

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy
May 6, 2015

Feds on Hook for Flooding Due to MR-GO. But For How Much, and Will It Stick?

For those of you not familiar with it, the Mississippi River Gulf Outlet was an [ill-fated](#) federal navigation project that created an alternate route from the Mississippi River at New Orleans. The route cut right through freshwater swamp and marsh to the Gulf of Mexico. It also created a route for salt water and storm surge to funnel in from the Gulf to interior Orleans and St. Bernard Parishes, radically changing the area's hydrology. The swamp and marsh started to disappear at an alarming rate immediately after its initial construction was completed in 1963.

Despite internal and external acknowledgment of the heightened flood risk and ecological collapse created by the MR-GO, the feds did not act to mitigate or remedy the situation until it was too late. In 2005, the MR-GO played an instrumental role in amplifying Hurricane Katrina's storm surge, which resulted in catastrophic flooding to the 9th Ward and St. Bernard Parish. Flooding in the area continued to occur with the several severe storms and hurricanes that passed through until the MR-GO was closed in late July 2009.

Under the Federal Tort Claims Act, property owners demanded compensation from the Army Corps for damages resulting from canal breaches caused by MR-GO. After the district court [ruled](#) for the plaintiffs, the U.S. Fifth Circuit – while agreeing with the facts – [reversed](#) the District Court's ruling and held that the Army Corps was immune from such tort claims arising from levee breaches caused by MR-GO. End of that litigation? Yes.

End of story? Not by a longshot. Some of those property owners flooded during Katrina and subsequent storms also filed for relief under a different legal theory: uncompensated taking of property under the Fifth Amendment. Last Friday, the [U.S. Federal Claims Court found for the plaintiffs](#) in this case. The judge ruled that the flooding of their properties was the foreseeable and imminent result of the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO. In analyzing the role Katrina played in the flooding, the court analogized that the government need not light the match to be liable; supplying the fuel, in this case the MR-GO, was sufficient causation. The flooding attributable to the Corps' handling of the MR-GO therefore constituted a temporary, uncompensated taking that requires payment of "just compensation."

The Tulane Institute on Water Resources Law and Policy is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water.

Coming up:

[Webinar: Towards Equitable Water Governance](#)
International Water Resources Association
8:00AM May 7, 2015

Louisiana Water Network/Horizon Initiative
Committee Meeting
Garden Study Center, City Park, New Orleans
11:30AM May 13, 2015

[ABA Water Law Conference](#)
June 4-5, 2015
Denver, CO

Water jobs:

[Manager, Coastal Habitat Restoration](#)
National Fish and Wildlife Foundation
Baton Rouge, LA

[Campaign Director](#)
Gulf Restoration Network
New Orleans, LA

[Manager, Coastal Habitat Restoration](#)
National Wildlife Federation
Baton Rouge, LA

[Attorney](#)
Community Water Center
Sacramento, CA

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While the U.S. Department of Justice may very well appeal the decision, this case [could set important precedent](#) with respect to governmental immunity, water management projects, and the effect of changing circumstances and new information on liability. The judge has ordered all parties to meet today to decide whether they can agree to have damages assessed by a mediator or whether further litigation will be necessary. For those who think they might have a dog in this hunt, the court noted that the 6-year prescriptive period for filing a takings claim started when the Corps closed off the MR-GO in late July 2009, so you might start seeing a flurry of attorney ads between now and late July.

Speaking of a Foreseeable Breakdown in Flood Protection

Coming off the abovementioned court win the day before, St. Bernard Parish on Saturday curiously [voted down](#) (for the second time now) a millage to help pay for upkeep of its hurricane protection levees and drainage infrastructure. The Lake Borgne Levee District says the vote could result in reduced staff and pumping capabilities as well as increased flood insurance premiums (due to the heightened risk of flooding). The millage would have equated to less than \$40 a year for properties worth \$125,000. So for the 88% of registered voters who [didn't cast their ballots](#) on Saturday, that's half as much a one-day ticket to the New Orleans Jazz and Heritage Festival. The vote demonstrates vulnerability of administering a "comprehensive" flood risk reduction system in locally funded pieces. Despite the post-Katrina reform of bringing the levee districts under one roof – the Southeast Louisiana Flood Protection Authority – East and West – expenditures on flood protection are [restricted](#) to the districts where those revenues are collected. What could possibly go wrong?

On a counter note, St. Charles Parish went the other way on Saturday, passing with overwhelming support a 30-year millage that will bring in \$4.8 million annually for flood protection. The millage will create a much needed revenue stream to match federal and state grants and implement a slew of projects with the goal of protecting the parish from a 100-year storm within the next 10-15 years.

Aren't They Dried Out By Now? A Deeper Look into Sao Paulo's Drought

Looking back over the last year, we've seen a lot of dire headlines about the Sao Paulo drought. In July 2014: [Sao Paulo Told to Cut Water or Risk Running Out in 100 Days](#). Then a month later, the [same prediction](#). Only to read this past December, the city had [two months of water left](#). The apocalyptic predictions [kept coming](#), with an April prediction that the city will [run out of water by June](#). Popping up between these reports are [reports of significant flooding](#).

So what gives (beyond the sensationalism)? Well, droughts are relative, and unlike California, Sao Paulo historically got about 62 inches of rain a year. So even in a drought, the mega city still gets a good deal of rain. Unfortunately, 80% of the rain usually falls between January and March, so the city is indeed bracing for a dry stretch. Much of that flood water flows into the regions polluted rivers and reservoirs. The [abnormally wet](#) start to 2015, however, has not fully rebounded reservoirs from the abysmal rain in 2014, the least in 80 years. Beyond the typical property damage and risk to human life, the recent deluges have also a negative impact on [conservation campaigns](#). It's hard to convince people to conserve when the streets are flooded and plants are green. But as scientists continue to [improve their understanding](#) of the drought and investors come to terms with its effect on [business](#), the city's 20 million residents and its public officials may soon reevaluate their [approach to water management](#).

Calling All Your Socially-Conscious, Crazy (But Viable) Ideas to Solve Water Issues

Do you have an early-stage venture involving [coastal restoration](#), [urban water retention and quality](#), maritime industries and ports, or [fisheries](#)? If so, consider applying for [Propeller's 2015 Startup Accelerator: Startup Track](#). Hands-on mentorship, access to high-level networks, pro bono technical support, and free office space, are just some of the benefits of this 3-month program. The application deadline is July 31, so if your venture is just a twinkle in your eye, you have time to start fleshing it out before applying.