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Washing Away Liability: The Federal Circuit’s Holding in *St. Bernard Parish v. United States* Limits the Army Corps of Engineers’ Liability in Flooding Takings Cases

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I. INTRODUCTION

Congress authorized the Mississippi River Gulf-Outlet (MRGO) channel to provide a direct connection between the port of New Orleans and the Gulf of Mexico.¹ The Army Corps of Engineers (Corps) completed construction of MRGO in 1968. Around the same time period, in 1965, Congress authorized funding for the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV project). The Corps recommended to Congress the installation of floodgates, levees, and floodwalls in the Lake Pontchartrain area for additional hurricane protection.² The LPV project was a system of levees and floodwalls designed to reduce the risk of flooding during a hurricane. In August 2005, a hurricane that tested the limits of the LPV system touched down in New Orleans. Hurricane Katrina produced “the largest storm surge elevations in the history of the United States.”³ Overwhelmed, the LPV levees breached. Catastrophic flooding ensued over huge swaths of the region, damaging or completely destroying countless properties throughout the New Orleans area. Katrina was “one of the most devastating hurricanes that has ever hit the United States.”⁴

After the United States Court of Appeals for the Fifth Circuit held that the Corps was immune from negligence claims,⁵ residents of St. Bernard Parish, the Lower Ninth Ward, and the St. Bernard Parish

1. *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1357, 2018 AMC 1458 (Fed. Cir. 2018).

2. *Id.* at 1357-58, 2018 AMC at 1459-60.

3. *Id.*, 2018 AMC at 1459-61.

4. *Id.*

5. *Id.* at 1362 n.6, 2018 AMC at 1466 n.6.

Government sought recovery for their damages in an inverse condemnation claim based on a taking of a flowage easement and looked to the existence of MRGO to hold the government liable.⁶ Plaintiffs sued the federal government under the Tucker Act, alleging the government committed a taking because the “construction, operation, and improper maintenance” of MRGO led to increased storm surge during Hurricane Katrina.⁷ The Court of Federal Claims agreed with plaintiffs, finding that the United States committed a taking because a causal link existed between increased storm surge and MRGO.⁸ However, on appeal the United States Court of Appeals for the Federal Circuit disagreed. The Federal Circuit *held* that the government cannot be liable for a taking resulting from inaction, and the correct legal standard to establish that the government is liable under a takings theory is one that weighs the benefit of government risk-reducing projects like the LPV along with government risk-increasing projects like MRGO, even though they are separate unrelated government projects, so that the proper standard is to ask if the risk would have occurred if there had been no government action at all. *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362, 1366 (Fed. Cir. 2018).

II. HISTORICAL BACKGROUND

The Fifth Amendment “provides that private property shall not ‘be taken for public use, without just compensation.’”⁹ A taking of private property by the government is not prohibited, *per se*, as long as the property owner is compensated.¹⁰ The United States Supreme Court stated that “[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”¹¹ Courts once understood that such a physical invasion must necessarily be permanent to rise to the level of a taking, but the Supreme Court recently held that temporary physical invasions can also give rise to a taking.¹² The Supreme Court examines “the ‘taking’ question by engaging in essentially

6. *Id.* at 1357-59, 2018 AMC at 1459-62.

7. *Id.* at 1357, 2018 AMC at 1460.

8. *Id.* at 1358, 2018 AMC at 1461.

9. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

10. *Id.* at 537.

11. *Id.* (noting that, in addition, a taking can occur from a separate theory of liability called a “regulatory taking” when a “government regulation of private property” is “so onerous that its effect is tantamount to a direct appropriation or ouster”).

12. *See Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 34 (2012).

ad hoc, factual inquiries” where takings cases “must be resolved through reason in light of common sense and experience.”¹³

If the government does not institute condemnation proceedings prior to the alleged taking, property owners can bring an inverse condemnation suit. Inverse condemnation “is a cause of action against the government to recover the value of property taken by the government without formal exercise of the power of eminent domain.”¹⁴ Courts analyze an inverse condemnation case using a two-pronged analysis. First, the property owner must show that treatment under takings law, rather than tort, is proper.¹⁵ In assessing this first prong, the Supreme Court in *Ridge Line, Inc. v. United States*¹⁶ developed a two-part test where the claimant must prove that (1) the government intended to invade a protected property interest or the invasion is the “direct, natural or probable result of an authorized [government] activity,”¹⁷ and (2) the invasion must have conferred a benefit to the government at the expense of the property owner.¹⁸ If the claim makes it past the first prong, the claimant then must meet the second prong of the inverse condemnation analysis which requires a showing that the property owner “possessed a protectable property interest in what it alleges the government has taken.”¹⁹

In addition to the two-part test set out in *Ridge Line*, claimants in inverse condemnation cases alleging a taking by government-induced flooding must establish a causal connection between a government action and the increased flooding that caused injury to their property.²⁰ The Supreme Court in *United States v. Sponenbarger* promulgated a standard for the taking causation analysis in flooding cases wherein courts must examine two considerations.²¹ First, the Court stated that claimants must show that the government subjected their property to “additional flooding, above what would occur if the Government had not acted.”²² Second,

13. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see Ark. Game*, 568 U.S. at 34.

14. *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005).

15. *Id.*

16. 346 F.3d 1346 (Fed. Cir. 2003).

17. *Moden*, 404 F.3d at 1343 (explaining that an invasion is the “direct, natural, or probable” result of an authorized government activity if the property owner’s injury “was the foreseeable or predictable result of the authorized [government action]” (citing *Ridge Line*, 346 F.3d at 1355)).

18. *Id.* at 1342 (citing *Ridge Line*, 346 F.3d at 1356).

19. *Id.*

20. *See United States v. Sponenbarger*, 308 U.S. 256, 266 (1939); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *United States v. Archer*, 241 U.S. 119, 132 (1916).

21. 308 U.S. at 266.

22. *Id.*

“[t]he Supreme Court further set forth a relative benefits test which espouses that even if the government action results in greater flooding, ‘if [g]overnmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole,’” a taking cannot be found.²³ A claimant carries the burden “to establish causation in the first instance,” and upon proof that additional flooding has occurred than otherwise would have without government action, the burden is then “on the government to show that the relative benefits plaintiffs received precludes a taking finding under *Sponenbarger*.”²⁴

Courts have consistently underlined the importance of these considerations in taking cases involving flooding.²⁵ For example, in *John B. Hardwicke Co. v. United States* the claims court found that though one dam caused flooding to the landowner’s property, another dam constructed as part “of the same scheme” reduced the amount of flooding the property experienced so that “on the whole, the value of the [landowner’s] property has been greatly enhanced” by the government program.²⁶ As such, no taking could be found. Additionally, the Supreme Court in *Danforth v. United States* held that the government had not committed a taking because no additional flooding occurred after the construction of a levee that would not have also occurred prior to its construction.²⁷ The Court noted that the government was only liable for a taking “by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction.”²⁸ Conversely, in *Arkansas Game & Fish Commission v. United States*, the Federal Circuit on remand found that because a “substantial increase” in flooding occurred as a result of deviations from a dam constructed by the Army Corps of Engineers, the government was liable to the property owners for a taking.²⁹ The Federal Circuit noted in its takings analysis that “the proper comparison would be between the

23. *Big Oak Farms Inc. v. United States*, 131 Fed. Cl. 45, 47 (Fed. Cl. 2017) (quoting *Sponenbarger*, 308 U.S. at 266-67).

24. *Id.* at 54.

25. *See id.* at 48-49 (denying motions for summary judgment because there were insufficient facts to resolve (1) whether plaintiffs property suffered more flooding due to government activity than it would have otherwise, and (2) whether the damage to plaintiffs’ property “is slight when compared to the benefits the property received” from the government project as a whole).

26. 467 F.2d 488, 491 (Ct. Cl. 1972).

27. 308 U.S. 271, 286-87 (1939).

28. *Id.* at 286.

29. 736 F.3d 1364, 1372 (Fed. Cir. 2013).

flooding that occurred prior to the construction of [the dam]” and the flooding that occurred during the deviation period.³⁰

III. THE COURT’S DECISION

In the noted case, the Federal Circuit interpreted the causation analysis in takings cases to not only require the weighing of risks and benefits from a single government program but from any and all government programs “directed to the same risk.”³¹ First, the Federal Circuit held that the government cannot be liable for inaction but “only for affirmative acts by the government.”³² Second, the court held that to establish causation under a takings theory, plaintiffs must show that flooding would not have occurred but for *any* government action directed to the same risk—even when actions that increase the risk of flooding arise from an entirely separate project than actions that decrease the risk of flooding.³³ The Federal Circuit stressed in the noted case that plaintiffs must show not just that the flooding on their property would not have occurred absent the MRGO project but that the flooding would not have occurred absent the MRGO project *and* the LPV project.³⁴ As such, the Federal Circuit held that the government was not liable for a taking because plaintiffs failed to prove the flooding that occurred on their property was greater than if both the LPV *and* MRGO had never been constructed.³⁵

First, the Federal Circuit held that government inaction cannot result in a taking. Plaintiffs argued, and the Claims Court found, that the Corps failed to maintain MRGO, which led to considerable erosion along the banks and allowed MRGO to “carry significantly more water at higher velocities” and thus intensify storm surge during a hurricane.³⁶ Accordingly, a causal link existed between the expansion of the canal way and the storm surge that contributed to the breached levees. The Federal Circuit, however, reasoned that while these facts may give plaintiffs a claim in tort, they do not have a takings claim. Citing to a number of cases to construct its holding, the Federal Circuit found that takings liability

30. *Id.* at 1372 n.2.

31. *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1365, 2018 AMC 1458, 1472 (Fed. Cir. 2018).

32. *Id.* at 1360, 2018 AMC at 1464.

33. *Id.* at 1363-64, 2018 AMC at 1469.

34. *Id.*

35. *Id.* at 1367-68, 2018 AMC at 1475.

36. *Id.* at 1360, 2018 AMC at 1463.

arises only from affirmative, authorized government activity.³⁷ The Court noted that plaintiffs failed to present any cases where government inaction formed the basis of liability in a successful takings claim.³⁸ Therefore, the Federal Circuit concluded that case law indicates an affirmative government action has historically been the basis of an acceptable takings claim, to the specific exclusion of government inaction.³⁹

Second, analyzing only the government's affirmative authorized actions (rather than inactions) in the noted case, the Federal Circuit held that a proper causation analysis requires a showing that flooding would not have occurred on the plaintiffs' property absent construction of both MRGO and the LPV project.⁴⁰ The Claims Court found, *inter alia*, that a causal link existed between the Corps' construction and operation (i.e., affirmative authorized actions) of MRGO and the significantly increased storm surge and flooding during Hurricane Katrina and subsequent hurricanes.⁴¹ However, the Federal Circuit noted that these findings should not be the end of the causation analysis.⁴² A court must not only weigh the flood risks associated with the government project alleged to have caused injury, like MRGO, but must also weigh the benefits received by government programs like the LPV project, which has historically reduced the risk of flooding in the New Orleans region. The Federal Circuit again looked to case law to construct this rule in its holding.⁴³ While plaintiffs argued that the scope of government action considered in the causation analysis should only be those government actions arising from the same project (here, MRGO), the Federal Circuit disagreed and stated that any and all government action "directed to the same risk" (here, the risk of flooding) should be evaluated.⁴⁴ Accordingly, the Federal Circuit stated that plaintiffs "failed to show that government action,

37. *Id.* at 1360-62, 2018 AMC at 1463-66; see *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1358 (Fed. Cir. 2003); see also *Moden v. United States*, 404 F.3d 1335, 1346 (Fed. Cir. 2005) (holding that to find a taking the claimant must show that their injury is a "direct, natural, or probable result" of an authorized government activity).

38. *St. Bernard*, 887 F.3d at 1362, 2018 AMC at 1466.

39. *Id.* at 1360, 2018 AMC at 1464.

40. *Id.* at 1367-68, 2018 AMC at 1475.

41. *Id.* at 1358-59; 2018 AMC at 1461-62.

42. *Id.* at 1363, 2018 AMC at 1469.

43. See *United States v. Sponenbarger*, 308 U.S. 256 (1939); *Sanguinetti v. United States*, 264 U.S. 146 (1924); *United States v. Archer*, 241 U.S. 119 (1916); see also *Cary v. United States*, 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009) (noting that landowners cannot "cherry pick" parts of a government policy they claimed increased fire risks "without acknowledging that much of the Forest Service policy over the last century has been devoted to reducing the risk of wildfire"); *Accardi v. United States*, 599 F.2d 423 (Ct. Cl. 1979).

44. *St. Bernard*, 887 F.3d at 1365, 2018 AMC at 1472.

including both MRGO and the LPV project, caused their injury” and so “the government is not liable for a taking.”⁴⁵

IV. ANALYSIS

In holding that a court must weigh the risks and benefits of *all* government actions that are “directed to the same risk that is alleged to have caused the injury to the plaintiffs,” the Federal Circuit in the noted case goes beyond what case law indicates is the proper evaluation in a takings causation analysis.⁴⁶ Though no case has provided an explicit answer to the question presented here, a review of takings jurisprudence involving flooding indicates that in answering the causation question, courts have consistently limited their review to only risks and benefits of government actions arising from the *same* government program, which includes actions promulgated under or stemming from a single legislative act or a single government project.⁴⁷ In *Sponenbarger*, when the Supreme Court articulated the appropriate causation standard in flooding takings cases, the Court tellingly noted that the risks and benefits from a (singular) “program” are to be weighed in the causation analysis.⁴⁸ Even when courts have weighed the relative benefits of two seemingly separate projects, like two separate dams, those projects were still part of the same

45. *Id.* at 1368, 2018 AMC at 1475.

46. *Id.* at 1365, 2018 AMC at 1472.

47. For example, in *United States v. Archer*, the Supreme Court remanded the case with instructions to analyze the risks and benefits endured by the plaintiff property owner from the government’s construction of a *single* dike. 241 U.S. at 132. Additionally, in *Sanguinetti v. United States*, the Supreme Court held that no flooding had occurred on the property owner’s land after the construction of a *single* canal that had not also previously occurred prior to the construction of the same canal, and as such the government was not liable for a taking. 264 U.S. at 149. Furthermore, in *Accardi v. United States* the Claims Court found there was no taking as a result of the Trinity River division, a *single* project with many different components (some risk reducing, some risk increasing), because the property owners “wholly failed to show that defendant’s construction or operation of the Trinity River division subjected their lands to additional flooding above what would have occurred,” prior to its construction, and in fact the flooding experienced after the construction “was far less than would have been the case had the Trinity River division never been built.” 599 F.2d at 429-30. Moreover, in *Arkansas Game & Fish Commission*, the Federal Circuit on remand found that the Corps’ deviations policy from a *single* dam “caused a substantial increase” in flooding, and therefore the government had caused a taking in the form of a flowage easement on the property owner’s land. 736 F.3d 1364, 1372 (Fed. Cir. 2013). Finally, in *Alost v. United States*, the Claims Court found that a *single* Corps project, a navigational waterway, “did not cause more frequent flooding or flooding of a longer duration on the plaintiffs’ property,” and as such the plaintiff property owners “failed to establish a taking by overflow flooding.” 73 Fed. Cl. 480, 496 (Fed. Cl. 2006).

48. 308 U.S. at 265-66.

government program.⁴⁹ Additionally, though case law does not answer the problem presented directly, the Supreme Court in *United States v. Danforth* comes very close—analyzing its takings question by asking what flooding would have occurred absent only the government project at issue and not what flooding would have occurred absent every government project directed to the same risk.⁵⁰ Accordingly, the Federal Circuit incorrectly weighed the benefits of the LPV system in its causation analysis, and the inferences drawn from case law indicate the court should have limited its review to whether plaintiffs’ properties were subject to additional flooding as a result of government action stemming from only the single government project at issue—the MRGO project.

In *Sponenbarger*, the Supreme Court held that a taking had not occurred on a property owner’s land because government activity conducted in furtherance of one act, the Mississippi Flood Control Act of 1928,⁵¹ did not subject the land to additional flooding.⁵² The land in question had historically been subject to repeated flooding from the river.⁵³ When Congress enacted the Mississippi Flood Control Act of 1928, it authorized activities including flood reducing measures like dredging and lowering the river, but also flood increasing activities like diverting floodwater to floodways.⁵⁴ The property owner’s land was to be located in one of these floodways, the Boeuf floodway.⁵⁵ In its causation analysis, the Supreme Court weighed only the government activities “contemplated by that Act.”⁵⁶ The Court noted that the “program of improvements under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent’s land had always been subject.”⁵⁷ Additionally, it noted that the relative benefits the plaintiff enjoyed because of “the program of the 1928 Act” outweighed the risks from the same program.⁵⁸ In elaborating on the standard it promulgated, the Court (tellingly using the singular form) noted that “a broad flood control program does not involve a taking merely because *it* will result in an

49. See *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 491 (Cl. Ct. 1972) (analyzing the risks and benefits of two separate dams that were both constructed as part of the Rio Grande water control program).

50. See *United States v. Danforth*, 308 U.S. 271, 286 (1939).

51. 33 U.S.C. §§ 702a-702m (2012).

52. 308 U.S. at 265.

53. *Id.* at 263.

54. *Id.* at 262-63.

55. *Id.* at 262.

56. *Id.* at 260.

57. *Id.* at 265.

58. *Id.* at 265-67.

increase in . . . otherwise inevitably destructive floods, where *the* program measured in its entirety greatly reduces the general flood hazards” to the property owner’s land.⁵⁹ The Court considered the activities contemplated by the 1928 Act as part of one program, and only as such did it then embark on weighing their risks and benefits to analyze causation. This analysis is in contrast to the one espoused by the Federal Circuit in the noted case, which requires flooding takings cases to look at the risks and benefits not of a single program like the Mississippi Flood Control Act in *Sponenberger*, but of any and all government programs directed at the “same risk” (i.e., the risk flooding).⁶⁰ As such, the Federal Circuit’s interpretation of causation looks to the risks and benefits of two entirely separate government programs—the LPV and MRGO—in analyzing the risks and benefits conferred onto plaintiffs.⁶¹ This is not the correct analysis implied by the Supreme Court in *Sponenbarger*.

Even when courts have weighed the risks and benefits of two seemingly separate projects like two different dams, they were still part “of the same scheme.”⁶² For example, in *John B. Hardwicke Co. v. United States*, the court weighed the risks and benefits of two dams: the Falcon Dam and the Anzalduas Dam.⁶³ After the construction of the Falcon Dam, the plaintiff’s property rose in value because the risk of flooding to the land decreased. A few years later, though, the Anzalduas Dam was built and increased the likelihood of flooding on the same property, therefore reducing the value of plaintiff’s land.⁶⁴ However, the Claims Court held that the government had not committed a taking because even though the Anzalduas Dam led to increased flooding, “on the whole, the value of the [plaintiff’s] property [had] been greatly enhanced by the operation of the Rio Grande water control program, *of which both Falcon and Anzalduas Dams are parts*.”⁶⁵ As the dams were both part of the water control program, “there never was a time when an owner of land [in the area] could have directly benefited from Falcon, yet have been unaware that Anzalduas would arise in fulfillment *of the same scheme*.”⁶⁶ That the dams

59. *Id.* at 266 (emphasis added); *see also id.* at 267 (“[The Court] has never held that the Government takes an owner’s land by a flood program that does little injury in comparison with far greater benefits conferred.” (emphasis added)).

60. *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1365, 2018 AMC 1458, 1472 (Fed. Cir. 2018).

61. *Id.*

62. *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 491 (Cl. Ct. 1972).

63. *Id.*

64. *Id.*

65. *Id.* (emphasis added).

66. *Id.* at 490-91 (emphasis added).

were part of the same scheme was critical to the Claims Court's analysis, thus underscoring the notion that courts have limited their review to those activities arising from the same project. This analysis is in marked contrast to the Federal Circuit's holding in the noted case.⁶⁷ Straying from the court's analysis in *John B. Hardwicke*, which made a point to emphasize the dams were part of the "same scheme" and only as such were the risks and benefits of the two dams weighed, the Federal Circuit in the noted case held that the risks and benefits of both MRGO and the LPV system must be weighed together even though they are completely separate government programs.⁶⁸ Again it seems that the Federal Circuit's causation analysis here strays from the limits courts have historically adhered to in flooding takings cases.

The Supreme Court in *Danforth* suggests a differing view of the causation analysis than the one advanced by the Federal Circuit in the noted case. In *Danforth*, the Supreme Court held that the government had not committed a taking because, though the construction of a second levee contributed to the retention of water for longer periods of time on the property owner's land, the land was not subject to any *additional* flooding than what occurred prior to the construction of the second levee.⁶⁹ The second levee system was built in response to the Mississippi Flood Control Act of 1928. An existing levee (i.e., "riverbank levee") had already stood along the river prior to the 1928 Act and the construction of the second levee.⁷⁰ The second levee was to be set five miles behind the riverbank levee, thus creating a floodway where in times of great flooding the Corps could divert floodwater from the main river channel into the floodway. The property owner in *Danforth* claimed that when the government completed this second levee, creating a floodway that his property fell in the middle of, the government committed a taking.⁷¹ The Court noted that since the riverbank levee "had not been lowered from its previous height," the property owner's land was "as well protected from destructive floods as formerly."⁷² The Court compared the flooding that occurred after the construction of the second levee to the flooding that would have occurred had *only the second levee* never been built. This analysis still factored in the protection afforded by the riverbank levee, a separate project,

67. *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1365-66, 2018 AMC 1458, 1472-73 (Fed. Cir. 2018).

68. *Id.*

69. *Danforth v. United States*, 308 U.S. 271, 286 (1939).

70. *Id.* at 277-78.

71. *Id.* at 283.

72. *Id.* at 286.

suggesting that the correct comparison in a causation analysis is limited to assessing only those risks and benefits arising from the one program alleged to have caused plaintiff's injury.

Departing from the Supreme Court's analysis in *Danforth*, the Federal Circuit in the noted case suggested that the correct comparison in a causation analysis is to ask if the same flooding that occurred on plaintiffs' land would have occurred if the LPV system *and* MRGO had never been built.⁷³ However, both the Supreme Court's analysis in *Danforth* and prior case law indicate that the correct analysis is to compare the flooding that actually occurred on plaintiffs' land to the flooding that would have occurred had *only* MRGO never been built.⁷⁴ Therefore, contrary to the Federal Circuit's holding in the noted case, the proper causation analysis is to weigh the risks and benefits arising *only* from MRGO and ask if the flooding on plaintiffs' land would have occurred absent *only* MRGO. In light of the factual findings that the levee breaches during Hurricane Katrina resulted in large part from the increased storm surge caused by the compounding effects of MRGO's construction and operation,⁷⁵ it is hard to imagine the answer to this question could be anything but "no."

V. CONCLUSION

The Supreme Court denied plaintiffs' Petition for a Writ of Certiorari on January 7, 2019.⁷⁶ As such, the causation standard in the noted case is upheld for the foreseeable future. This could have the effect of limiting the Corps' liability in takings cases regarding flooding that occurred as a result of a Corps project. The Fifth Circuit has already held that the Corps cannot be held liable under a tort theory,⁷⁷ and the noted case constructs an extraordinarily high standard for plaintiffs to successfully bring a claim under a takings theory.⁷⁸ The Federal Circuit's standard makes it possible to mitigate the risks of Corps projects with the benefits from *any* other

73. *St. Bernard Par. Gov't*, 887 F.3d at 1363-65, 2018 AMC at 1468-72.

74. *Danforth*, 308 U.S. at 286.

75. *St. Bernard Par. Gov't v. United States*, 121 Fed. Cl. 687, 737-38 (Fed. Cl. 2015). Additionally, though the Fifth Circuit held that the Army Corps was "immune from claims arising from levee breaches caused by [MRGO] under the discretionary function exception to the Federal Tort Claims Act," it left undisturbed the factual findings the Eastern District reached in finding that "MRGO's expansion thus allowed Hurricane Katrina to generate a peak storm surge capable of breaching the Reach 2 Levee and flooding the St. Bernard polder." *Id.* at 692.

76. *See St. Bernard Par. Gov't v. United States*, 139 S. Ct. 796 (2019).

77. *St. Bernard*, 121 Fed. Cl. at 691.

78. *St. Bernard*, 887 F.3d at 1365-66, 2018 AMC at 1471-73.

project “directed to the same risk.”⁷⁹ This standard strays from the scenarios historically analyzed in flooding takings case law where, for example, a single project with the overall purpose of reducing floods had some flood risk components.⁸⁰ The Federal Circuit’s insistence on weighing the benefits of completely separate projects in its takings analysis presents a worrisome picture for cities like New Orleans that are prone to flooding and have existing flood-reducing infrastructure systems like the LPV. This court suggests that the existence of flood-reducing systems excuse the Corps from liability as long as any flooding resulting from the Corps’ flood-increasing projects is less than it would be if the completely separate flood-reducing projects had never been built.⁸¹ This conclusion seems to not only contravene case law for the reasons discussed above but also promotes the construction of projects that negate the effectiveness of flood-reducing systems and consequently put public property, personal property, and, even more importantly, human life at risk.⁸²

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79. *Id.*

80. *See* United States v. Sponenbarger, 308 U.S. 256 (1939).

81. *St. Bernard*, 887 F.3d at 1365, 2018 AMC at 1471-72.

82. POPPY MARKWELL & RAOULT RATARD, LA. DEP’T OF HEALTH, DEATHS DIRECTLY CAUSED BY HURRICANE KATRINA 1, http://ldh.la.gov/assets/oph/Center-PHCH/Center-CH/stepi/specialstudies/2014PopwellRatard_KatrinaDeath_PostedOnline.pdf (last visited Apr. 16, 2019) (finding that Hurricane Katrina was responsible for up to 1170 deaths).

* © 2019 Alexandra K. Calabro. J.D. candidate 2020, Tulane University Law School; B.A., Political Science & Journalism, 2014, Miami University of Ohio. The author would like to thank her mentor, Bryant Gardner of Winston & Strawn LLP, for his comments and guidance during the writing process. The author would also like to thank the staff and members of the *Tulane Maritime Law Journal* for their support and feedback.