Hurricane Katrina Decision Highlights Liability for Decaying Infrastructure

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March 2, 2012, decision from the U.S. Court of Appeals for the Fifth Circuit, little noticed outside of New Orleans, has broad implications for the liability of federal agencies for injuries caused by the decay or obsolescence of infrastructure due to erosion, sea level rise, and other ongoing conditions, whether of natural or human origin. Less directly, the decision also affects the liability of state and municipal governments, and even private entities in charge of built structures.

This article describes the underlying facts, the decision, and its implications. It also considers how governments and private parties can, to a limited extent, protect themselves from this liability.

Mississippi River Gulf Outlet

The saga can be traced to 1956, when Congress authorized the U.S. Army Corps of Engineers to build a 76-mile channel to provide a shorter shipping route between the Gulf of Mexico and New Orleans. The channel became known as the Mississippi River Gulf Outlet or MRGO (pronounced Mr. Go). It was cut through virgin coastal wetlands and into “fat clays,” a form of very soft soil. The channel’s designers considered and rejected lining its banks with riprap (large rocks) or other armor.

In 1965, Hurricane Betsy hit New Orleans and caused massive damage. Injured parties claimed that the MRGO—which was then nearly complete—had become a conduit that allowed the storm surge to flood eastern New Orleans and St. Bernard Parish, the county immediately southeast of New Orleans.2

The channel was initially designed to be 500 feet wide, but over time the heavy traffic from ocean-going vessels caused so much turbulence that the banks continually eroded and the channel required constant dredging. The Corps finally armored the banks in the 1980s, but by then MRGO had bloated to more than triple its design width. This not only meant that it could carry much more water, but it also had more fetch (the width of open water that wind can act upon), allowing a more forceful wave attack, and the saltwater it carried killed much of the wetlands vegetation that had tamed the waters.

When Hurricane Katrina struck in 2005—just a week shy of the 40th anniversary of Hurricane Betsy—the storm surge roared up MRGO again, but this time it gathered so much force that it wiped out levees and floodwalls that in the meantime had been built along the way, devastating parts of New Orleans and St. Bernard Parish. (The hurricane also caused other levees to breach for other reasons.)

Over 400 plaintiffs sued in the U.S. District Court for the Eastern District of Louisiana to recover for Katrina-related damages. Seven of these plaintiffs (the “Robinson plaintiffs”) went to trial. Judge Stanwood R. Duval Jr. held a 19-day trial and on Nov. 18, 2009, issued a 156-page decision.3 It was a blistering account of what he found was the “gross negligence” of the Corps in its operation of MRGO, and it awarded just under $720,000 to five plaintiffs.

It left open the possibility of trials by hundreds of additional plaintiffs and a final liability to the Corps of hundreds of millions of dollars.4

In order to prevail, the plaintiffs needed to overcome three major legal obstacles. Plaintiffs won on all three counts.

The Corps appealed. The Fifth Circuit issued its decision on March 2, 2012.5 It found that the district court’s “careful attention to the law and even more cautious scrutiny of complex facts allow us to uphold its expansive ruling in full,” with one small exception.

In order to prevail, the plaintiffs needed to overcome three major legal obstacles: a defense under the Flood Control Act (FCA); the discretionary-function exception to the Federal Tort Claims Act (FTCA); and the argument that the Corps was not negligent. Plaintiffs won on all three counts. The first is of narrow application; not so the second and third.

Flood Control Act

The FCA was enacted in 1928 in response to the catastrophic Mississippi River Valley flood of 1927.6 The flood control program it launched was the largest public works project undertaken up to that time in the United States.7 The FCA also provided in Section 702c 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.”8 The Supreme Court has interpreted the scope of this exemption as determined 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.”9

In the Hurricane Katrina case, the Fifth Circuit rejected the Corps’ defense that its decision to dredge MRGO for many years instead of armor-ing it constituted flood-control activity that qualified it for Section 702c immunity. The court also found that MRGO was not so interconnected with a separate flood control project in the vicinity as to make it part of that project. It concluded, “the flood waters that destroyed the plaintiffs’ property were not released by any flood-control activity or negligence therein.”

Sovereign Immunity

The lawsuit was brought under the Federal Tort Claims Act, which is a limited waiver of the federal government’s sovereign immunity. This immunity is subject to the discretionary-function exception (DFE). The Corps vigorously argued that its decisions with respect to the MRGO enjoyed this exception.

The Fifth Circuit was not persuaded. It declared “the government enjoys immunity only where its discretionary judgments are susceptible to public-policy analysis. The key judgment made by the Corps, however, involved only the (mis-)application of objective scientific principles and not any public-policy considerations: The Corps misjudged the hydrological risk posed by the erosion of MRGO’s banks.”

Citing the Supreme Court’s Berkovitz-Gaubert test,10 the appeals court stated, “the relevant question is whether the discretionary judgment at issue involved the application of objective technical principles or of policy considerations,” and that if the discretion is “grounded in the policy of the regulatory regime,” then “the decision is immune under the DFE, even if it also entails application of scientific principles. If it involves only the application of scientific principles, it is not immune.”

The Fifth Circuit found “ample record evidence indicating that policy placed no role in the government’s decision to delay armor-ing MRGO.” Rather, in the words of an amicus brief approvingly quoted by the Fifth Circuit, “the Corps labored under the mistaken scientific belief that the MRGO would not
increase storm-surge risks. And because the Corps disbelieved the scientific evidence of the MRGO’s storm-surge effect, it did nothing to protect against it.”

The Fifth Circuit said the plaintiffs “have mustered enough record evidence to demonstrate that the Corps’ negligent decisions rested on applications of objective scientific principles and were not susceptible to policy considerations.” Duval found, and the Court of Appeals affirmed, that the Corps was negligent under the Louisiana Civil Code.

State negligence rules vary, so each case—whether in federal court under the FTCA, or in state court—will need to be analyzed under the law of the particular state. As noted, the FTCA is an exception to sovereign immunity, and the DFE is a limitation to that exception. None of this applies to the liability of a private entity. Thus, if a privately owned structure does not withstand a disaster of natural or human origin, a court considering liability for the loss will look at whether its construction, operation, or maintenance involved negligence under the law of the state. The MRGO litigation is an example of how a property manager was found liable for ignoring scientific evidence of perils it faced; the fact that the property manager was a federal agency does not diminish the case’s relevance to a negligence analysis involving private parties. There is no discretionary function exemption for private liability.

Foreseeability

An important basis for the liability of the Corps for MRGO was that scientific information was available to the Corps that revealed at least some of the dangers that were created by the failure to armor the banks. Scientific information is now available about many emerging perils. In this country the most authoritative source for many of these is the U.S. Global Change Research Program (USGCRP), which was mandated by Congress in the Global Change Research Act of 1990 as “a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change.” The USGCRP prepares and periodically updates information, on a regional basis, of anticipated changes in patterns of flooding, drought, snowfall, wildfire, and other conditions. Conditions anticipated by the USGCRP would seem, under any analysis, to be foreseeable.