

CRS Report for Congress

Federal Liability for Flood Damage Related to Army Corps of Engineers Projects

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Summary

The most costly natural disaster ever to hit the United States was Hurricane Katrina. It struck land on August 29, 2005, as a Category 3 hurricane. The damage to New Orleans from the hurricane was largely not the result of wind, but water. Within three days, 80% of New Orleans was under water. In June 2008, continuous heavy precipitation caused severe flooding in seven midwestern states after numerous levees along the Mississippi River were breached. In the wake of these major flood events and levee breaches, the issue of federal flood control projects and liability is getting new attention in the media and in Congress.

After Katrina, lawsuits were filed against the federal government claiming that the levees and floodwalls designed, constructed, and maintained by the U.S. Army Corps of Engineers failed to protect the city. To succeed in these lawsuits, the litigants first must show that the federal government is not immune from suit. One source of government immunity is the federal government's exemption under the Federal Tort Claims Act for actions that constitute a discretionary function. A second source of immunity for the government is the Flood Control Act of 1928, which prevents the government from being sued for damages resulting from flood control projects or flood waters. Only after those two issues are resolved will the federal government's negligence be reviewed.

This report examines selected issues of the federal government's liability depending on the theory of the levee failures, and analyzes legal defenses available to the federal government. The report uses flood damage related to Hurricane Katrina as an illustration of these legal issues regarding federal liability, but the general principles in the analysis would apply to flood damage resulting from any such flood control project.

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Introduction

In June 2008, continuous heavy precipitation resulted in severe flooding of the Midwest. Portions of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri and Wisconsin flooded after water from the Mississippi River breached at least 35 levees.¹ The flood was the second worst that the Midwest has experienced in 15 years.² This flooding brought renewed attention to liability after major flood events, including the liability for damage caused by Hurricane Katrina in 2005.

Hurricane Katrina struck the Gulf Coast on August 29, 2005, as a Category 3 hurricane, bringing with it rain, high-velocity winds, and a large storm surge, and leaving behind a massive path of destruction.³ Much of the extensive damage that occurred was the result of the storm surge that breached levees and floodwalls protecting New Orleans. By August 31, 2005, 80% of New Orleans was under water.⁴ The city was not declared free of floodwaters until October 11, 2005.⁵ Some flooding was expected in New Orleans, primarily because the city sits below sea level and lacks natural drainage, but the extent of inundation was not anticipated. The

¹ News Release, U.S. Army Corps of Engineers, Upper Mississippi River Flooding Update (June 25, 2008) (on file with author).

² The major flooding in the Midwest is reported to be in the range of a 400-year to 500-year flood; however, most levee protection is built to withstand a 100-year flood. These flood-year designations, however, do not indicate how often an area may flood. Rather, they are based on the chance that an area may flood in any given year. For example, the term *100-year flood* is the flood elevation that has a 1% chance of being equaled or exceeded *annually*. It is *not* the flood that will occur once every 100 years. Likewise, a 500-year flood is five times less likely to occur in any given year than a 100-year flood (0.2% chance of flooding).

³ Richard D. Knabb *et al.*, Tropical Cyclone Report: Hurricane Katrina. National Hurricane Center (December 20, 2005), as updated (August 10, 2006), online at [http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf]. The estimated height of the storm surges that hit New Orleans ranges between 5 and 19 feet. Even larger storm surges hit Mississippi.

Hurricanes are categorized between 1 and 5, according to the Saffir-Simpson Hurricane Scale, with a Category 3 hurricane having winds of 110-130 mph, and storm surge of 9-12 feet above normal. See National Oceanic and Atmospheric Administration (NOAA) website at [<http://www.nhc.noaa.gov/aboutsshs.shtml>].

⁴ See National Climatic Data Center, [<http://lwf.ncdc.noaa.gov/oa/climate/research/2005/katrina.html>].

⁵ Richard Knabb *et al.*, Tropical Cyclone Report: Hurricane Katrina. National Hurricane Center, p. 9 (December 20, 2005).

protective structures that were breached were part of the federally authorized Lake Pontchartrain and Vicinity Project, constructed by the U.S. Army Corps of Engineers and maintained by local levee districts.

A fundamental question in litigating damages caused by the breaches is whether the breaches occurred because the storms overwhelmed a flood protection system with a force that it was not designed to contain, or whether faulty design, construction, and maintenance caused the system to fail. Studies indicate that both theories may have played a part in the failures after Katrina. According to a National Hurricane Center (NHC) report, most of the breaches were due to overtopping, where the water was higher than the protective structures, but some breaches at significant floodwalls occurred before the water reached the top, meaning the floodwalls failed.⁶

Trillions of dollars in liability claims reportedly have been filed against the United States for damages from Hurricane Katrina.⁷ More lawsuits may follow after the Midwest flooding subsides. The federal government's exposure is thus potentially significant, but defenses, including absolute immunity, may be available. This report analyzes potential federal liability for flood damage specifically relating to Hurricane Katrina and generally relating to U.S. Army Corps of Engineers projects.

Flood control has garnered significant attention across the country and in Congress in recent years. In addition to Hurricane Katrina and the Midwest floods, flooding in Nevada stranded thousands of people in January 2008.⁸ Congress provided for a National Levee Safety Program in the Water Resources Development Act of 2007 (WRDA).⁹ Bills relating to levee inspection have been introduced in both the House and Senate.¹⁰ The Senate Subcommittee on Water and Power held a hearing in July 2008 regarding bills relating to improving water infrastructure.¹¹

⁶ *Id.*

⁷ Brad Heath, *Katrina Victims Swamp Corps for Trillions in Claims*, USA TODAY, January 7, 2008, at 1A. According to the article, more than 489,000 claims have been filed against the Corps, including 247 claims that seek \$1 billion or more.

⁸ See Martin Griffith, *Levee Breaks in Nevada, 3,500 Stranded*, ASSOCIATED PRESS ONLINE, January 5, 2008. The Nevada flooding was caused by a breach in a levee owned by the U.S. Bureau of Reclamation.

⁹ See Water Resources Development Act of 2007, P.L. 110-114, title IX, National Levee Safety Program.

¹⁰ See National Levee Safety Program Act of 2007, H.R. 1587; Aging Water Infrastructure and Maintenance Act, S. 2842.

¹¹ *Hearing to Receive Testimony on Pending Legislation*, Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources, July 8, 2008.

Background

The legal defenses available to the federal government are closely linked to the facts behind the flooding. Therefore, some factual background is related here before discussing the legal issues.

New Orleans is a city below sea-level, virtually surrounded by water, with Lake Pontchartrain to its north and the Mississippi River to the south. Not far to the east is the Gulf of Mexico. The city faces flooding risks from the Mississippi River, coastal storms, and heavy precipitation. A system of levees and floodwalls was designed to protect the city from these threats. Levees are typically broad, earthen structures; floodwalls are made of concrete or steel, built atop a levee or in place of a levee. This infrastructure around New Orleans represents a combination of federal and local investments and responsibilities, and is referred to in this report as the Hurricane Protection System. Like most of the nation's flood and storm damage reduction infrastructure, the levees and floodwalls in New Orleans were built primarily by the federal government but are maintained by local governments and local levee districts once they are completed. Some portions of the Lake Pontchartrain and Vicinity Hurricane Protection Project,¹² the project most relevant to the Katrina failures, were under construction when Katrina struck. Consequently, while some portions of the system were managed by the levee districts, other portions were still under the jurisdiction of the U.S. Army Corps of Engineers (Corps), the principal federal agency responsible for constructing flood, storm, and shore protection infrastructure.¹³

The landscape of the Mississippi Delta has changed significantly since the 1965 Lake Pontchartrain act. According to one report, an average of 42 square miles per year of coastal wetlands was lost during the 1960s, a rate that has slowed only recently to between 25 and 35 square miles per year.¹⁴ This is meaningful because marshlands slow storm surges. A study by the Louisiana Department of Natural Resources found that in 1992, Hurricane Andrew's 9.3-foot surge height dropped 3.1 inches for every mile of marsh-and-water landscape it crossed, dropping to 3.3 feet.¹⁵

According to *The Times-Picayune*, the Corps was planning an "array of hurricane-protection projects" in 2002, including a 72-mile levee, the Morganza-to-the-Gulf of Mexico levee.¹⁶ Such projects might indicate a decision by the Corps to

¹² P.L. 89-298, § 204, 79 Stat. 1073, 1077 (1965) (hereinafter referred to as the Lake Pontchartrain act).

¹³ For more on the Corps' water resources activities, see CRS Report RS20866, *The Civil Works Program of the Army Corps of Engineers: A Primer*, by Nicole T. Carter and Betsy A. Cody.

¹⁴ John McQuaid and Mark Schleifstein, "In Harm's Way," *The Times-Picayune* (2002).

¹⁵ *Id.* Hurricane Andrew was a Category 3 hurricane by the time it reached Louisiana, having been a Category 5 storm when it struck Florida earlier.

¹⁶ *Id.*

design a new system rather than improve the existing one, and could affect the Corps' liability.¹⁷

Levee Failure

According to the Corps, the enormous amount of flooding that devastated the city of New Orleans following Hurricane Katrina was predominantly the result of structure failure, allowing waters from Lake Pontchartrain, Lake Borgne, and other stormwaters to flow into the low-lying city. Although the protection system was designed to withstand a Category 3 hurricane,¹⁸ and Hurricane Katrina was a Category 3 storm at the time of landfall, the storm surges were higher than normal for such a storm.¹⁹ In addition, Katrina dumped more than five inches of rainfall in eight hours. With respect to the failure of the Hurricane Protection System in New Orleans, two central questions have emerged: (1) were the levees and floodwalls breached because their design was exceeded, or (2) did they fail due to faulty design, construction, or maintenance, before ever reaching design capacity?

The protection system failed in approximately 50 locations and for a variety of reasons. The vast majority of those failures occurred because of “overtopping,” where the waters that exceeded design capacity went over the floodwalls. Although most failed in this manner, evidence gathered by a panel of experts commissioned by the Corps suggests that at least four levees/floodwalls were breached before they exceeded their design capacity.²⁰

Following Katrina, the Corps prepared an extensive report via a multiparty task force known as the Interagency Performance Evaluation Task Force (IPET). The IPET report did not point to one failure, but to a system of failures, noting that a flood protection system by its nature is a series: if one part fails, it increases the impacts on the others.²¹ IPET found “differences in the quality of materials used in

¹⁷ Likewise, reports following the Midwest flooding in 2008 alleged that “the government ignored an expert panel’s advice after 1993’s devastating Mississippi River floods” and that “federal inaction may have exacerbated the current flood’s destructive power.” Daniel Cusick, *Army Corps: As Waters Recede, Questions About Flood Control Arise*, Greenwire (June 24, 2008).

¹⁸ The Lake Pontchartrain act required the system to withstand a “standard” storm, which is roughly equivalent to what is now called a Category 3 storm.

¹⁹ The height of storm surges for Hurricane Katrina reportedly ranged between 5 and 19 feet, whereas storm surges for Category 3 hurricanes generally ranges between 9 and 12 feet. See Richard Knabb, *et al.*, *Tropical Cyclone Report: Hurricane Katrina*, National Hurricane Center, *supra* note 3.

²⁰ For an extensive study of levee failure, see Interagency Performance Evaluation Task Force (IPET), *Draft Final Investigation of the Performance of the New Orleans Flood Protection Systems in Hurricane Katrina on August 29, 2005* (Washington, DC: May 22, 2006).

²¹ *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane* (continued...)

levees, differences in the conservativeness of floodwall designs, and variations in structure protective elevations due to subsidence and construction below the design intent due to error in interpretation of datums” all contributed to inconsistent protection within the system. The IPET report states that the 17th Street and London Avenue levees experienced foundation failures prior to water levels reaching the design levels of protection. The storm surges in the Inner Harbor Navigation Canal (IHNC) exceeded design levels, but IPET also found that the walls had subsided by over 2 feet, contributing to the amount of overtopping that occurred.

Another theory of causation is that the levees were overtopped or breached because the storm surge was enhanced by the Mississippi River Gulf Outlet (MRGO). MRGO (also known as Mr. Go) is a 76-mile navigational channel between the Port of New Orleans and the Gulf of Mexico. It is designed as a shortcut for ships.²² Studies have reviewed whether MRGO became a hurricane highway, or a funnel, acting as an accelerator in moving water from the Gulf into the IHNC. IPET found that MRGO did not accelerate the movement of the water. However, it did find that a portion of MRGO allowed the Lake Borgne waters to be pushed into the interior of New Orleans. IPET found that this connection amplified the surge level and velocity through the interior of the city and to have raised the level of Lake Pontchartrain.²³ In turn, that increased the pressure on the levees throughout the area, according to IPET.

Theories of Liability

Hundreds of lawsuits related to Hurricane Katrina have been filed, many against insurers, some against the city and its officials, and some against the federal government. The lawsuits against the federal government and some contractors have been consolidated under the heading *In re Katrina Canal Breaches Consolidated Litigation*, in the federal District Court for the Eastern District of Louisiana.²⁴

Any suit against the federal government, including the Corps, must overcome the doctrine of sovereign immunity. Simply put, sovereign immunity means that the government cannot be sued. This basic concept has been modified over the years to hold that the federal government cannot be sued unless Congress specifically provides for such a suit.²⁵ Although the government can be sued under such

²¹ (...continued)

Protection System: Draft Final Report of the Interagency Performance Evaluation Task Force (June 1, 2006).

²² P.L. 84-155, 70 Stat. 65 (1956).

²³ See CRS Report RL33597, *Mississippi River Gulf Outlet (MRGO): Issues for Congress*, by Nicole T. Carter and Charles V. Stern.

²⁴ Nos. 05-4182, 05-5237, 05-6314, 05-4181, 05-6073, 06-2545, 05-4191, 06-2268 (E.D. La.).

²⁵ See, e.g., *Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940) (“the United States cannot be sued without its consent”); *Rothe Development Corp. v. United States*, 194 (continued...)

circumstances, it is up to the plaintiff to demonstrate that it has the right to sue; the burden is not on the government to show it is immune from suit. One such vehicle for suit is the Federal Tort Claims Act.²⁶ Another is the Flood Control Act of 1928.²⁷

The Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) waives the federal government's sovereign immunity if a tortious act of a federal employee causes damage. (A tort, generally speaking, is a harmful act, other than breach of contract, for which relief may be sought in civil court.) Specifically, the FTCA creates liability for the following:

injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act of omission occurred.²⁸

Negligence. To win a negligence claim under the FTCA, as elsewhere, a plaintiff must demonstrate four things: (1) that the defendant owed a duty to the plaintiff, (2) that the duty was breached by the defendant, (3) that the breach was the cause of the plaintiff's injury, and (4) that the plaintiff was actually injured. All of these elements must be shown in order to have a valid claim.

Discretionary Function Exception. The FTCA contains a number of exceptions under which the United States may not be held liable even if negligent, notably, the discretionary function exception. The discretionary function exception prevents the government from being sued for

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.²⁹

In determining whether a government action is discretionary, courts look at whether the course of action was mandatory, or whether there was a choice. A claim related to the performance (or non-performance) of a mandatory function, one required by statute, would be actionable under the FTCA. However, a claim related to an action that requires decision making on the part of the government is likely to be found discretionary and exempt from suit. The theory behind this is, if Congress requires a certain action and the government unit fails to comply with that specific directive, the government should not be protected for failing to do what Congress

²⁵ (...continued)
F.3d 622, 624 (5th Cir. 1999).

²⁶ 28 U.S.C. §§ 1346, 2671-2680.

²⁷ 28 U.S.C. §§ 702a *et seq.*

²⁸ 28 U.S.C. § 1346(b).

²⁹ 28 U.S.C. § 2680(a).

expressly required. The difficulty lies in determining which part of the government action was specifically required by Congress, and which part involved *discretion*. In this case, for example, we know that Congress specifically required construction of the New Orleans Hurricane Protection System to protect against hurricanes. However, as caselaw illustrates, that does not mean that construction of the system was a purely non-discretionary action.

The Supreme Court has acted to clarify the use of the discretionary function exception. In *Dalehite v. United States*, the Court described discretion as being “more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.”³⁰

In *United States v. Gaubert*, the Court suggested a two-part test for applying the discretionary function exception: (1) the challenged conduct must involve an element of judgment or choice and (2) the judgment or choice must be based on considerations of public policy.³¹

The Discretionary Function Exception as Applied to Corps of Engineer Projects

The discretionary function exception has typically been interpreted broadly. Generally, the discretionary function exception has prevented claims against the United States for water damage to real property as a result of negligent design or construction of flood control or irrigation projects. In *Vaizburd v. United States*, plaintiffs alleged that a Corps project to reduce storm damage and protect the shoreline damaged their property because of negligent design and implementation.³² The court used the *Gaubert* two-part test to find that the Corps exercised discretion in the design, planning, and implementation of the project. The Corps chose from several different project plan designs and factored in a number of policy considerations, including cost, reliability, resource allocation, environmental protection, and political implications. The court also found that even though the project was required by statute, the actual implementation of the project was not precisely dictated by any plan, regulation, or statute, and thus, the Corps had a degree

³⁰ *Dalehite v. United States*, 346 U.S. 15, 35-6 (1953).

³¹ *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991), refining the test developed in *Berkovitz v. United States*, 486 U.S. 531 (1988). The *Gaubert* Court stated:

[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations. (internal citations omitted)

³² *Vaizburd v. United States*, 90 F. Supp. 2d 210, 214-15 (E.D.N.Y. 2000).

of choice in how to implement the project.³³ Accordingly, even if there has been negligent design or implementation, the presence of choice and judgment may allow the discretionary function exception to preclude any claim against the United States.

A discretionary function can also be exercised when choosing the materials of a required project. In *United States v. Ure*, the plaintiff argued the government was negligent in constructing an irrigation canal that burst and flooded the plaintiff's property. The canal had not been constructed with a stronger (and more expensive) material available for reinforcement, which the plaintiff claimed to be a breach of the government's duty to ensure against breaks. Ultimately, the court found that the government made a cost-based decision not to use stronger material. That the decision was based on cost was enough to invoke the discretionary function exception and overcome any negligence claim.³⁴

Similarly, when the government creates infrastructure to withstand a certain level of storm, despite knowing that more powerful storms are possible, courts have held that the discretionary function exception applies. In *Valley Cattle Co. v. United States*, the plaintiff contended that the government was negligent and liable for damages because of flood preparations that could handle only a "two-year storm" despite having the knowledge that storms of much stronger intensity hit the area. The court found that the government clearly made decisions at the planning level to prepare only for a two-year storm based on policy factors, and was immune from liability because of the discretionary function exception.³⁵

Even deciding to delay improving a project can excuse liability as a discretionary action. In *National Union Fire Insurance v. United States*, the court held the Corps' decision to delay a smaller improvement to a breakwater that protected a harbor while planning for a larger improvement was a choice immune from liability. The plaintiff asserted the Corps was negligent for not discovering the existing structure had subsided, and for not acting quickly to improve the deficiency. The Corps in fact was aware of the problems with the breakwater protection several years before the damage to plaintiff's property actually occurred. However, the court held that the FTCA's discretionary function exception applied because the Corps chose to put off the smaller improvement to the breakwater while studying the feasibility of a larger improvement. The decision of timing with respect to improvements invoked the exception.³⁶ The court also decided that considering the cost of greater safety is a discretionary function.

³³ *Id.*

³⁴ See *U.S. v. Ure*, 225 F.2d 709, 712-13 (9th Cir. 1955).

³⁵ *Valley Cattle Co. v. United States*, 258 F. Supp. 12, 19-20 (D. Haw. 1966) (finding that the FTCA allowed claims for only one of the two floods at issue).

³⁶ See *National Union Fire Ins. v. United States*, 115 F.3d 1415 (9th Cir. 1997). The Corps had to make the decision as to improvements weighing a wide variety of factors, including (1) how much commerce benefits from the project; (2) what kind of commerce benefits from the project; (3) how much the project will cost; (4) how necessary the work is; and (5) whether the work should be built, continued, or maintained by the federal government or some other entity.

At times discretion has been construed more narrowly in a construction context, despite the prevailing practice of broad interpretation. In *Seaboard Coast Line Railroad Company v. United States*, the Court of Appeals for the Fifth Circuit found the government liable for damages caused by a drainage system. The government claimed that the discretionary function exception applied, arguing it was a policy decision to create the drainage system in the first place. The court found that the decision to build a drainage system was discretionary but the construction was not. The construction of the ditch had to be performed in a non-negligent manner.³⁷ However, this decision was made before the U.S. Supreme Court decision in *United States v. Varig* and thus, according to the 11th Circuit, may no longer be a good evaluation.³⁸ Under the *Varig* analysis, an agency's execution of a decided-upon action is also a discretionary action.³⁹

Under some circumstances, maintenance has been found *not* to be a discretionary action. In *E. Ritter & Co. v. U.S. Army Corps of Engineers*, the court found the government liable for a failure to maintain a flood control project. The court noted that it was the Corps' decision not to maintain the banks of the project. However, the fact that a decision was made did not mean the discretionary function exception automatically applied. The court relied on the second prong of the *Gaubert* test, that only governmental decisions *based on considerations of public policy* are protected by the exception. The court found the discretionary function exception did not apply because operating the project incorrectly was not part of the Corps' mandated policy to prevent flooding.⁴⁰ A similar result was found in a case where a court decided that the failure not to maintain a road in a National Park was not "a decision grounded in social, economic, or political policies."⁴¹ Therefore, the discretionary exemption did not apply.

A contrary result was found in a second case based on the failure of the National Park Service (NPS) to maintain a road. In that case, the court looked at whether a decision had been made not to maintain. It considered that the NPS had developed a maintenance task list, and that maintaining that particular road was to occur following other projects.⁴² That scheduling determination was discretionary, according to the court. Agencies are allowed to establish priorities "by balancing the objectives sought to be obtained against such practical considerations as staffing and

³⁷ 473 F.2d 714 (5th Cir. 1973). The Corps was not a party to the case. *See also* *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989) (specific safety standards for construction meant discretionary function exception did not apply).

³⁸ *Alabama Elec. Co-op., Inc. v. United States*, 769 F.2d 1523, n. 5 (11th Cir. 1985)

³⁹ *United States v. Varig*, 467 U.S. 797 (1984) (holding that the Federal Aviation Administration had immunity from failing to find a problem with an aircraft during its spot-checking, because that inspection process was discretionary).

⁴⁰ 874 F.2d 1236 (8th Cir. 1989).

⁴¹ *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987).

⁴² *Cope v. United States*, 45 F.3d 445 (D.C. Cir. 1995).

funding.”⁴³ In a third case, the NPS’s trail maintenance was held to be a discretionary action. In that case, the court reviewed the policy-prong of the *Gaubert* test to find that agencies are allowed to balance public policy against “the constraints of resources available to them.”⁴⁴

Flood Control Act of 1928

Even if litigants are able to refute the discretionary function exception and sue the government under the FTCA, the Flood Control Act of 1928 (FCA) offers additional immunity to the federal government. Section 702c of the FCA provides that “no liability of any kind shall attach to or rest upon the United States from any damage from or by floods or flood waters.”⁴⁵ The overall breadth and scope of this immunity from liability is the subject of considerable controversy and litigation. Despite the Supreme Court’s comment that “it is difficult to imagine broader language,”⁴⁶ the case history of the FCA evidences a more nuanced application.

The FCA was enacted in response to a large flood that devastated the Mississippi River Valley. Congress wanted to fund large flood control projects while also limiting the government’s liability for those projects. One stated purpose during floor debate was to provide safeguards that would protect the government against lawsuits if the government provided flood protection to the people.⁴⁷ The legislative history illustrates that “Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from ‘any’ liability associated with flood control,” according to the Supreme Court.⁴⁸

The Supreme Court applied Section 702c immunity broadly in the case of *United States v. James*. The petitioners filed wrongful death claims against the government after two recreational boaters drowned in the reservoirs of federal flood control projects. The Court wrote that the language of Section 702c was unambiguous and should be given its “plain meaning.”⁴⁹ *Damage* under the act included both personal and property damage.⁵⁰ The terms *flood* or *flood waters* applied to “all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.”⁵¹ This holding was interpreted by most courts to mean if a public

⁴³ *Id.* at 451, quoting from *United States v. Varig*, 467 U.S. at 820.

⁴⁴ *Childers v. United States*, 40 F.3d 973 (9th Cir. 1994).

⁴⁵ 33 U.S.C. § 702c. Section 702c is sometimes referred as “Section 3 of the act,” based on where it appears in the public law.

⁴⁶ *United States v. James*, 478 U.S. 597, 604 (1986).

⁴⁷ 69 Cong.Rec. 6641 (1928) (remarks of Rep. Snell).

⁴⁸ *United States v. James*, 478 U.S. at 608.

⁴⁹ *United States v. James*, 478 U.S. 597 (1986).

⁵⁰ *Id.* at 604-606.

⁵¹ *Id.* at 604.

works project has flood control as one of its purposes, Section 702c immunity would apply.

Following the *James* decision, the courts split as to what relationship a federal project must have to flood control. All circuits agreed that federally funded public works projects “wholly unrelated” to flood protection purposes are not entitled to Section 702c immunity. The dissent among circuits arose in determining exactly how connected the project must be to flood control in order to invoke Section 702c immunity.

However, in 2001 the Supreme Court revisited its interpretation of the FCA.⁵² The Court held that the portion of the *James* decision that referred to flood control projects was dicta and did not relate the specific wording of the statute, thereby rendering the bulk of FCA litigation of little precedential value. The Court did not focus on the character of the federal project or the purpose it served, but looked at the waters that caused the damage and the purpose for their release. The unanimous Court held that “in determining whether § 702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project.”⁵³

Analysis

The FTCA and the FCA are compatible statutes, frequently appearing as defenses within the same case. It has been affirmatively held by one circuit court that the FTCA does not overrule or invalidate Section 702c of the Flood Control Act.⁵⁴

Both the immunity provision under the FCA and the FTCA’s discretionary function exception are jurisdictional, meaning that if they apply, the court has no authority to hear the case. The typical process for reviewing a case brought under the FCA and the FTCA is to see whether the immunity provisions or exceptions apply. Then, if the case survives that review, the court would consider the application of the facts to the underlying tort claim. However, the District Court for the Eastern District of Louisiana has ruled that the facts necessary to show whether the Corps exercised any discretion are inextricably intertwined with the factual questions that will determine liability.⁵⁵ Also, the court ruled that the facts necessary to show whether flooding was linked to a flood control project were inseparably linked to the determination of whether FCA immunity applied.⁵⁶ The court decided it would be judicially inefficient to consider the discretionary exception and Section 702c immunity, and then have the jury consider the same facts to determine negligence.

⁵² *Central Green Company v. United States*, 531 U.S. 425 (2001).

⁵³ *Id.* at 437.

⁵⁴ *National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir. 1954).

⁵⁵ *In re Katrina Canal Breaches Consolidated Litigation (Robinson)*, 471 F. Supp. 2d 684 (E.D. La. 2007).

⁵⁶ *Id.*

Accordingly, a jury will determine whether the Corps used its discretion and whether MRGO caused damages from floodwaters.⁵⁷ To give some context to this decision, none of the other cases cited in this report used juries to decide these issues.

Federal Tort Claims Act

To invoke the discretionary function exception under the FTCA, the court would apply the *Gaubert* test: (1) the challenged conduct must involve an element of judgment or choice and (2) the judgment or choice must be based on considerations of public policy.⁵⁸ Hence, to be successful, a suit based on the FTCA would have to show that policy decisions and government discretion did not play any part in building the Hurricane Protection System. The resolution of these questions should be independent of any decision regarding negligence or fault.

Under the Flood Control Act of 1965,⁵⁹ Congress authorized and delegated primary design and construction responsibility to the Corps. The construction of the Hurricane Protection System was almost constantly ongoing up through the time Hurricane Katrina hit the city.⁶⁰ In those several decades, the Corps had to revise the design and construction of the Hurricane Protection System for a number of reasons, including cost, environmental factors, technical issues, the necessity of acquiring additional lands, and aesthetic issues. Thus, the overall design and construction required balancing many different policy factors, which aids the Corps in invoking discretionary immunity.

As discussed, courts have found that design and construction of a project are considered discretionary activities, and it appears likely that the various steps that went into designing and building the Hurricane Protection System were all discretionary actions under existing precedent. A possible complicating factor is that the statute mandated the levees and floodwalls be constructed to withstand a standard hurricane for the region, which was roughly equivalent to a Category 3 hurricane, the rated strength of Katrina.⁶¹ The decision to design to that standard appears to be a non-discretionary action.

A more difficult issue may be liability related to maintenance of the system. As discussed earlier, the courts are inconsistent in finding whether maintenance requires choice or is purely a non-discretionary action. Courts tend to lean away from finding an exemption in cases where a maintenance decision appears to be contrary to public policy and not supported by documentation showing public policy considerations

⁵⁷ *Id.*

⁵⁸ *United States v. Gaubert*, 499 U.S. 315 (1991).

⁵⁹ P.L. 89-298, Title II.

⁶⁰ *See* New Orleans Hurricane Protection Projects Data at [<https://ipet.wes.army.mil/>]. Construction was temporarily halted in December 1977 when a court decision enjoined the Corps from continued building until an environmental impact study could be completed. After the study was accepted, the Corps changed significant portions of the design in response to environmental and cost concerns.

⁶¹ P.L. 89-298, § 204.

behind the decision. In this case, if the Corps could show it lacked available money to make the necessary repairs, and that its decision not to maintain the levees was based on public policy concerns such as limited resources, the discretionary function exception might be available. Also the Corps' ongoing evaluation of a new Hurricane Protection System could bolster the argument that the Corps was considering public policy, if it were shown that the Corps chose to work on a new system, rather than expend funds on an existing system.

It also is not clear who was responsible for maintenance of the levees and floodwalls, because local levee districts managed them only after they were completed, and not all were completed.

Plaintiffs would potentially be able to bypass discretionary immunity if they demonstrated that the persons at the operational level were required to maintain the system according to a prescribed protocol. For example, if inspections had to meet specific guidelines, or if various assessments were strictly prescribed, there may be little or no discretion involved.⁶² However, to be consistent with other caselaw, any documented choice involving prioritization would likely be considered a discretionary action, exempting the government from liability.

Bolstering a case for immunity is the July 2007 report released by the Corps describing 50 years of decision making behind the Hurricane Protection System.⁶³ The report's stated purpose is to show "how Corps' policies and organization, legislation, and financial and other factors influenced the decisions" leading to the New Orleans' system. This report appears to relate directly to the discretionary function exception, as it addresses not only decision making, but the policies behind the decisions, thus satisfying the two prongs of *Gaubert*.⁶⁴

Flood Control Act

Even if the government cannot invoke discretionary function immunity, a plaintiff would have to overcome the broad Section 702c immunity of the Flood Control Act. According to the district court in *In re Katrina Canal Breaches*, the U.S. Supreme Court *Central Green Company* decision did not resolve what nexus floodwaters must have to a flood control project to trigger immunity.⁶⁵ Under this theory, Section 702c immunity appears to apply only where the floodwaters are

⁶² *Id.* The "pre-Katrina" section has several examples of studies that were done prior to the storm.

⁶³ Douglas Woolley and Leonard Shabman, Draft Final Report: Decision-making Chronology for the Lake Pontchartrain & Vicinity Hurricane Protection Project (June 2007), available at [<http://www.iwr.usace.army.mil/inside/products/pub/hpdc/hpdc.cfm>].

⁶⁴ The report addresses three main issues: selection of the overall protection approach; treatment of new information, including surge modeling and land subsidence; and the design of I-wall parallel protection structures. It also considers the number of decision makers during the project's history, including local levee districts.

⁶⁵ *In re Katrina Canal Breaches Consolidated Litigation* (Robinson), 471 F. Supp. 2d at 695 (E.D.La. 2007).

linked to a flood control project. It is not clear how this ruling fits with the Supreme Court’s statement that courts “determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release.”⁶⁶

There appears to be little controversy that the Hurricane Protection System was a flood control project, and so the Corps likely would be immune from claims based on that system’s failure. However, some plaintiffs have alleged that their claims are based not on the levee and floodwall failures, but on MRGO, which they argue is solely a navigational project. Section 702c has already been found not to apply to MRGO by the Fifth Circuit in 1971, in *Graci v. United States*.⁶⁷ In the 1971 case, which followed Hurricane Betsy, litigants argued the construction of MRGO caused their properties to flood. The circuit court refused to find Section 702c applied to all flood damage actions, stating it would be “contrary to the express policy of the Federal Tort Claims Act.”⁶⁸ However, the *Graci* case predates *Central Green Company*.

Also, language in a more recent Fifth Circuit case might imply that projects with mixed purposes (i.e., that are not purely flood-related) may be covered under the FCA, in which case a navigational channel that served some flood control purposes could be covered under the FCA. A 1999 decision by the Fifth Circuit refused to find FCA immunity where the action was neither “associated with flood control” nor “clearly related to flood control,”⁶⁹ seemingly establishing immunity for those projects that are associated with or clearly related to flood control. The government has argued that MRGO serves some flood control purposes.⁷⁰

Negligence

Only after a court decides the FTCA and the FCA defenses in the plaintiffs’ favor would it consider the negligence of the federal government. The plaintiffs will still have to show that the federal government owed them a duty when it built the Hurricane Protection System. The plaintiffs must show that the federal government breached that duty, that the breach caused harm, and that the plaintiffs were injured as a result of that breach.

The most difficult factor of negligence for the plaintiffs to prove appears to be the second one — that the duty was breached by the Corps. To succeed on this count, the plaintiffs would have to show that specific properties were flooded because the Corps failed to exercise reasonable care. This argument could be based on the allegedly faulty design, construction, and maintenance, arguing that the levees fell apart. Or it could be based on a theory that the system was overwhelmed because

⁶⁶ *Central Green Co. v. United States*, 531 U.S. at 434.

⁶⁷ *Graci v. United States*, 456 F.2d 20, 27 (5th Cir. 1971)

⁶⁸ *Graci v. United States*, 456 F.2d at 27.

⁶⁹ *Kennedy v. Texas Utilities*, 179 F.3d 258, 263 (5th Cir. 1999).

⁷⁰ *In re Katrina Canal Breaches Consolidated Litigation (Robinson)*, 471 F. Supp. 2d at 695-97.

of water funneled by MRGO and that this result was reasonably foreseeable and preventable.

A common defense for such a claim is that the damage was caused by an act of God, in the case of Hurricane Katrina, a hurricane. The act of God defense appears to apply the most easily to those levees and floodwalls that were overtopped by the waters. They essentially failed because their design capacity was exceeded by the unusually high storm surges brought on by Katrina. However, as was discussed earlier, some of the overtopping occurred because some levees and floodwalls had subsided by as much as two feet. Also, plaintiffs may argue that the storm surge was as large as it was because of MRGO, which was the result of an act of Congress, not of God.

It may be more difficult to defend the system breaches that some studies have attributed to design defects. The purported design defects reportedly led to the deterioration of the four levees nearest downtown New Orleans that failed before reaching their design capacity. The failure of these levees might also be attributed to negligent construction or negligent maintenance.

The district court would follow state law when reviewing for negligence. Louisiana is a comparative fault state, meaning if multiple actors are negligent, they are each responsible only for that portion of the harm that they caused.⁷¹ This applies even if all of the actors are not parties to the suit. In this case, if it is found that negligent maintenance of the levees caused the flooding, the Corps would be responsible only for that portion of the blame attributed to it, as opposed to the local levee boards, or contractors that may have worked on the project.

Conclusion

In 2008, two key decisions were made in the Katrina litigation. In January, the federal district court dismissed certain counts of the class action that alleged federal liability for levee failures, citing Section 702c immunity as a bar to the claims.⁷² That decision barred recovery for flood damage determined to be caused by levee failures, but allowed the plaintiffs to proceed with the litigation with respect to MRGO.⁷³ In May 2008, the court held that Section 702c immunity did not apply to claims that alleged liability for MRGO because MRGO was a navigation project, rather than a flood control project.⁷⁴

⁷¹ La. C.C. art. 2323: comparative fault means a “percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person’s insolvency, ability to pay, immunity by statute ... or that the other person’s identity is not known or reasonably ascertainable.” *See also* La. R.S. 9:2800.68

⁷² *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, January 30, 2008.

⁷³ *Id.*

⁷⁴ *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, May 2, 2008.

The liability of the United States Army Corps of Engineers for damages following Hurricane Katrina appears to be in the hands of a jury. In such a case, with the previous decisions issued by the judge regarding Section 702 immunity for the levees and MRGO, the jury would have to establish first whether any legal defense is available to the Corps, such as the discretionary function exception under the FTCA. This determination will examine the design, construction, maintenance, and purpose of MRGO. The Corps' liability depends on whether the Corps' actions are found to be discretionary. Only after making these decisions will the jury consider the question of whether the Corps acted without reasonable care in regard to the project. Even if the Corps is found liable, its liability could be reduced if other parties share responsibility.