster.¹ This standard establishes the rights of displaced people to recover in dignity and with justice as well as the duties of government to ensure recovery. Under this standard, displacement is not defined by physical space, but by need. Thus, displacement ends when a person no longer has needs associated with his or her displacement. Instead of applying this standard in the aftermath of Hurricane Katrina, our government implemented programs that were formulated by the discretionary decisions of elected and appointed officials.

Leaving Critical Recovery Needs to the Discretion of Others

Five years after Hurricane Katrina, critical recovery needs such as flood protection and housing remain unmet – not for the lack of funding, but the abundance of unaccountable decisions by our government that overrides the right of Gulf Coast residents to a full recovery. These unaccountable decisions flow from the broad discretionary authority of government to take whatever action it prefers in responding to a disaster.

Although \$14 billion U.S. tax dollars have been set aside for discretionary levee and floodwall projects,² predominantly African American neighborhoods in New Orleans are without flood protection.³ The government chose projects for predominantly white neighborhoods in the New Orleans area that reduce flood waters by 5½ feet, but chose projects that reduce flood waters by only 6 inches in an African American neighborhood. Overall, post-Katrina flood projects are mired in controversy regarding time delays, ineffectiveness, and failure to address coastal restoration.

More than \$34 billion U.S. tax dollars have been spent on discretionary housing programs⁴ that destroyed affordable housing,⁵ created unreasonable and discriminatory barriers to home repair grants,⁶ and placed people in toxic temporary housing known as FEMA trailers.⁷ As a result, there are more homeless Gulf Coast Region residents and more residents sharing homes with other families than there were before Hurricane Katrina,⁸ as well as a substantial number of residents living in unrepaired flood-damaged homes.⁹

Far from ensuring recovery, these discretionary programs have exacerbated the destabilizing and traumatic effects of displacement and deepened racial inequities. These and other post-Katrina discretionary programs have failed to ensure the recovery of people and the restoration of the environment.

What Is a Rights-Based Recovery?

A rights-based recovery is non-discretionary. It *requires* the government to remedy the destabilizing effects of a disaster on a person's life as well as prevent or at least mitigate a disaster. The sources of a rights-based recovery are part of U.S. law. However, the U.S. Government has failed to apply these laws to protect the rights of U.S. residents harmed by a disaster.

This failure is contrary to the U.S. Government's promotion of a rights-based recovery in foreign countries.¹⁰ The global scale of disaster-induced displacement and human suffering during the 1990's compelled the U.S. Government to participate in the United Nations' development of a standard known as the Guiding Principles on Internal Displacement. The Guiding Principles on Internal Displacement apply the basic human rights to life, health, freedom from racial and gender discrimination, adequate

² Advocates for Environmental Human Rights is a public interest law firm dedicated to upholding our human right to live in a healthy environment. For more information about AEHR, go to: www.ehumanrights.org.

housing, and other rights to protect people who are forced to flee their communities in times of disaster. Furthermore, the Guiding Principles on Internal Displacement establish the duties of national governments to ensure recovery and the rights of people displaced by a disaster to recover with dignity and justice.

In the aftermath of Hurricane Katrina, two U.N. treaty monitoring committees have urged the U.S. Government to implement this standard in order to comply with the ratified treaties that are part of U.S. law – the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. These treaties protect the human rights to life, freedom from racial discrimination, and adequate housing without distinction as to race. The U.N. treaty monitoring committees determined that the U.S. Government's responses to Hurricane Katrina failed to protect these human rights.

The U.S. Government's response to the BP oil drilling disaster in the Gulf of Mexico continues the pattern of disregarding the right to recover. The Oil Pollution Act of 1990 establishes the right to full recovery when a company responsible for an oil incident was negligent, violated a federal regulation, or failed to comply with a request by government official regarding oil removal activities.¹¹ However, the U.S. Government has failed to take action. Although BP's actions make it liable for the full cost of recovery, the U.S. Government promotes BP's promise to deposit \$20 billion dollars in a voluntary fund for people harmed by the disaster that will be managed at the discretion of Kenneth Feinberg. In addition, the U.S. Government has failed to enforce provisions of the Oil Pollution Act that protect the rights of subsistence fishermen and women as well as people who work on a cash-basis as deckhands on fishing boats to be compensated for their losses.

In a U.S. policy that is at odds with governmental responses to Hurricane Katrina and subsequent storms, the US Government has acknowledged that the failure to ensure the recovery of people and communities harmed by a disaster creates significant setbacks that can last for generations.¹² Avoiding this tragic outcome can only be achieved by upholding the rights enshrined in the UN Guiding Principles on Internal Displacement and the diligent enforcement of existing legislation such as the Oil Pollution Act.

Endnotes

¹ United Nations Economic and Social Council, Guiding Principles on Internal Displacement, (E/CN.4/1998/53/Add. 2), February 11, 1998.

See also the reports by UN expert advisors on internal displacement: The Brookings-Bern Project on Internal Displacement, Improving the US Response to Internal Displacement: Recommendations to the Obama Administration and Congress, June 2010, and The Brookings-Bern Project on Internal Displacement, When Displacement Ends: A Framework for Durable Solutions, June 2007.

² US Army Corps of Engineers, Flood Risk Management Newsletter, March 2009, vol. 3, no. 1, p. 6. The White House Council on Environmental Quality, which has an oversight role regarding projects undertaken by the Army Corps of Engineers, exercised its discretion and chose to eliminate the process for public scrutiny of and comment on post-Katrina levee and floodwall projects, which the Corps refers to in its newsletter as "Alternative Arrangements."

³ Advocates for Environmental Human Rights, Racism & Flood Risk Post-Katrina.

⁴ United States Government Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, January 13, 2009, pp. 12-13.

⁵ Bill Quigley, Katrina Pain Index – Five Years Later, August 6, 2010.

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David Hammer, Road Home's Grant Calculations Discriminate Against Black Homeowners, Federal Judge Rules, The Times Picayune, August 16, 2010.

⁷ Sheila Kaplan, FEMA Covered Up Cancer Risks to Katrina Victims, Salon.com, January 29, 2008.

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See, e.g., Katrina Forces the Merging of Families, The Associated Press, April 30, 2006. See also Jordan Flaherty, On the Fourth Anniversary of Katrina, New Orleans Is Still Far From Recovery, The Louisiana Weekly, August 31, 2009.

⁹ Flaherty, *supra*, n. 8.

¹⁰ US State Department, USAID Assistance to Internally Displaced Persons Policy (PD-ACA-558), October 2004.

¹¹ Under Section 2704(c) of the Oil Pollution Act of 1990, BP is liable to pay the full cost of recovery from its oil drilling disaster when its actions leading up to or following the disaster meet any one of the five statutory exceptions: 1. gross negligence or willful misconduct; 2. violation of a Federal safety, construction, or operating regulation; 3. failure to report the incident as required by law; 4. failure to provide all reasonable cooperation and assistance requested by a responsible official in connection with oil removal activities; and 5. failure to comply with an order pertaining to unlawful discharges of oil and other hazardous substances from a vessel or the Intervention on the High Seas Act. By enacting this law, Congress recognized that bad actors should not have the benefit of a liability cap.

The information that has come forth since the oil rig exploded on April 20, 2010 shows that BP is a bad actor. Survivors of the oil rig explosion have testified before Congress that numerous reports of serious malfunctions at the oil rig were ignored by BP and its contractors. A federal regulatory requirement for inspection of the blow-out preventer device on the oil rig had been ignored for years. The Environmental Protection Agency's official request that BP reduce its use of toxic chemical dispersants as part of oil removal activities was met with a resounding "no" from the oil company.

¹² US State Department, *supra*, n. 10 at p. 3.