

Fifth Circuit Reverses Itself On Hurricane Katrina Cases, Raises Bar For Pursuing Flood Claims Against Army Corps Of Engineers

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On September 24, 2012, the U.S. Court of Appeals for the 5th Circuit reversed itself and, in so doing, reversed the trial court's judgment in favor of several Hurricane Katrina plaintiffs. This ruling sets the bar significantly higher in pursuing flood claims against the Army Corps of Engineers. Given the recent devastation caused by Superstorm Sandy, this is a good time to review the impact of this decision on pursuing flood-related subrogation claims against government entities.

There are significant hurdles in pursuing any flood claim against the Army Corps of Engineers, or any other federal government agency for that matter. First, the Flood Control Act of 1928, 33 U.S.C. § 702(c), provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." In addition, under the Federal Tort Claims Act, the Discretionary Function Exception (DFE) bars any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

A New Orleans federal district trial court, however, decided that flood claims by certain Hurricane Katrina plaintiffs against the Army Corps of Engineers were not barred by the Flood Control Act because they were based on alleged negligent design and maintenance of the Mississippi River Gulf Outlet (MRGO) channel by the Corps of Engineers. It found that the Flood Control Act did not apply because MRGO was a navigation project, not a flood control project. The court further found that the plaintiffs' claims were not barred by the DFE because the Corps of Engineers had a non-discretionary duty to properly design and maintain MRGO.

In its first review of the case in *In re: Hurricane Katrina Canal Breaches Litig.*, 573 F.3d 381 (2012), the 5th Circuit significantly broadened the circumstances under which the

Army Corps of Engineers would enjoy immunity under the Flood Control Act. It ruled that immunity would attach whenever the Army Corps of Engineers engaged in flood control activities, regardless of whether or not those activities were related to any "flood control project." Nevertheless, because it agreed that MRGO design and maintenance were not "flood control activities," and because it agreed with the district court's DFE analysis, it upheld the judgment in favor of the plaintiffs.

However, on September 24, 2012, in *In re: Katrina Canal Breaches Litig.*, Case No. 10-30249, the 5th Circuit reversed its prior ruling on the DFE. In its previous decision, it had agreed with plaintiffs' arguments that the Corps of Engineers had a non-discretionary duty to comply with certain provisions of the National Environmental Policy Act (NEPA), had a non-discretionary duty to armor the banks of MRGO to prevent erosion, and that allegedly "erroneous scientific judgments" made by corps were not discretionary judgments.

In its September 24 decision, however, the 5th Circuit reversed course. It decided that although the corps had failed to follow mandatory NEPA procedures, NEPA did not mandate a particular result. Accordingly, it found that, "at most," the corps had abused its discretion, which still fell within the immunity of the DFE. It also ruled that the design of MRGO that did not call for armoring of its banks, even though bank erosion was expected, was a discretionary design decision shielded by the DFE. Finally, the court ruled that, although decisions based solely on scientific principles are not discretionary, a policy decision involving the application of scientific principles was immune under the DFE. Thus, the 5th Circuit's new ruling on the DFE rendered the corps completely immune to all of the plaintiffs' claims.

The net effect of these rulings is to set a very high bar for pursuing flood claims against the Corps of Engineers. The corps has broad immunity for any "flood control activities," regardless

of whether those activities are tied to a particular flood control project or not. Further, the corps has broad immunity under the Discretionary Function Exception to the Federal Tort Claims Act regarding its design and maintenance decisions.

These decisions do not completely negate the possibility of holding the corps accountable for flood damage. However, these decisions do emphasize the factual and legal complexity of such claims and the need for a careful analysis when any such claim is contemplated. The analysis must begin with a detailed hydraulic and hydrologic analysis by a qualified hydrologist.

This engineering analysis will provide the foundation for a legal evaluation to determine whether the facts present viable opportunities for subrogation. The impact of these rulings will apply not just to claims brought against the Corps of Engineers, but also against any federal agency. Indeed, since individual

state tort claims acts are often modeled on the Federal Tort Claims Act, their impact may be felt at the state level as well. Cozen O'Connor has extensive experience dealing with flood claims, the Federal Tort Claims Act and related statutes, and can assist with the identification and retention of appropriate experts and conduct the appropriate legal analysis to determine whether a flood claim has subrogation potential.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact David M. Bessho at dbessho@cozen.com or 404.572.2046.