


# COURT FAULTS ARMY CORPS IN KATRINA LEVEE BREACHES

Late last Wednesday, there was a  blockbuster court ruling that got lost in the healthcare and oversight hearing onslaught. However, the decision by Eastern District of Louisiana Judge Stanwood R. Duval Jr. in the *In Re: Katrina Canal Breaches Consolidated Litigation* case is a game changer with immense and far reaching ramifications.

Duval excoriated the Army Corps of Engineers and held them, and the government, directly liable for much of the flooding that devastated New Orleans' Lower 9th Ward and St. Bernard Parish in the Hurricane Katrina disaster of 2005.

The full opinion is here. It is long, 156 pages, detailed, and absolutely fascinating reading. Seriously.

The potential ramifications are huge and, if the decision holds up in the certain appeal, affect large swaths of policy from basic concepts of Federal governmental liability, the structure and performance of government contracting and the entire future of national flood control policy.

Duval finds:

The Corps' lassitude and failure to fulfill its duties resulted in a catastrophic loss of human life and property in unprecedented proportions...

Clearly, in this instance, the Corps shortchanged the inhabitants of New Orleans and the environs by its myopic approach to the maintenance and operation of the [Mississippi River Gulf Outlet] .... It simply chose to ignore the effects of the channel.

...

It is the Court's opinion that the negligence of the Corps, in this instance by failing to maintain the MRGO properly, was not policy, but insouciance, myopia and shortsightedness. For over forty years, the Corps was aware that the Reach II levee protecting Chalmette and the Lower Ninth Ward was going to be compromised by the continued deterioration of the MRGO, as has been exhaustively discussed in this opinion. The Corps had an opportunity to take a myriad of actions to alleviate this deterioration or rehabilitate this deterioration and failed to do so. Clearly the expression "talk is cheap" applies here.

The government had asserted immunity under the Flood Control Act of 1928 which, along with other laws, generally protects the Army Corps of Engineers from liability for defective flood-control project and provides the government can't be sued for acting with reasonable care or making a judgment call based on policy. Duval, however held the pertinent shipping channel to be a navigation canal, not a flood-control project under the Flood Control Act of 1928 and that the Corps breached the duty of due care in their construction, maintenance and oversight of the navigation canal.

Duval's current ruling only covers six named plaintiffs, but is thought to potentially open the door to over 100,000 plaintiffs' actions on behalf of private property owners and businesses pending in the areas described in the ruling. So now the obvious question is whether Judge Duval's monumental decision will withstand appeal.

The New York Times, citing Tulane University law professor Oliver Houck, an expert in environmental and natural resource law, indicated:

The United States Court of Appeals for

the Fifth Circuit in New Orleans, where the case would go, has a record of hostility to plaintiffs in environmental cases, said Oliver Houck, a law professor at Tulane University. But, he said, Judge Duval's decision is so technical and packed with details – it came with a 33-page appendix of graphs, charts and maps – that there are only a few areas where it would be exposed to a reversal.

“For an appellate court to reverse him on the facts is unthinkable,” Professor Houck said.

Well that still leaves the law of course, in this case Duval's interpretation and application of the Flood Control Act of 1928 and the other immunity sources claimed by the government, but there is no question that Duval has intentionally and meticulously crafted a piece of art designed to anticipate and withstand scrutiny. Here is the Appendix of charts, graphs, maps and specs that Houck described; specially downloaded from PACER for the discerning readers of Emptywheel.

The government has been placed in a game changing box. Duval's opinion is a work of art and, despite being lost in the hubbub of the healthcare shuffle and cable shouting orgies over Sarah Palin, is of seminal importance. Enjoy.