

MEMORANDUM

June 5, 2023

TO: Greater Fort Bend County Economic Development Council

FROM: Keith Lapeze
Eric Storm
David Tuckfield
THE AL LAW GROUP, PLLC

RE: The Objectives and Status of Administrative Procedure Act (APA) litigation against the U.S. Army Corps of Engineers (“USACE”).

I. Continuing Merit of the APA Litigation:

From its inception, the APA litigation has had a very different objective from that of the plaintiffs in the upstream takings litigation, the (“Upstream Litigation”). Rather than seeking compensation for the property damage caused by the U.S. government’s flooding during Harvey—a one-time event, our goal has been to protect the property rights of the constituents of the Flooded Parties in perpetuity (1) by seeking judicial declarations of their rights afforded by the Fifth Amendment and existing Corps regulations and (2) by obtaining injunctive relief to prevent unconstitutional impoundment of government-controlled floodwaters on private property in the future.

The APA Litigation also offers a beneficial “backstop” to the Upstream Litigation. In the event that individual Upstream Plaintiffs are unsuccessful in litigating their claims that the government’s actions caused in a Fifth Amendment taking, (claims that are currently under appeal), the APA litigation provides a means to compel the Corps to change its practices that violate individual property rights and that are contrary to Corps regulations.

Each of these objectives and benefits remain viable and important following Judge Lettow's liability decision in the Upstream Litigation.

II. The Unanticipated Downsides of Judge Lettow's Opinion

While Judge Lettow's opinion that the Corps' actions to impound floodwater on private property during Harvey caused a 5th Amendment taking of a flowage easement on the affected properties is generally considered good news for the affected plaintiffs because it entitles them to just compensation, there are at least two significant downsides to the opinion that elevate the importance of our APA Litigation. In determining that the Corps's actions to impound floodwater on the plaintiff's property caused a taking of a flowage easement, Judge Lettow made very clear that the flowage easement taken is perpetual in its duration. The following excerpts from the 46-page opinion are instructive:

- “The government through its construction, maintenance, and operation of the Addicks and Barker Dams in the past, present, and future, **has taken a permanent flowage easement on plaintiffs' properties.**” (page 29).
- “The time and duration of the government's actions at issue here is *not* measured by “the length of time the water inundates the properties,” as the government would have it, . . . rather, it is measured by **a permanent right to inundate the property with impounded flood waters.**” (page 30).
- “Plaintiffs may have—in many, if not most, instances—been able to repair their real property, if not their personal property, but the taking here involves more than damage already incurred; **it encompasses a loss of the property owner's right to exclude future floodwater incursions onto their land and into their homes. Thus, that most of the bellwether plaintiffs were able to repair their property is likewise irrelevant to their inability to prevent future government-induced flooding on that property.**” (page 33).

Whether the Upstream Plaintiffs knew it or not, assuming Judge Lettow's opinion stands, they will be entitled to compensation once, but their property will forever be encumbered by a permanent flowage easement that will allow the government to flood their property at will.

Thus, while the takings claims asserted in the Upstream Litigation may result in well-deserved compensation for many upstream residents who suffered flood damage during Harvey, that compensation is likely to be limited to a one-time payment that comes with the high cost of a perpetual flowage easement and no protection from further government-induced flooding.

III. The APA litigation may Compel the Army Corps to acquire land sufficient for operation of the Barker and Addicks Reservoirs.

A. Fort Bend County, Fort Bend County Drainage District and Cinco Municipal Utility District No. 1 (The "County Parties") seek to compel the Corps to comply with its regulations. These regulations not only require the Corps to acquire property in fee simple (rather than just take a flowage easement), but also require the Corps to (1) revise the Water Control Manual following repeated flooding or changed circumstances, (2) include safeguards to prevent flooding, and (3) develop plans in concert with all basin interests.

IV. Recent Court Rulings & Case Events:

- A. On February 2, 2023 the Fifth Circuit Court of Appeals issued its Opinion and Order reversing the federal district court and remanding the APA case for further proceedings. A copy of the Fifth Circuit Opinion is enclosed herewith.
- B. On March 27, 2023, the case was reassigned to the docket of United States District Judge Drew B. Tipton.
- C. On Monday, March 27, 2023 the Mandate issued from the Fifth Circuit formally returning the APA case back to the Federal District Court in Houston for further proceedings.

D. The County Parties and the Corps have agreed to and the court has approved a schedule for future pleading amendment, production of the applicable administrative records, and for leave to request necessary discovery.

V. Key Issues Identified in the Fifth Circuit Opinion:

A. The basis for APA Challenge is uncontested. The Fifth Circuit pointed out that the Corps has acknowledged that “Fort Bend’s [] APA challenge to the Corps’ adoption of the Water Control Manual could be sufficient to state a claim at the Motion to Dismiss stage” and that the Corps further admitted the Plaintiff’s challenge to the Corps’ Water Control Manual is a challenge to “final agency action.”

B. **Mootness:** The appellate court noted that the Corps contends that “the County Parties’ Challenge to the adoption of the WCM is moot due to the issuance of a new WCM in October 2019.” Yet, the appellate court declined to address the Corps’ argument because neither copies of the WCM were in the record and the link provided by the Corps did not lead to the alleged revised WCM.

1. While the appellate court did not address the merits of the Corps’ mootness argument saying that the Corps “may renew this argument before the district court,” the appellate court did provide the following guidance:

i. “the mootness issue here seems to turn on whether the 2019 manual made meaningful changes to the Corps’ relevant obligations as set out in the 2012 WCM.”

ii. The Court went onto instruct that “[o]n remand, the district court should evaluate the nature of the revisions in the 2019 WCM and, in light of the Plaintiffs’ claims, how the mootness doctrine applies to those changes.”

C. The AL Law Group will continue to vigorously litigate each of these issues on behalf of the County Parties.