

## CRACKING THE FLOODWALL CODE

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### GENERAL

“Where there are men, there can be no peace” (Charles Beaumont, *Elegy*, 1960). Wars do not have to be fought with weapons of mass destruction. Lies, broken promises, and doubt can bring their own seeds of destruction. Only hope and perseverance can survive. This short paper may bring a ray of hope to the legal minded in the flood fights of both present and future.

People are looking for someone or some entity to blame, scapegoat or real culprit, for the failed levees and floodwalls in Orleans and adjacent parishes during 2005. This is not just about anger but about money. Flood insurance, FEMA, Write Your Own Policy Companies, homeowner insurers, the Corps of Engineers, public works contractors, and local and state governments have turned flood victims into predators and these entities are their prey. No one knows yet how successful plaintiffs will be legally or if we just will have to rely on good will and the public fisc for help.

However, of the many entities that could be named, certainly the Corps tops most lists, from newspapers and scientists, to lawyers. The Corps and FEMA are providing most of the funds to fix measures of what can be fixed for flood protection in the near future, but longer term measures remain uncertain. The Federal Tort Claims Act (FTCA) and inverse condemnation are two causes of action that I will preliminarily address that relate primarily to the Corps. Certainly state analogs and private tort claims apply to others, but I will focus on the Corps of Engineers.

### FTCA

This Act (28 U.S.C. §1346(b)) provides a limited waiver of federal sovereign immunity when federal employees are negligent and acting within the scope of their employment. The United States can be sued under circumstances where the United States, if a private person, would be liable in accordance with applicable state law.

To sue, one must first timely file an administrative claim (see Standard Form 95, attached). The government then has a time period to review the claim before suit in federal district court can be filed. Failing in this administrative claim step can result in dismissal of a FTCA lawsuit. Alleging a sum certain in property and personal injury damages is a key part of an administrative claim or else a subsequent FTCA lawsuit is in jeopardy.

The Act focuses on negligence and excepts from its coverage intentional torts, such as assault, battery, deceit, negligent and deliberate misrepresentation, etc. See 28 U.S.C. §2680(a) through (h).

### DISCRETION

Further, the Act excludes certain claims arising out of an act or omission of a federal employee exercising due care in the execution of a statute or regulation (28 U.S.C. §2680(a)) and discretionary functions (§2860(a)). The former exception has limited application, but the latter exception is broader. The federal government is thus not liable for actions and decisions based on public policy

considerations and judgment choices. U.S. v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267 (1991) (e.g., management of banking affairs).

Negligence is irrelevant to discretion. Barnson v. U.S., 816 F.2d 549 (10<sup>th</sup> Cir. 1987), cert. denied, 484 U.S. 896 (1987). However, if the agency fails to act in accord with a mandatory statutory or regulatory directive, the discretionary function exemption does not apply. Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 108 S.Ct. 1954 (1988). Formal agency policy may also suffice. Guidelines are not enough here.

If governmental judgment or choice is involved based upon social, economic or political considerations, an FTCA claim will be barred. For example, the government (and its contractors) were immune from a tort suit for designing a “death trap”, e.g., it was apparently too costly to design a helicopter emergency escape that would open under water. Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510 (1988).

Therefore, federal tort claims based upon allegations that the Corps did not build higher levees, not armor all levees, not close certain waterways or canals, not provide enough pumping capacity for closed canals, not favor communities’ risk over navigation interests, etc., could face a discretionary function challenge by the United States, unless it violated statutes, rules, or binding policy. Levees apparently are not under the tight scrutiny of something like a National Dam Safety Program Act (33 U.S.C. 467, et seq.). However, it is still open to question whether parts of the federal flood control projects were designed and built according

to congressionally mandated standards. For instance, were floodwalls and levees designed and constructed to meet the Congressionally approved reports and plans by the Chief of Engineers in the Flood Control Act of 1965, Pub. L. 89-298, §204, for the Lake Pontchartrain and Vicinity Hurricane Protection Project, e.g., Category 3 hurricanes? See GAO diagram of project attached. There lies the rub that requires more investigation and research.

## FLOOD

More pointed, the Flood Control Act of 1928, 33 U.S.C. §702(c), bars claims against the United States “...for any damage from or by floods or flood waters at any place”. Though derived from the great Mississippi River flood of 1927, see, e.g., Barry, Rising Tide (Simon and Schuster, 1997), courts have, rightly or wrongly, applied this immunity geographically more broadly. They had also focused on immunizing the Federal government from all flood control projects. The United States Supreme Court in Central Green Co. v. U.S., 121 St. Ct. 1005 (2001), changed the judicial, immunity analysis from the character of the project (flood control or not) to the character and purpose of release of the waters that caused damage, e.g., a release of flood waters from a reservoir. In Central Green, it was irrigation water allegedly causing subsurface damage, but the court remanded the issue to see if flood waters were also involved. Simply put, not all damaging water is flood or flood water under the Act. Some water allows for governmental immunity, and others create governmental liability.

Thus, blowing a levee to flood area A and spare area B, a la Rising Tide, is an immunized “flood,” but storm waters from

canals eroding subsurface soils may be a liability flood. Tidal surges do not automatically flood and storm waters are not automatically flood waters. The logical problem with this analysis is that once a tidal surge or storm water erodes a levee or scours in flood wall banks, the character of the lake or rain water appears to become flood waters. However, under Central Green's analysis, there is no planned purpose of the release here, just overtopping, erosion and seepage.

Reservoir water was not released; levees eroded and flood walls broke. Perhaps all fugitive lake water and storm water are not immunized "flood or flood waters" under this Act, and the FTCA's liability applies. This argument will require lower courts to rethink the 1928 Act.

## TAKING

I next try to differentiate torts from something more ominous. On the other side of the coin, putting torts aside, we can turn to compensable takings under the Fifth Amendment to the United States Constitution. Federal flooding is certainly eminent domain at the apex of abuse.

Invasion of private property from government activity, e.g., a flowage easement, may amount to appropriation or inverse condemnation. Ridge Line, Inc. v. U.S., 346 F.3d 1346 (Fed. Cir. 2003). Ridge Line, dealing with increased flooding from a federal project, held to constitute a taking, 1) the government must intend to invade a protected interest or the asserted invasion is the direct, natural or probable result of an authorized activity, and 2) an invasion must either appropriate a benefit to the government at the expense of the property

owner, or preempt the owner's right to enjoy his property for an extended period of time rather than inflict incidental or consequential injury that reduces its value. In other words, the flooding must be predictable and the landowner must be deprived of beneficial uses of his or her land.

We have seen the Corps teams and National Science Foundation scientists dispute the obvious, e.g., whether it was predictable that a poorly designed or built flood wall could cause floods. See Corps reports at <http://ipet.wes.army.mil>. This is a question of fact and expert opinion, but certainly foreseeability is arguable. On the magnitude issue, we had one Katrina flood but the extent and duration of that flooding reclaimed parish lands that were once swamps many decades ago ("the worst natural [and man-made] disaster in United States history"). If government action did cause flooding that is substantial, even if the frequency is not fully known yet, this is arguably more than a mere tort in scope.

Of course, unlike damages in the FTCA, taking claims entitle landowners to just compensation only. Suit would not be filed in the United States District Court, like the FTCA, but in the United States Court of Federal Claims if more than \$10,000.00 is involved. Time limitation are more generous than the FTCA.

## CONCLUSION

Litigating with the federal government is no easy task. Other litigation options exist at the state, private and local levels, and all are starting to play out. Running the course here is like tiptoeing on the undulations of a Loch Ness monster – expensive to even locate. Bail-outs and buy-outs in the long

run may be the best option, even if they leave us in a Davy Jones-like “death traps” should we stay.

Now a parting thought as I go beyond legal. Perhaps our biggest shortcoming is, with our heads still bowed, we are gazing too low to find the bigger solutions. We should also look up with the cloud physicists for answers and not focus solely on engineers working at ground level (and perhaps recreating some errors from the past). Atmospheric modification has long been with the realm of science but is now ignored for political reasons. See, e.g., <http://commerce.senate.gov/pdf/golden.pdf>. (attached) Feasible seeding techniques may slow the leading edge from the energy sails of tropical hurricanes and erode and weaken their vortex. At least that option should not be ignored.

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