

5th Circuit Reverses Itself on Hurricane Katrina Liability Lawsuit

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INTRODUCTION

The Fifth Circuit Court of Appeals recently reversed an earlier ruling by holding that the Army Corp of Engineers (“the Corps”) is not liable for damages against private individuals arising out of the Corps’s management of a shipping canal called the Mississippi River Gulf Outlet (“MRGO”) during and after Hurricane Katrina in 2005.¹ This unusual move by the three-judge panel reverses some of the liability issues that may have arisen from its initial ruling.² Although the same three-judge panel wrote the new opinion, little is known about why the panel has reversed itself.³ This surprising turn-around, which happened over the course of a mere six months, can be explained as an attempt by the panel to bring its opinion back into consistency with the Fifth Circuit’s case law around the Federal Tort Claims Act (“FTCA”).⁴

This Field Report provides background on the MRGO and its role in Hurricane Katrina’s impact on the Gulf region, the subsequent district court litigation, and compares the initial Fifth Circuit ruling with the panel’s current ruling on the case. Although the reasons why the Fifth Circuit withdrew its initial ruling may never be known beyond the walls of the judges’ chambers, a comparison of the two rulings suggests that there was a change from emphasis on what the Corps actually *did* to an emphasis on the *nature* of the decision the Corps had to make. This revised opinion brings the Fifth Circuit back in line with its other decisions

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1. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 452–54 (5th Cir. 2012).

2. *See In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012); *see also* Michael B. Gerrard, *Hurricane Katrina Decision Highlights Liability for Decaying Infrastructure*, N.Y. L.J., May 10, 2012, at 1 (describing implications of initial appeals court decision on federal, state, and municipal agencies).

3. Nate Raymond, *Army Corps not liable for Katrina damage-court*, REUTERS, Sept. 25, 2012, available at <http://in.reuters.com/article/2012/09/25/katrina-appeals-idINL1E8KP87B20120925> (“The fact that the judges reversed themselves deserves an explanation,” [Plaintiffs’ lawyer Joseph Bruno] said.”).

4. 28 U.S.C. §§ 1346(b), 2671–2680 (2006); *see, e.g.*, *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010).

requiring the government merely to show that “the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis.”⁵

I. THE MISSISSIPPI RIVER GULF OUTLET AND HURRICANE KATRINA

In March 25, 1954, Congress authorized construction of the MRGO in order to facilitate the use of the city of New Orleans, Louisiana for maritime and military purposes.⁶ Construction began in 1958 and was fully completed a decade later in 1968.⁷ The original plan for the MRGO was for a seaway canal, thirty-six feet deep and 500 feet wide, extending seventy miles from New Orleans to the Gulf of Mexico, expanding to thirty-eight feet deep and 600 feet wide at the Gulf.⁸

The MRGO was cut through pristine coastal wetland at a depth that went into a layer of so-called “fat clay,” a form of soil soft enough that it would move if made to bear a load.⁹ The channel’s original designers considered and rejected a plan to armor its banks with foreshore protection, leaving them vulnerable to erosion.¹⁰ Following years of wave wash by large oceangoing vessels, the MRGO had eroded, expanding it by an average of three times its design width before the Corps decided to armor the banks to mitigate the erosion.¹¹

In August 2005, Hurricane Katrina struck the region, resulting in more than 1800 direct and indirect deaths and financial damage of approximately \$108 billion.¹² The expanded size of the MRGO not only meant that it could carry more water, but also that it had more fetch (defined as the width of open water that wind can act upon), leading to a more forceful wave attack on levees protecting New Orleans.¹³ The

5. See *Spotts v. United States*, 613 F.3d 559, 573 (5th Cir. 2010) (quoting *Shansky v. United States*, 164 F.3d 688, 692 (1st Cir.1999)).

6. An Act to Authorize Construction of the Mississippi River-Gulf Outlet, Pub. L. No. 84-455, 70 Stat. 65 (1956).

7. See U.S. Army Corps of Eng’rs, New Orleans District, *History of MRGO* (Sept. 30, 2012, 5:00 PM), http://www.mrgo.gov/MRGO_History.aspx (describing the history and construction of MRGO).

8. H.R. DOC. NO. 82-245, at 5 (1951).

9. In re Katrina Canal Breaches Litig., 696 F.3d 436, 452–54 (5th Cir. 2012).

10. *Id.*

11. In re Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 671 (E.D. La. 2009); see also Joby Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws*, WASH. POST, Oct. 24, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/23/AR2005102301200_pf.html (describing MRGO’s effect on aggravating hurricane-related damage).

12. RICHARD D. KNABB ET AL., NAT’L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 11–13 (2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

13. In re Katrina Canal Breaches Litig., 696 F.3d at 441.

MRGO's expansion thus allowed Hurricane Katrina to generate a peak storm surge capable of breaching the Reach 2 levee abutting the city and flooding the St. Bernard parish.¹⁴

II. DISTRICT COURT LITIGATION IN THE EASTERN DISTRICT OF LOUISIANA

More than 400 property owners filed lawsuits in federal court following Hurricane Katrina, many of which were consolidated before District Judge Stanwood R. Duval Jr. in the United States District Court for the Eastern District of Louisiana. One group of seven plaintiffs, the Robinson plaintiffs, filed claims for damages from flooding under the FTCA¹⁵ against the Corps. After a nineteen-day bench trial, the district court found for three of the seven plaintiffs.¹⁶

Notably, the district court found that neither the immunity provision of the Flood Control Act of 1928 ("FCA")¹⁷ nor the discretionary-function exception ("DFE") to the FTCA¹⁸ protected the government from suit. Additionally, the court found that some of the plaintiffs had established that their damages arising from Hurricane Katrina could be substantially attributable to the Corps's negligence, grounded on a failure to appreciate certain hydrological risks related to armoring the MRGO.¹⁹ The court awarded just under \$720,000 to three plaintiffs and left open the possibility that hundreds of others similarly affected could also bring suits against the Corps.²⁰

III. INITIAL FIFTH CIRCUIT RULING IN MARCH 2012

The district court ruling was appealed to the Fifth Circuit.²¹ In March 2012, a three-judge panel affirmed each of the lower court's judgments in an opinion written by Judge Jerry E. Smith.²² On the FCA-immunity defense, the court relied on a narrow holding that the MRGO "cannot be characterized as flood-control activity." Because the FCA is applicable

14. *Id.*

15. 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

16. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, at 734–736.

17. 33 U.S.C. § 702 (2006).

18. 28 U.S.C. § 2680(a) (The DFE bars suit on any claim that is "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.").

19. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d at 671.

20. *Id.* at 736; *see also* Gerrard, *supra* note 2.

21. *See In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012).

22. *Id.*

only to flood-control activity, the Fifth Circuit held that the FCA cannot be used to immunize the government against liability for flooding caused by the MRGO, affirming the decision of the district court.²³

With regards to the DFE defense to the FTCA claim, the court applied the two-part *Berkovitz-Gaubert* test, whereby the government enjoys immunity only where its judgments are susceptible to public-policy analysis.²⁴ In order to raise a DFE defense, the government must first show that the conduct in question involves an “element of judgment or choice.”²⁵ Second, the government must establish that the decision was susceptible to policy analysis.²⁶ If both elements are present, then the government’s conduct is exempted from FTCA.²⁷

Applying this test to the facts on a *de novo* review standard, the Fifth Circuit ruled that the plaintiffs presented sufficient evidence to show that the Corps made a misjudgment based on objective scientific principles and not on the basis of any public-policy considerations in delaying armoring of the banks.²⁸ The Corps’s decision to delay armoring of the banks, once it became clear that armoring was necessary, failed the second prong of the *Berkovitz-Gaubert* test and the court therefore found that the DFE is inapplicable because the Corps’s action did not involve a “decision rooted in public-policy considerations.”²⁹ The court wrote that the plaintiffs pointed to “ample record evidence indicating that policy played no role in the government’s decision to delay armoring MRGO.”³⁰ The opinion relies on an amicus brief filed by AT&T Entities stating that “the Corps labored under the mistaken scientific belief that the MRGO would not increase storm-surge risks” and that “because the Corps disbelieved the scientific evidence of the MRGO’s storm-surge effect, it did nothing to protect against it.”³¹ This novel legal hook to bypass the DFE expanded the FTCA case law in a new direction that had never been explored.

Lastly, the panel upheld factual findings with respect to the individual plaintiffs, affirming the judgment for each of the parties under a clear error standard.³² This March 2012 ruling from the Fifth Circuit had major

23. *Id.* at 387.

24. *Id.* at 391.

25. *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

26. *Id.*

27. 33 U.S.C. § 702 (2006).

28. *In re Katrina Canal Breaches Litig.*, 673 F.3d at 391.

29. *Id.*

30. *Id.*

31. Brief of Amici Curiae AT&T Entities in Support of Plaintiffs-Appellees/Cross-Appellants at 20–21, *In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012) (No. 10-30249), 2011 WL 990295 at *20.

32. *Id.* at 396–99.

implications for federal, state, and municipal government entities, suggesting that the court would find liability under the FTCA where an agency mishandled scientific evidence about an environmental peril it faced.³³ Following the adverse ruling, the United States government filed a petition for rehearing *en banc*.³⁴

IV. SEPTEMBER 2012 RULING AFTER REHEARING

Presented with a petition for rehearing *en banc*, the same three-judge panel treated the petition as a petition for rehearing and withdrew its initial March 2012 ruling.³⁵ The panel reversed the judgments for the plaintiffs and granted judgment for the government in an opinion once again written by the same Judge Jerry E. Smith.³⁶ The new ruling left the holding on the FCA immunity undisturbed from the initial ruling, finding that the FCA does not immunize the government against liability from the flooding for the same reasons as before.³⁷

This time around, however, the Court instead found that the DFE is in fact applicable to the Corps's actions, holding that "the Corps's failure to armor timely Reach 2 is shielded by the DFE,"³⁸ which "completely insulates the government from liability."³⁹ The panel found that "there is ample record evidence indicating the public-policy *character* of the Corps's various decisions contributing to the delay in armoring Reach 2"⁴⁰ — a subtle but important change from analyzing the actions *taken* to instead analyzing the *nature* of the decision at hand. This new analysis echoes the Fifth Circuit case law regarding the DFE.⁴¹

Building upon this distinction, the opinion explored the availability of alternatives to armoring the banks and found that "[t]he Corps's actual reasons for the delay are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations."⁴² The evidence relied upon and discussed at length in the

33. See Gerrard, *supra* note 2.

34. Corrected Petition of the United States for Rehearing En Banc at at 1, In Re Katrina Canal Breaches Litig., 673 F.3d 381 (5th Cir. 2012) (No. 10-30249).

35. In re Katrina Canal Breaches Litig., 696 F.3d 436, 452–54 (5th Cir. 2012).

36. *Id.* at 441.

37. *Id.* at 444–48.

38. *Id.* at 451.

39. *Id.* at 454.

40. Compare *id.* at 451 (emphasis added), with In re Katrina Canal Breaches Litig., 673 F.3d 381, 394 (5th Cir. 2012) ([the plaintiffs] "point to ample record evidence indicating that policy played no role in the government's decision to delay armoring MRGO.").

41. See, e.g., Spotts v. United States, 613 F.3d 559 (5th Cir. 2010).

42. In re Katrina Canal Breaches Litig., 696 F.3d at 451.

March 2012 decision regarding the mistaken use of scientific evidence is succinctly dealt with in a footnote observing that “[m]uch, if not all, of the proffered evidence, however, suggests negligence in the original design of MRGO, including the ‘funnel effect,’ and does not support the theory that the Corps’s decision to delay armoring was grounded in a purely scientific misjudgment.”⁴³

Comparing the subtle use of language in the original and revised opinions illustrates the different inquiry that the panel undertakes in each. For example, the March 2012 ruling features a quote of the case *Cope v. Scott* describing the functionality of actual actions in determining whether policy considerations could be implicated.⁴⁴ The September 2012 ruling also includes the quote, but features more of the excerpt: “but the applicability of the exemption does not turn on whether the challenged decision involved such judgments.”⁴⁵

With respect to the factual findings, the Fifth Circuit agreed with the findings of the district court, but instead found that the individual plaintiffs’ claims were mooted by the DFE, and therefore the plaintiffs could not bring a successful FTCA claim against the Corps.⁴⁶ Given the application of the DFE defense to the Corps’s conduct, the Fifth Circuit panel reversed the lower court and instead found for the government against the Robinson plaintiffs, dismissing each of the suits.⁴⁷ Critics have dispraised the lack of an explanation for the dramatic change.⁴⁸

V. CONCLUSION

While this litigation was progressing through the legal system, the United States government took steps to avoid another disaster from the MRGO. In June 2006, Congress requested a plan for de-authorization of the MRGO.⁴⁹ On June 5, 2008, the Assistant Secretary of the Army for Civil Works forwarded the Final MRGO Deep-Draft De-authorization

43. *Id.* at 451 n.9.

44. In re Katrina Canal Breaches Litig., 673 F.3d 381, 394 (5th Cir. 2012) (“[e]vidence of the actual decision may be helpful in understanding whether the nature of the decision implicated policy judgments,” *Cope v. Scott*, 45 F.3d 445, 449 (D.C.Cir.1995) . . .” (internal quotation marks omitted)).

45. In re Katrina Canal Breaches Litig., 696 F.3d at 451 (quoting *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995)).

46. *Id.* at 454.

47. *Id.*

48. See, e.g., Robert Verchick, *Fifth Circuit’s Reversal on Katrina Litigation Leaves Flood Victims Gasping for Air*, CTR. FOR PROGRESSIVE REFORM (Sept. 30, 2012, 5:00 PM), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=08E62277-9773-4CA1-85E69FD4E5843072>.

49. Supplemental Appropriations Act for Defense, The Global War of Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418 (2006).

Study⁵⁰ to Congress, officially removing the MRGO as a federal navigation project.⁵¹ In July 2009, the government completed closure of the MRGO by finishing a rock closure structure across the canal nearby Bayou La Loutre in St. Bernard Parish.⁵²

The Fifth Circuit's sudden withdrawal of its earlier ruling for the Robinson plaintiffs and subsequent opinion has left plaintiffs "devastated."⁵³ While litigation related to Hurricane Katrina is almost sure to continue, the new ruling temporarily alleviates some of the concerns government agencies may have about liability arising from their handling of scientific evidence. The March 2012 decision left an opening for plaintiffs seeking to sue the federal government, allowing them to argue against the DFE defense by analyzing what the government actually *did*. With the new decision, that window has effectively closed, as the Fifth Circuit continues to adhere to its existing FTCA case law using the *Berkovitz-Gaubert* test. For now, plaintiffs seeking to file claims under the FTCA against the federal government arising from the MRGO's role in the damages from Hurricane Katrina will continue to have to face the DFE. The surprising outcome for the plaintiffs is a sign to others that the DFE is still a very formidable barrier to overcome in FTCA suits against the government.

50. U.S. ARMY CORPS OF ENG'RS, NEW ORLEANS DISTRICT, INTEGRATED FINAL REPORT TO CONGRESS AND LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT FOR THE MISSISSIPPI RIVER—GULF OUTLET DEEP-DRAFT DE-AUTHORIZATION STUDY 1 (2007) available at <http://www.mrgo.gov/FileDownload.aspx?ProdType=reference&id=304>

51. U.S. Army Corps of Eng'rs, New Orleans District, *supra* note 7.

52. See U.S. Army Corps of Eng'rs, New Orleans District, *MRGO Navigation Channel Closure*, (Sept. 30, 2012, 5:00 PM), http://www.mrgo.gov/MRGO_Closure.aspx.

53. See Raymond, *supra* note 3.